No. 05-915

Title:	Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald, Petitioner v. Jefferson County Board of Education, et al.
Docketed:	January 23, 2006
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(04-5897)
Decision Date:	July 21, 2005
Rehearing Denied:	October 21, 2005

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 18 2006	Petition for a writ of certiorari filed. (Response due February 22, 2006)
Feb 21 2006	Brief of respondents Jefferson County Board of Education, et al. in opposition filed.
Feb 22 2006	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Mar 8 2006	DISTRIBUTED for Conference of March 24, 2006.
Apr 5 2006	DISTRIBUTED for Conference of April 21, 2006.
Apr 24 2006	DISTRIBUTED for Conference of April 28, 2006.
May 8 2006	DISTRIBUTED for Conference of May 11, 2006.
May 15 2006	DISTRIBUTED for Conference of May 18, 2006.
May 22 2006	DISTRIBUTED for Conference of May 25, 2006.
May 30 2006	DISTRIBUTED for Conference of June 1, 2006.
Jun 5 2006	Petition GRANTED This case is to be argued in tandem with No. 05-908, Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1.
Jun 26 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jun 28 2006	Consent to the filing of amicus briefs in support of either/neither party received from counsel for the respondents.
Jul 14 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 21, 2006.
Jul 14 2006	Extension of time within which to file respondents' brief on the merits to and including October 10, 2006.
Aug 1 2006	Motion to proceed further herein in forma pauperis filed by petitioner Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald.
Aug 3 2006	Joint appendix filed.
Aug 10 2006	Brief amici curiae of Pacific Legal Foundation, et al. filed.

Aug 17 2006	Brief of petitioner Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald filed.
Aug 17 2006	Brief amici curiae of Project on Fair Representation, et al. filed. VIDED.
Aug 21 2006	Brief amicus curiae of United States filed.
Aug 21 2006	Brief amicus curiae of Asian American Legal Foundation filed. VIDED.
Aug 21 2006	Brief amici curiae of Various School Children from Lynn, Massachusetts, Who are Parties in Comfort v. Lynn School Committee filed. VIDED.
Aug 21 2006	Brief amicus curiae of David J. Armor, et al. filed. VIDED.
Aug 21 2006	Brief amici curiae of Florida Governor John Ellis "Jeb" Bush, and State Board of Education filed. VIDED.
Sep 1 2006	Motion for leave to proceed further herein in forma pauperis filed by petitioner GRANTED.
Sep 22 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 29 2006	SET FOR ARGUMENT ON Monday, December 4, 2006.
Oct 6 2006	Brief amicus curiae of Anti-Defamation League filed. VIDED. (Distributed)
Oct 9 2006	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED. (Distributed)
Oct 10 2006	Brief amicus curiae of Civil Rights Clinic at Howard University School of Law filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of Hon. Clifford L. Alexander, et al. filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of Leadership Conference on Civil Rights, et al. filed. VIDED. (Distributed)
Oct 10 2006	Brief amicus curiae of Caucus for Structural Equity filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of Joseph E. Brann, et al. filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of Swann Fellowship, et al. filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of Historians filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of National Women's Law Center, et al. filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of Religious Organizations and Affiliated Individuals filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of Historians of the Civil Rights Era, William H.Chafe, et al. filed. VIDED. (Distributed)
Oct 10 2006	Brief amicus curiae of National Parent Teacher Association filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of Council of Greater City Schools, et al. filed. VIDED. (Distributed)
Oct 10 2006	Brief amici curiae of Asian American Justice Center, et al. filed. VIDED.

(Distributed)

Oct 10 2006 Brief amici curiae of Coalition to Defend Affirmative Action, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of National School Boards Association, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Massachusetts Association of School Superintendents, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amicus curiae of Media & Telecommunication Companies filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Professors Amy Stuart Wells, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Urban League of Metropolitan Seattle and the National Urban League filed. VIDED. (Distributed)

Oct 10 2006 Brief amicus curiae of Collaborative of Catholic Leaders and Organizations filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of New York, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amicus curiae of Lawyers' Committee for Civil Rights of San Francisco Bay Area filed. VIDED. (Distributed)

Oct 10 2006 Brief amicus curiae of Black Women Lawyers' Association of Greater Chicago, Inc. filed. VIDED. (Distributed)

Oct 10 2006 Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Asian American Legal Defense and Education Fund, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Association of the Bar of the City of New York filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of 19 Former Chancellors of the University of California filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of NAACP filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of American Psychological Association, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Housing Scholars and Research & Advocacy Organizations filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Massachusetts filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Jim McDermott, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of 553 Social Scientists filed. VIDED. (Distributed)

Oct 10 2006 Brief amicus curiae of American Educational Research Association filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Senators Edward M. Kennedy, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Brennan Center for Justice, et al. filed. VIDED.

(Distributed)

Oct 10 2006 Brief amici curiae of National Education Association, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Interested Human Rights Clinics and Organizations filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Former United States Secretaries of Education, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Human Rights Advocacy Groups and International Law Professors filed. (Distributed)

Oct 10 2006 Brief of respondents Jefferson County Board of Education, et al. filed. (Distributed)

Oct 10 2006 Brief amici curiae of Louisville Area Chamber of Commerce, Inc., et al. filed. (Distributed)

Oct 10 2006 Brief amici curiae of National Collegiate Athletic Association, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of American Council on Education, et al. filed. VIDED. (Distributed)

Oct 10 2006 Brief amici curiae of Latino Organizations filed. VIDED. (Distributed)

Oct 10 2006 Brief amicus curiae of Prichard Committee for Academic Excellence filed. (Distributed)

Oct 10 2006 Brief amicus curiae of Walt Sherlin filed. VIDED. (Distributed)

Oct 11 2006 CIRCULATED.

Oct 12 2006 Record received from U.S.C.A. for Sixth Circuit. (1 binder)

Oct 24 2006 Motion of NAACP Legal Defense & Educational Fund, Inc. for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.

Oct 24 2006 Motion of NAACP Legal Defense & Educational Fund, Inc. for leave to participate in oral argument as amicus curiae and for divided argument filed.

Oct 31 2006 Record received from U.S.D.C. for Western District of Kentucky. (1 envelope)

Nov 6 2006 Motion of NAACP Legal Defense & Educational Fund, Inc. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.

Nov 6 2006 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED, and the time is to be divided as follows: 15 minutes for the petitioner and 15 minutes for the Solicitor General.

Nov 13 2006 Reply of petitioner Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald filed. (Distributed)

Dec 4 2006 Argued. For petitioner: Teddy B. Gordon, Louisville, Ky.; and Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. (for

United States, as amicus curiae.) For respondents: Francis J. Mellen, Jr., Louisville, Ky.

Supreme Court, U.S.
FILED
05-915 JAN 18 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CRYSTAL D. MEREDITH,
CUSTODIAL PARENT AND NEXT FRIEND
OF JOSHUA RYAN MCDONALD
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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Counsel for Petitioner

January, 2006

QUESTIONS PRESENTED FOR REVIEW

1. Should Grutter v. Bollinger, 539 U.S. 306 (2003) and Regents of University of California v. Bakke, 438 U.S. 268 (1978) and Gratz v. Bollinger, 539 U.S. 244 (2003) be overturned and/or misapplied by the Respondent, the Jefferson County Board of Education to use race as the sole factor to assign students to the regular (non-traditional) schools in the Jefferson County Public Schools?

2. Whether the race-conscious Student Assignment Plan with mechanical and inflexible quota systems of not less than 15% nor greater than 50% of African American students without individually or holistic review of any student, meets the Fourteenth Amendment requirement of the use of race which is a compelling interest narrowly tailored with strict scrutiny.

3. Did the District Court abuse and/or exceed its remedial judicial authority in maintaining desegregative attractiveness in the Public Schools of Jefferson County, Kentucky?

PARTIES TO PROCEEDING

Crystal Meredith as Custodial Parent and Next Friend of Joshua Ryan McDonald, a student in the regular (non-traditional) schools of the Jefferson County Public Schools.

Jefferson County Board of Education is the legal entity encompassing the Jefferson County Public Schools.

Stephen W. Daeschner is the Superintendent of the Jefferson County Board of Education.

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PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Petition for Writ of Certiorari, Petitioner, Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald, respectfully prays that a Writ of Certiorari issued to review the decision entered by the United States Court of Appeals for the Sixth Circuit dated July 21, 2005 (Opinion, App. B1). McFarland v. Jefferson County Public Schools, 416 F. 3d 513 (6th Cir. 2005).

OPINIONS BELOW

Petition for Rehearing and Rehearing En Banc for the Sixth Circuit was denied October 21, 2005. (Order, App. A1).

The decision of the United States District Court for the Western District of Kentucky (Memorandum Opinion & Order, App. C78-C79) is reported at McFarland v. Jefferson County Public Schools, 330 F. Supp. 2d 834 (W.D. Ky. 2004).

BASIS OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on the 21 day of July, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States reads in relevant part, "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution Amendment XIV.

STATEMENT OF THE CASE

A. BACKGROUND

This trilogy of litigation involving use of race in the Jefferson County schools began in 1973 when parents and students filed two federal law suits against the Jefferson County Board and the former Louisville Board of Education, pledging that each maintain a segregated school system and demanding desegregation of the schools, collectively referred to as the "Haycraft" case. See Newburg Area Council, Inc. v. Board of Education of Jefferson County, 489 F. 2d 925 (6th Cir. 1973); Newburg Area Council, Inc. v. Board of Education of Jefferson County, 510 F. 2d 358 (6th Cir. 1974); Newburg Area Council, Inc. v. Gordon, 521 F. 2d 578 (6th Cir. 1975); Cunningham v. Grayson, 541 F. 2d 538 (6th Cir. 1976); Haycraft v. Board of Education of Jefferson County, 560 F. 2d 755 (6th Cir. 1977); and Haycraft v. Board of Education of Jefferson County, 585 F. 2d 803 (6th Cir. 1978).

The second portion of the trilogy ended in a court order of June 20, 2000, wherein the United States District Court for the Western District of Kentucky at Louisville with Chief Judge John G. Heyburn presiding dissolving the 1975 desegregation decree, determining that the system had gained unitary status. These cases were affectionately known as the "Hampton cases." See Hampton I - Hampton v. Jefferson County Board of Education, 72 F. 2d 753 (W.D. Ky. 1999); and Hampton II - 102 F. Supp. 2d 358 (W.D. Ky. June 20, 2000). It is important to note that the Plaintiffs seeking relief in the Hampton's cases, supra. were African American parents and students seeking a return to their previous segregated high school which had been the pride of the African American community, and a neighborhood school, when pride still mattered!

Central High School was 500 seats under capacity due to the race-designated, hard-core quota student assignment plan in effect at the time. To comply with the court order of June 20, 2000 (see Hampton II, supra.), the Board ended its use of racial quotas of Central High School and three (3) other schools within the Jefferson County school system that offered county-wide magnet programs, those being Dupont Manual High School (including the Youth Performing Arts School), the Brown School and Brandeis Elementary School.

Although the desegregation decree had been dissolved, Jefferson County Board of Education continued to use the same race-designated, hard-core quota Student

Assignment Plan to assign students to the remainder of the public schools in Jefferson County, Kentucky. All students are assigned to schools based upon quotas of not less than 15% nor greater than 50% African-American. Any other ethnic group, such as Hispanic, Asian-American or even Native American are considered as other and are categorized as White. Therefore, the race-designated, hard-core quotas are strictly compiled as Black and White.

The trilogy was completed when complaint was filed by David McFarland, as Parent and Next Friend of his two sons, Stephen and Daniel McFarland, on or about October 22, 2002 (Complaint, App. E1). Subsequently thereto, two additional parents in the same or similar circumstances of David McFarland, to hereinafter be discussed, filed Amended Complaints which were granted leave to be of record by Judge Heyburn (Order, App. D1). They were Ronald Jeffrey Pittenger, Parent and Next Friend of Brandon Pittenger and Anthony Underwood, Custodial Parent and Next Friend of Max Aubrey. All three of these Plaintiffs had their children denied entry into the traditional schools, which were county-wide magnet programs, solely because of the race-designated, hard-core quotas used, with race being the sole factor, by the Jefferson County Board of Education in their Student Assignment Plan.

The last Plaintiff to join the current litigation was Crystal Meredith as Custodial Parent and Next Friend of Joshua Ryan McDonald; her Amended Complaint being the

Third Amended Complaint was granted leave to be filed of record on May 2, 2003 (Order, App. D1). Joshua was denied entrance into the neighborhood school, literally across the street from where he lived, solely because he is White. Thus, as explained by said Memorandum Opinion of the trial court, now all of the traditional and non-traditional schools being controlled by the race-designated, hard-core quota racial Student Assignment Plan of the Jefferson County Board of Education would be reviewed as to the Equal Protection Clause by the trial court. In the trial court's Memorandum Opinion, in addition to the history of the trilogy of litigation, the first 45 pages comprises the discussion of the non-traditional schools, with the last four (4) pages comprising the discussion of the traditional schools. The trial court found that the traditional school assignment process was not narrowly tailored and, therefore, in violation of the Equal Protection Clause and the rights guaranteed there under to the first three Plaintiffs; namely, McFarland, Pittenger and Underwood, and, of course, their sons.

The trial court found that the Student Assignment process in the non-traditional schools' regular program did not violate the rights that Crystal Meredith had under the Equal Protection Clause in regard to where her son, Joshua, attends school (attended school), (representing the remainder of the students attending non-traditional schools in the Jefferson County school system) and denied her request for relief.

Similarly, at all times herein, the Jefferson County Public Schools and the Jefferson County Board of Education were identified as the same party. On page 1 of Judge Heyburn's Memorandum Opinion, he specifically states, ". . . The Jefferson County Public Schools ("JCPS" or "the Board") . . ." The Jefferson County Public Schools (JCPS) and the Jefferson County Board of Education (JCBE) were and have become interchangeable. Technically, only Crystal Meredith remains as an Appellant/Petitioner for purposes of this Writ.

The Respondent, Stephen Daeschner, is named as the Superintendent of the Jefferson County Board of Education.

Although the trial court has submitted the phraseology of the legal issue to hereinafter be reviewed as: ". . . One-half a century of social changes after Brown v Topeka Board of Education, 347 U.S. 483 (1954), the constitutional questions the federal courts confront are derivative of but dramatically different from those addressed in Brown, supra. This case raises one of those questions: To what extent does the Equal Protection Clause limit JCPS's discretion to use race-conscious policies to maintain an integrated public school system. The Supreme Court has yet to consider this question directly. . . .," (Memorandum Opinion & Order, App. C2-C3). Petitioner, Crystal Meredith, in behalf of her son, Joshua, submits that the issue comprises the statement of the case is: 1) Should Grutter v. Bollinger, 539 U.S. 306 (2003) and Regents of

University of California v. Bakke, 438 U.S. 265 (1978) be overturned by the Respondent, Jefferson County Board of Education to use race as the sole factor to assign students in order to achieve diversity in the public schools of Jefferson County, Kentucky; and 2) Whether the race-conscious Student Assignment Plan with mechanical and inflexible quota systems of not less than 15% nor greater than 50% of African American students without individual or holistic review of any student, meets the Fourteenth Amendment requirement of the use of race which is a compelling interest narrowly tailored with strict scrutiny?

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

A. The Trial Court Exceeded its Judicial Authority in its Intervention in the Jefferson County Public Schools.

By granting Certiorari of this Petition, the Supreme Court of the United States will give guidance, clarification and rule of law as to whether or not this District Court's opinion ratifying desegregating attractiveness is not only consistent with current opinions of the Supreme Court of the United States, but should become the law of the land.

This Petition for Writ of Certiorari asks this Honorable Supreme Court to review the Opinion of the United States District Court for the Western District of Kentucky. This Opinion, in itself, is a conflicting, derisive

opinion, misapplying Bakke, supra., Grutter, supra. and Gratz, supra. in deciding when a plan uses race as the sole factor is or is not narrowly tailored. All Districts agree with the ruling of the Supreme Court of the United States that strict scrutiny applies to this narrowly tailored review of the use of race. Bakke, supra and Grutter, supra are being misapplied because race was not used as a "plus" factor in deciding student assignment to all schools with the Jefferson County Public Schools. Gratz, supra was being misapplied because hard core race conscious admission plans were found unconstitutional.

B. There are Conflicts Within the Circuits.

The Districts divide as to the application both before and after Grutter, supra. and Gratz, supra. See Tuttle v. Arlington County School Board, 195 F. 3d 698 (4th Cir., 1999) Cert. Dismissed 529 U.S. 1050 (2000) and Eisenberg v. Montgomery County Public Schools, 197 F. 3d 123 (4th Cir., 1999), Cert. Denied 529 U.S. 1019 (2000); Cavalier v. Caddo Parish School Board, 403 F. 3d 246 (5th Cir., 2005); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 377 F. 3d 949 (9th Cir., 2004), 2005 Westlaw 2679585; Smith v. Univ. of Washington, 3392 F. 3d 367 (9th Circuit 2004) Petition for Cert filed April 18, 2005; Doe v. Kamehameha Schools, 416 F. 3d 1029 (9th Cir., 2005); Comfort v. The Lynn School Committee, et al, 283 F. Supp. 2d 328 (D. Mass., 2003),

418 F. 3d 1 (1st Cir., 2005), Brewer v. W. Irondequoit Cent. School District, 212 F. 3d 738 (2nd Cir., 2000).

The decision of the Sixth Circuit directly conflicts with decisions of the Fourth, Fifth and Ninth Circuits concerning voluntarily-adopted race-based student assignment plans designed to advance racial diversity.

The Fourth Circuit examined two such plans in Tuttle, supra. and Eisenberg, supra. That Court concluded that because both assignment plans inflexibly used racial balancing in an effort to achieve the purported educational benefits of racial diversity, they violated the Equal Protection Clause. Tuttle, 195 F. 3d at 705-07; Eisenberg, 197 F. 3d at 133. In reviewing the plans at issue in Tuttle and Eisenberg, the Fourth Circuit reached conclusions about the appropriate narrow tailoring standard that directly conflict with the standard applied by the Sixth Circuit.

More recently, the Fifth Circuit addressed the appropriate narrow tailoring standard for race-based K-12 assignment plans in Cavalier, supra. Unlike the Sixth Circuit, the Fifth Circuit concluded that racial balancing plans are not narrowly tailored. Id. At 260.

The Ninth Circuit has also recently rejected the use of a race-based admission policy at a private school under 42 U.S.C. §1981. Doe, supra. The Ninth Circuit adopted a standard based on Title VII for its §1981analysis and found against the mechanical inflexible use of race even under that lower standard.

In Brewer, supra. the Second Circuit reviewed an order granting a preliminary injunction. The District Court had granted the injunction based on its conclusion that racial diversity could never be a compelling interest. Id. At 747. The Second Circuit reversed, holding "we do not think that we can conclude 'clearly'—the plaintiffs' burden in this case—that reduction of racial isolation to ameliorate what may be *de facto* segregation in the voluntarily participating public schools is not a compelling state interest" (Id. At 752) and remanded the case for a determination of whether such a plan could meet the requirements of narrow tailoring. Id. At 753. The case settled before further proceedings could take place.

The Fourth, Fifth and Ninth Circuits have each found the use of racial balancing assignment plans unconstitutional. Tuttle, Eisenberg, Cavalier, and Kamehanega Schools. The First Circuit, and to a limited extent, the Second and Sixth Circuits, have upheld the use of racial balancing assignment plans. Comfort, Brewer and McFarland. In McFarland, the Kindergarten was within the 15% to 50% quota by pure choice without the use of the racial student assignment plan giving credence to Petitioner's argument that said race-conscious plan is not narrowly tailored.

Factual and legal niceties aside, once again, this Honorable Court faces the ultimate decision as to the extent this court will allow an expansion of district court's remedial authority to maintain desegregated attractiveness

in the public school systems of the United States of America. From Lynn, Massachusetts to Seattle, Washington, which includes all "large" public school systems in the United States of America in between, for the most part, the public school systems have decided to be the arbiter of the social agenda to cure past societal de jure segregated practices that arose out of the same public school systems.

C. The Trial Court has Overturned and/or Misapplied Bakke, supra; Grutter, supra; and Gratz, supra.

This Honorable Court has just reviewed the factual and legal arguments of both sides of this issue at the law school level and the undergraduate level, with Grutter, supra. and Gratz v. Bollinger, 539 U.S. 244 (2003). The rule of law in these two cases should be easily followed and legally applied as to the use of race in the public school system, in the Jefferson County public schools and/or throughout the United States of America. With this writ brought forward by Crystal Meredith in behalf of her son, Joshua McDonald, it is obvious that those legal pronouncements were not followed.

The Jefferson County Board of Education uses a race-designated Student Assignment Plan of Black and White to determine where the children of the Jefferson County public school system shall attend school .The Jefferson County Board of Education applies a strict,

mechanized quota without individual review of not less than 15% nor greater than 50%. Thus, the denial of Joshua McDonald to his neighborhood school was solely based on Joshua McDonald being White. Converse of that statement is absolutely true. Joshua McDonald would have been admitted to the school literally across the street from where he lives if he were Black. All other factual distinctions for the purposes of this Honorable Supreme Court to grant this Writ are not material in apposition to the ultimate issue proffered for review to this Honorable Court. For example, all the school boards must argue that when race is used as the sole factor for student assignment, the school in which my Joshua attends or all the other school children in the United States of America attend are basically equal (fungible) and that Joshua McDonald will receive an education equal to where all the other students would receive in any other school in this given school system, regardless of race being the sole factor as to where the Joshua McDonalds of the United States receive their education.

In the split opinion rendered by the Honorable Judge John Heyburn of the United States District Court for the Western District of Kentucky which is the exact order appealed from based upon the Per Curium Opinion of the Sixth Circuit Court of Appeals, race could not be used as the sole factor to exclude any student from a specialized program where there is a benefit or detriment (equal

protection) such as the traditional school portion of the Jefferson County Public School system.

As previously stated, although this Petitioner, as well as all of the other Petitioners similarly situated, who are denied entry into their neighborhood schools would argue that the various schools within the Jefferson County Public School system as well as other public school systems are not basically equal, in order for this Honorable Court to grant certiorari of the writ of Joshua McDonald, that fact must be conceded.

In addition thereto, school capacity is not a factor; nor as it applies to the Jefferson County Public Schools are achievement tests between the schools that Joshua McDonald would have attended and did attend a factor; nor that White students generally do better on these achievement tests at the neighborhood school that Joshua McDonald wanted to attend is not a factor.

The only difference is that vestiges of de jure segregation and/or the failure to find a unitary school system that has abolished those vestiges has now metamorphasized to the curing of past societal ills from the desire to prevent public schools having a majority of African-American students. Although other public school systems may differ, in the Jefferson County Public School system, this is a Black-White issue, and therefore, by definition, the Jefferson County Public School system has declared that the proper school setting is a school wherein the majority of students are White. The logical opposite of

the Respondent's position would be that by definition a regular school program with a majority of African-Americans is inferior. Thus, the cycle of the respective positions begins.

On behalf of the Jefferson County Board of Education and all boards of education similarly situated social scientists have decreed and this Honorable Court has so found that racial diversity is an accepted compelling constitutional issue. In all of these cases, it is conceded that where our African American parents have chosen to live (if they can afford it), have been forced to live due to the existence of public housing and lower socio-economic barriers; or do reside based upon de facto residential patterns, if race was not used to continue to desegregate the schools at the school house door; then public schools with 100% and/or close to 100% African Americans would be recreated. The school boards and the social scientists have brought forth testimony accepted by this District Judge that he has the remedial authority to interpret Brown, supra., to prevent resegregation of the public schools, or maintain desegregated attractiveness.

Crystal Meredith, as well as all of the other parents agreeing with Crystal Meredith in the United States of America, persists in believing and appealing that this is an abuse of judicial discretion and exceeds the District Court's remedial authority. The societal philosophical debate of two opposite views that have become established precedent in Grutter, supra., and Gratz, supra. need direction and

clarification if to be applied uniformly across the circuits and our United States of America. As now applied in McFarland, supra., the established mandatory and essential precedent of an undefined critical mass as found in Grutter, supra. is a mere factual and/or legal nicety that no longer applies, because the Trial Court made no such finding. The race-designated, hard-core mechanized quota without individual, holistic review of any student that was found in Gratz, supra. no longer applies. Arguments proffered by Petitioner herein and other parents across the country as to expenditures of millions and millions of our tax dollars, without any improvement of educational outcome, does not apply. Achievement and/or test scores showing African-Americans consistently being 25 points and/or four (4) class grades behind their White counter parts does not apply. An African-American child being voluntarily bussed out of his or her neighborhood an hour and a half across town to be in a classroom of approximately three (3) African-American kids with an overwhelming White majority and how it affects that African-American child's self-esteem does not apply. Difficulty that "bussed children" have in participating in extracurricular activities of the school so far away from where they live does not apply. The difficulty that African-American parents have in participating in their child's school affairs, whether it be an extracurricular activity and/or a parent-teacher conference due to the distance which working parent is from his or her child's school does not apply.

The myriad of other social, professional, economic and personal factors, still totally at odds, are the underlying social dynamics in existence to request this Honorable Court to promulgate legal policies upon which both the parents and school boards can rely in determining what is the best possible public education our children can receive within the public school systems of the United States of America.

This Honorable Court should be very mindful that the onslaught of private schools, home schooling, charter schools, religious-oriented private schools, and the use of vouchers to be paid for by public funds is present in our society because of the perception that our public school systems throughout these United States of America fail to offer the best education to our children. If Bakke, supra., Grutter, supra. and Gratz, supra. are to be misapplied the public school systems across this United States of America, then it is incumbent upon this Supreme Court of the United States to establish the law of the land. Without direction and guidance from this honorable Court which can only be done by the granting of this writ, the School Boards, the School Administrators, and the School Principals who have intervened encompassing the entire United States are now armed with precedent to exclude African-Americans from the better schools within their respective school systems. We are merely a step above Missouri v. Jenkins, 515 U.S. 70 (1995) in deciding on a case-by-case basis the remedial authority of the Federal District Courts of the United States

of America. In this last case of judicial intervention with our school system, the Trial Court applied the rule of probability in finding and ordering that the use of race in the county-wide magnet and traditional programs is a violation of the 14th Amendment. With a school population of 97,200 students and no "set asides" or quotas for the African American students for these better programs, the percent of African American students will decrease subjugating qualified African American Students to the non-traditional program. Has this now become the exact opposite of what was envisioned by Brown, 347 U.S. 483 (1954). Without reversal of the law promulgated in this case, we have redefined "a badge if inferiority" to an educational lottery for our African American students. If they win the lottery and are accepted into the county wide magnet program and/or traditional schools, which as a matter of law have been found to be the better programs, they win a quality education with the opportunity to go to college, a/k/a the American Dream. If they lose the lottery, then they are in the non-traditional and/or regular program and they win a public school education of an hour and a half bus ride to school each day, school violence, achievement scores of 25 points lower than their white counterparts, four (4) class grades behind and graduation into a menial job in a non-existent workforce. Welcome to the 21st century's definition of "badge of inferiority."

CONCLUSION

Once again, the two diametrically opposed philosophies collide in this Petition for Writ of Certiorari to the Supreme Court of the United States. Crystal Meredith, representing the parents, both vocal but mostly silent, in Jefferson County, Kentucky, and in similar situations all over the United States of America petitions that this Supreme Court of the United States be the final arbiter as to how to cure societal ills of past discriminatory practices, when all vestiges of said discriminatory practices do not exist and/or there is absolutely no discrimination by a state actor.

This has become a derisive, racial issue by all those who are interested who absolutely are not racist. The Hon. Judge Heyburn of the United States District Court for the Western District of Kentucky, the trial court herein, states and asks, ". . . One-half a century of social changes after Brown, supra., the constitutional questions the federal courts confront are derivative of but dramatically different from those addressed in Brown, supra. This case raises one of those questions: To what extent does the equal protection clause limit JCPS's discretion to use race-conscious policies to maintain an integrated public school system. The Supreme Court has yet to consider this question directly. . . ." Fifty years later, this case, if sustained, has answered Judge Heyburn's question. All across this Country, we have traded the segregated schools

of the 50's to white majority schools with the highest percent of African American students attending the worst schools, as opposed to neighborhood schools with an equal distribution of money and the best teachers; and a resurgence of good old American pride. Hon. Justice Clarence Thomas states and asks, ". . . Given that desegregation has not produced the predicted leaps forward in Black educational achievement, there is no reason to think that Black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment. . . ." Missouri v. Jenkins, supra., pp. 121-122.

Frederick Douglas states, Hon. Justice Clarence Thomas reiterates, ". . . In regard to the colored people, there is always more that is benevolent, I perceive than just manifested toward us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what to do with us. Do nothing with us! I have had but one answer from the beginning. Do nothing with us! Your doing has already played the mischief with us. If the apples will not remain on the tree with their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! And if the Negro cannot stand on his own legs, let him fall also. All I ask is give us a chance to stand on our own legs! Let him alone. Your interference is doing positive injury. . . ." See Grutter v. Bollinger, 539 U.S. 306, pp. 353-354 (2003).

One hundred forty years later, after Frederick Douglas verbalized those remarks, the response goes unanswered. By granting Petitioner's Writ of Certiorari, Frederick Douglas can receive his response. Our community, as all the communities, especially in large urban areas in this wonderful United States of America, have come long way since the segregated days of the 40's and the 50's and on into the 70's. There is no going back. Regardless of where people live, or where they attend school, we are a multi-ethnic, inter-racial and homogeneous society. In our community as in the communities across our land, this is evident by the rainbow composition of legislative council, urban and state boards of control and high ranking administrative positions of the local, state and national government. This rainbow composition continues in our workplace, emphasized by the color-blind appearance of our local television networks.. We will not turn back the clock. I can assure you that we proud Louisvillians will not let this happen. There is nothing written in the Fourteenth Amendment that would allow the continuing discrimination by this Jefferson County Board of Education as to Whites or Blacks within our Jefferson County Public School system. Contrary thereto, it is the vision, it is the dream, though it must be demanded that the Fourteenth Amendment to the Constitution of the United States of America, once and for all, allows all individuals, whether they be White male, African American female, multi-ethnic Latino, multi-ethnic Asian-American, native

American, and/or children of inter-racial or multi-ethnic marriages/relationships to be afforded true and equal protection of the law. Although there are episodes that perceive racial injustice that continue in our community, as well as all other communities within these United States, all parties would have to agree that for the most part, Louisville, Kentucky and/or the United States of America are indeed color-blind communities.

If we were not a color-blind community, then our school system must do everything humanly possible to educate all of our children from age 5 forward so that deliberate race consciousness does not and will no longer belong in our community or, for that matter, in our entire society. Factually, the Jefferson County Public School system and all of the other public school systems that execute the race-conscious Student Assignment Plan do exactly the opposite. How can we truly believe that all citizens are afforded equal protection of the law without regard to race, gender or ethnicity if that is to be the dominating and encouraged academic environment when our children enter any public school, let alone the Jefferson County Public School system? The Jefferson County Board of Education and/or the Jefferson County Public School system, as well as all of the public school systems in our United States of America must and should be the torch-bearer of this 3rd millennium's homogeneous society.

No community can tolerate any longer the public educational system that makes race the determining factor

of educational outcome. As long as race consciousness is enforced, thus becoming the pervading educational environment then our children will continue to be treated differently. The dawn of a new millennium now begins in our entire educational process from Jefferson County, Kentucky, to our entire United States of America. In the public school systems of Jefferson County and across this country, the dream of a nation of equal students should become a reality. Race, gender and ethnicity within our school system will now become irrelevant to overall educational goals and one homogenous student body.

The public school systems of the United States of America will no longer recognize a student by the color of his skin but by the content of his educational achievement and the full potential of his ability. If we have a true color-blind society in the public school systems of the United States of America, we must no longer be obligated to mark the box of "Race."

Respectfully submitted,

TEDDY B. GORDON
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807 West Market Street
Louisville, KY 40202
(502) 585-3534

APPENDIX

6TH CIRCUIT FILINGS:

Order Denying Rehearing,
filed 10/21/05 ..... A1-A2

Opinion,
filed 07/21/05 ..... B1-B3

WESTERN DISTRICT OF KENTUCKY FILINGS:

Memorandum Opinion & Order,
filed 06/29/04 ..... C1-C79

Order,
filed 05/02/03 ..... D1-D2

Complaint,
filed 10/21/02 ..... E1-E6

No. 04-5897

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID MCFARLAND, PARENT AND NEXT FRIEND OF STEPHEN AND DANIEL MCFARLAND, ET AL., *Plaintiffs,*	)	FILED October 21, 2005 Leonard Green, Clerk
CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD, *Plaintiff-Appellant,*	)	
v.	)	**ORDER**
JEFFERSON PUBLIC SCHOOLS, *Defendant,*	)	
JEFFERSON COUNTY BOARD OF EDUCATION, ET AL., *Defendants-Appellees.*	)	

Before: NORRIS and DAUGHTREY, Circuit Judges, and JORDAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to

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* Hon. R. Leon Jordan, Senior United States District Judge for the Eastern District of Tennessee, sitting by designation.

the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been refereed to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE COURT

/s/ Leonard Green
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0309p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
July 21, 2005
Leonard Green, Clerk

DAVID MCFARLAND, Parent and Next Friend of Stephen and Daniel McFarland; RONALD JEFFREY PITTENGER, Parent and Next Friend of Brandon Pittenger; ANTHONY UNDERWOOD, Custodial Parent and Next Friend of Max Aubrey, *Plaintiffs*,	)	No. 04-5897
CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald, *Plaintiff-Appellant*,	)	
v.	)	
JEFFERSON COUNTY PUBLIC SCHOOLS, *Defendant*,	)	
JEFFERSON COUNTY BOARD OF EDUCATION; STEPHEN W. DAESCHNER, Superintendent, *Defendants-Appellees*.	)	

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 02-00620—John G. Heyburn II, Chief District Judge.

Argued: June 9, 2005

Decided and Filed: July 21, 2005

Before: NORRIS and DAUGHTREY, Circuit Judges; JORDAN, District Judge.*

COUNSEL

ARGUED: Teddy B. Gordon, Louisville, Kentucky, for Appellant. Francis J. Mellen, Jr., WYATT, TARRANT & COMBS, Louisville, Kentucky, for Appellees. **ON BRIEF:** Teddy B. Gordon, Louisville, Kentucky, for Appellant. Francis J. Mellen, Jr., Byron E. Leet, WYATT, TARRANT & COMBS, Louisville, Kentucky, for Appellees. Amy D. Cubbage, Sheryl G. Snyder, Bridget H. Papalia, FROST, BROWN & TODD, Louisville, Kentucky, Morgan G. Ransdell, KENTUCKY COMMISSION ON HUMAN RIGHTS, Louisville, Kentucky, Chester Darling, CITIZENS FOR THE PRESERVATION OF CONSTITUTIONAL RIGHTS, Andover, Massachusetts, Michael Williams, Robert J. Roughsedge, CITIZENS FOR THE PRESERVATION OF CONSTITUTIONAL RIGHTS, Boston, Massachusetts, Maya R. Kobersy, John W. Borkowski, Maree Sneed, HOGAN & HARTSON, Washington, D.C., Albert H. Kauffman, THE

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* The Honorable R. Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, Cambridge, Massachusetts, Chinh Quang Le, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, New York, New York, for Amici Curiae.

OPINION

PER CURIAM. Plaintiff Crystal Meredith, on behalf of her son Joshua Ryan McDonald, appeals the decision of the district court to uphold the student assignment plan of the Jefferson County Public Schools, which includes racial guidelines. The district court concluded that the assignment plan met the constraints of the Equal Protection Clause of the Fourteenth Amendment because the school board had a compelling interest to use the racial guidelines and applied them in a manner that was narrowly tailored to realize its goals. *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834 (W.D. Ky. 2004).

Because the reasoning which supports judgment for defendants has been articulated in the well-reasoned opinion of the district court, the issuance of a detailed written opinion by this court would serve no useful purpose.

The judgment of the district court is **affirmed**.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:02CV-620-H

DAVID McFARLAND, Parent
and Next Friend of Stephen and
Daniel McFarland, et al. PLAINTIFFS

V.

JEFFERSON COUNTY
PUBLIC SCHOOLS, et al. DEFENDANTS

FILED
June 29, 2004
Western District
of Kentucky,
Clerk

MEMORANDUM OPINION

For twenty-five years, the Jefferson County Public Schools ("JCPS" or "the Board") maintained an integrated school system under a 1975 federal court decree. After release from that decree four years ago, the JCPS elected to continue its integrated schools through a managed choice plan that includes broad racial guidelines ("the 2001 Plan"). This case arises because some students and their parents say that the Board's student assignment plan violates their rights under the Equal Protection Clause of the United States Constitution.[1]

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[1] Plaintiffs offer a litany of federal laws under which federal jurisdiction is appropriate and under which they request that the Court find their civil rights have been

The occasion of the fiftieth anniversary of *Brown v. Board of Education*[2] has generated much discussion regarding whether that ruling has fulfilled its original promise. To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of *Brown's* promise. The benefits the JCPS hopes to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all JCPS schools.

One half a century of social change after *Brown*, the constitutional questions the federal courts confront are derivative of but dramatically different from those

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violated: Titles VI and VII of the Civil Rights Act of 1964,42 U.S.C. § 703(a)(I), the Civil Rights Act of 1991, Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, KRS ch. 344, the First and Fourteenth Amendments to the U.S. Constitution, and "appropriate paragraphs" of the Kentucky State Constitution. The arguments presented by both sides have addressed only the constitutionality of the racial guidelines under the Equal Protection Clause.

[2] 347 U.S. 483 (1954).

addressed in *Brown*. This case raises one of those questions: to what extent does the Equal Protection Clause limit JCPS's discretion to use race-conscious policies to maintain an integrated public school system. The Supreme Court has yet to consider this question directly.

I.
SUMMARY

This case has required the Court to weigh individual rights under the Equal Protection Clause against the responsibility and right of an elected public school board to determine its own educational policies. For guidance, the Court has focused on the divided opinions of the Supreme Court in two recent cases: *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). The first of these opinions upheld race-conscious admissions policies at the University of Michigan Law School; the latter struck down different policies at the University of Michigan's College of Literature, Science and the Arts. These two cases set out the requirement that any use of race in a higher education admissions plan must further a compelling governmental interest and must be narrowly tailored to meet that interest. The Court considered these principles in the slightly different context of an elementary and secondary school student assignment plan.

JCPS meets the compelling interest requirement because it has articulated some of the same reasons for

integrated public schools that the Supreme Court upheld in *Grutter*. Moreover, the Board has described other compelling interests and benefits of integrated schools, such as improved student education and community support for public schools, that were not relevant in the law school context but are relevant to public elementary and secondary schools.

In most respects, the JCPS student assignment plan also meets the narrow tailoring requirement. Its broad racial guidelines do not constitute a quota. The Board avoids the use of race in predominant and unnecessary ways that unduly harm members of a particular racial group. The Board also uses other race-neutral means, such as geographic boundaries, special programs and student choice, to achieve racial integration.

The student assignment process for the traditional schools is distinct from that employed at all other programs and schools. In that process, JCPS separates students into racial categories in a manner that appears completely unnecessary to accomplish its objectives. To the extent the 2001 Plan incorporates these procedures, the Court concludes that it violates the Equal Protection Clause. The Board may continue to administer the 2001 Plan in every respect in all of its schools, with the exception of its use of racial categories in the traditional school assignment process.

II.
FACTUAL BACKGROUND

Plaintiffs all have children who attend or have attended Jefferson County public schools and have participated in the student assignment process. Each, in different ways, is dissatisfied with the procedure or result of his or her child's assignment to a Jefferson County public school.[3] Plaintiffs seek to enjoin the use of racial

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[3] Plaintiff David McFarland has two boys, Stephen and Daniel. In 2002-2003, Stephen applied to Jefferson County Traditional Middle School ("JCTMS") as a rising sixth grader without indicating a second choice option for a magnet or optional program. He was rejected by JCTMS and assigned to Newburg, his resides middle school. He then applied for a transfer to Myers Middle School, where he was accepted and enrolled. In 2003-2004, Stephen reapplied to JCTMS and was accepted. He attended JCTMS for the seventh grade.

Daniel McFarland lives in the Price Cluster. His resides elementary school is Bates. In 2002-2003, Daniel applied to two cluster schools, Fern Creek and Luhr, as well as to Schaffuer Traditional Elementary without indicating a second choice option for a different magnet or optional program. He was rejected by Schaffuer and chose not to accept an offer to go to the traditional program at Maupin; enrollment in the Maupin program would have put

Daniel in the traditional school "pipeline." Daniel was then assigned to Fern Creek. He did not apply for a transfer from Fern Creek after the cluster and magnet application process was complete. In 2003-2004, Daniel applied again to Schaffuer Traditional without indicating a second choice magnet program and was accepted. He attended Schaffner for the second grade.

Plaintiff Ronald Pittenger's son, Brandon, attended Bates Elementary School for kindergarten through fifth grade. In 2002-2003, as a rising sixth grader, Brandon applied to JCTMS as his frrst choice and the Newburg Math, Science and Technology Magnet Program as his second choice. He was not accepted at JCTMS, and his application to the Newburg MST Program was not processed because a student can only enroll in the Newburg magnet program if it is listed as the student's first choice. Brandon chose not to attend his resides middle school at Newburg. Brandon later enrolled at Evangel Christian School for the sixth grade and chose to stay there. He did not reapply to JCTMS or any other public school option in 2003-2004.

Plaintiff Anthony Underwood's son, Kenneth Maxwell Aubrey, attended several different schools in Jefferson County and elsewhere from kindergarten through fifth grade. In 2002-2003, he applied as a rising sixth grader to JCTMS without offering a second choice magnet or optional program. His application was rejected by

guidelines under the 2001 Plan, including the use of racial categories in the traditional school assignment process. This Court has stated that, because the student assignment plan applies at all grade levels in all school settings in the

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JCTMS, and he was assigned to Newburg. He applied for a transfer to Myers Middle School, which was accepted, and he enrolled in Myers for the sixth grade. In 2003-2004, he did not apply for magnet programs nor a transfer from Myers. He attended Myers in the seventh grade.

Plaintiff Crystal Meredith's son, Joshua McDonald, was unable to be enrolled in his resides school, Breckinridge-Franklin Elementary School, because it was filled to capacity. He was then assigned to Young Elementary School ("Young") for kindergarten in 2002-2003. He applied for a transfer to Bloom Elementary School ("Bloom"), which was not in his assigned cluster of schools, and was denied admittance because his transfer to Bloom would have had an adverse effect on Young's racial composition in violation of the racial guidelines under the student assignment plan. Joshua, however, did not apply for any further transfers after his request for Bloom was denied (students are unlimited in the number of transfer requests they can make), did not appeal the decision to deny the transfer, and did not apply in 2003-2004 for a different cluster school, a magnet program, or another transfer. Joshua attended Young in the first grade.

Jefferson County schools, any ruling would necessarily apply to the entire school system.

The JCPS Board is composed of seven members elected by district for terms of four years. The Board manages and controls JCPS. The Board is a corporate body which is organized and exists pursuant to KRS § 160.160. It has the powers and duties stated in KRS § 160.290 and other applicable statutes. The Board selects a superintendent, who acts as the chief administrative officer of JCPS. Defendant Stephen Daeschner is the Superintendent of JCPS.

This Court conducted a five-day hearing in December 2003. Prior to this hearing, the parties entered into a 135-paragraph stipulation that included 75 exhibits. At the hearing, several Plaintiffs testified about their experiences with the JCPS student assignment plan.[4] Defendants called the superintendent, several board members, numerous administrative staff members,

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[4] Plaintiffs called four witnesses. Plaintiffs David McFarland, Ronald Pittenger, and Crystal Meredith testified about their experiences with the traditional school admissions process and the student assignment plan in general. Plaintiffs also called an additional witness, Cherri Jackson, who testified about her failed attempt to enroll her children at the elementary school that she preferred in her cluster.

principals and educational experts, who provided testimony about all aspects of the JCPS student assignment plan, the traditional program, the student population and the importance of a racially integrated education.[5]

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[5] Defendants called thirteen witnesses (listed in order of appearance): Carol Ann Haddad, a school board member, testified about changes in 1991 and 1996 to the student assignment plan, the origins of the traditional program, and more generally about the importance and benefits of racial integration in education; Dr. Stephen Daeschner, JCPS Superintendent, testified about the student assignment plan and the traditional program, the variables involved in reducing the achievement gap between Blacks and Whites and low and high performing schools, and the benefits of racial integration; Patricia Todd, Executive Director for Student Assignment, testified about the different types of schools and academic programs and the assignment process for the traditional schools and JCPS as a whole; Carolyn Meredith, Director of Employee Relations for JCPS, testified about the hiring and placement of principals and teachers; Loudena Peabody, Director of Instructional Support for JCPS, testified about her previous experience as a teacher and principal in JCPS and methods for improving student performance; Sam Corbett, former school board member and local business owner, testified about the importance of racial integration in education as it prepares students for working in a diverse workplace and

the lack of differences between traditional and non-traditional schools; Dr. Robert Rodosky, Executive Director of Accountability, Research, and Planning, testified about the demographic make-up of and racial segregation in housing in Jefferson County, data about the student assignment process, data about state testing scores, use of income data as a predictor of academic performance, and data about the traditional school admissions process; Dr. Edward Kifer, Jr., Professor in the College of Education at the University of Kentucky, testified about research regarding socioeconomic status as a predictor of academic success, the achievement gap between Blacks and Whites, and the impact of diversity on a public school system; Janice Hardin, Chief Financial Officer and Treasurer for JCPS, testified about school funding, per pupil expenditures, and teacher salaries; Tito Castillo, Principal of Fern Creek Traditional High School, testified about the similarities of his traditional high school to the magnet traditional program; Mark Rose, Principal at Jefferson County Traditional Middle School ("JCTMS"), testified about the differences and similarities between traditional and non-traditional public schools and the admissions process at JCTMS; Rick Caple, Director of Transportation for JCPS, testified about the JCPS transportation system for students and the transportation budget; Joseph Burks, Assistant Superintendent for JCPS High Schools, testified about his previous experience as

A.

JCPS is the 28th largest public school system in the United States. Its district boundaries mirror those of the new Metropolitan Louisville which is now the 16th largest city in the nation. In 2003-2004, about 97,000 students were enrolled in JCPS: approximately 5,000 in preschool programs; 42,500 in elementary schools; 21,650 in middle schools; 24,750 in high schools; 2,100 in alternative schools; and about 1,000 in special schools and special education centers. The racial profile of students subject to the 2001 Plan is about 34% Black and 66% White.[6]

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principal of Louisville Male and his knowledge of Male and Butler as compared with other traditional JCPS high schools; and Dr. Gary Orfield, Professor of Education and Social Policy at Harvard University and Co-Director of the Harvard Civil Rights Project, testified about his research on desegregation and the benefits of diversity in public schools.

[6] The JCPS student assignment plan records the race of each student as Black or African-American and Other, which this Court will denote as "White." This particular practice of distinguishing only Black and non-Black students and referencing non-Black students as "Others" was discussed rather extensively during the hearing. As several witnesses testified, JCPS is a school district almost

JCPS offers a full array of comprehensive, specialized and advanced programs throughout its schools.[7] It operates pre-school and grades Primary 1 ("kindergarten") through grade five in its 87 elementary schools, sixth grade through the eighth grade in its 23 middle schools, and ninth grade through twelfth grade in its 20 high schools. It also operates the Brown School, which contains all grade levels in one building, as well as several alternative schools and special education centers. Each school building has a program capacity, which is the number of students that the building can accommodate, consistent with the programs offered there. JCPS allocates

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entirely populated by only Black and White students. Students of other races and backgrounds, such as Latino and Asian students, are represented only in very small numbers, e.g., less than five percent of the total student population is neither non-Hispanic Black nor White. The Court believes that it is more accurate to refer to the two groups as "Black" and "White."

[7] The Comprehensive Program is the main instructional program. The Advance Program offers a curriculum for gifted and talented students. The Honors Program provides intensive academic preparation for middle and high school students in the Comprehensive Program. The Exceptional Child Education Program offers services to students with identified disabilities.

operating funds to each school using the same formula that is uniformly applied to all JCPS schools.

The Kentucky Education Reform Act of 1990 ("KERA") sets out many requirements for curriculum development, educational goals and assessment requirements for all Kentucky schools, including JCPS. KERA requires each school to form a School-Based Decision Making Council ("SBDM council" or "Council") composed of parents, teachers and the school's principal or administrator. Each Council determines which textbooks, instructional materials and student support services will be used at its school. It also adopts policies for various aspects of school life.

KERA requires a statewide assessment program known as the Commonwealth Accountability Testing System ("CATS"). This test measures core academic content, basic skills, and higher-order thinking skills and their application. KERA requires that JCPS and SBDM councils identify achievement gaps between various groups of students, including between Black and White students, and between Free and Reduced Lunch ("FRL") students and non-FRL students. JCPS sets biennial targets for eliminating those achievement gaps.

B.

This case and its legal predecessors[8] are inseparable from JCPS's ongoing commitment to racial integration within its individual schools. One can find the complete legal and historical background of this case in *Hampton I*, 72 F. Supp. 2d 753, 754-67 (W.D. Ky. 1999). A brief description follows.

In 1973, parents and students filed two federal lawsuits against the Board and the former Louisville Board of Education, alleging that each maintained a segregated school system and demanding desegregation of those schools (collectively, the "*Haycraft*" case). In December 1973, on appeal from dismissal of both lawsuits, the Sixth Circuit directed Judge James Gordon to devise a student

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[8] *See Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 489 F.2d 925 (6th Cir. 1973); *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 510 F.2d 1358 (6th Cir. 1974); *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578 (6th Cir. 1975); *Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976); *Haycraft v. Bd. of Educ. of Jefferson County*, 560 F.2d 755 (6th Cir. 1977); *Haycraft v. Bd. of Educ. of Jefferson County*, 585 F.2d 803 (6th Cir. 1978); *Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753 (W.D. Ky. 1999) ("*Hampton I*"); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000) ("*Hampton II*").

assignment plan that eliminated all vestiges of state-imposed segregation in the two school systems. *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 489 F.2d 925, 932 (6th Cir. 1973). In July 1975, Judge Gordon approved such a plan, and the then-existing Board implemented it. By December 1981, Judge Gordon ended his direct monitoring of schools. In April 1984, the Board approved the first significant modification of its student assignment plan.

Over the next decade, the Board gradually increased specialized educational offerings and encouraged students to make voluntary school choices. In August 1996, after receiving advice from consultants, various committees and a public opinion survey, the Board again revised its student assignment plan. In April 1998, students and parents filed a lawsuit alleging that the students were denied admission to Central High School due to their race. In June 1999, this Court concluded that Judge Gordon's original *Haycraft* desegregation decree was still in effect. *Hampton I*, 72 F. Supp. 2d at 774. Plaintiffs then moved to dissolve that decree.

In June 2000, this Court dissolved the 1975 desegregation decree, ordered JCPS to cease using racial quotas at Central High School, and ordered JCPS to complete any reevaluation and redesign of the admissions procedures in other magnet schools before the beginning of

the 2002-2003 school year. *Hampton II*, 102 F. Supp. 2d 358, 377-81 (W.D. Ky. 2000).[9]

To comply with the Court's order, the Board ended its use of racial quotas at Central High School and at three other magnet schools, duPont Manual High School (including the Youth Performing Arts School ("YPAS")), the Brown School, and Brandeis Elementary. The Board determined that the Court's order did not address the use of

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[9] Some of the Court's findings *in Hampton II* are relevant to the current case: (1) the Board demonstrated extraordinary good faith through its dedication to quality education in an integrated setting, 102 F. Supp. 2d at 369-70; and (2) the Board's student assignment plan was no longer bound by a federal court decree, *id.* at 377. The Court concluded the following: (1) that elected school boards had traditional authority to establish an educational policy, *id.* at 379; (2) that, as between equal schools, the assignment to one particular school did not create a burden or confer a benefit that was constitutionally protected, *id* at 380; (3) that the Board could use race along with other factors to maintain an integrated school system, *id.* at 379; and (4) that the use of racial quotas to exclude students from magnet schools with special programs violated the Equal Protection Clause, *id.* at 381. The Court did not discuss the status of traditional schools or the assignment process for them.

race at magnet traditional schools. In April 2001, after considering public feedback from opinion surveys and community meetings, the Board adopted the 2001 Plan.

III.
THE 2001 STUDENT ASSIGNMENT PLAN

Notwithstanding many changes and refinements to its assignment plans over the past twenty-five years, the Board's primary objective has remained constant: to maintain a fully integrated countywide system of schools. The 2001 Plan contains three basic organizing principles: (1) management of broad racial guidelines, (2) creation of school boundaries or "resides" areas and elementary school clusters, and 3) maximization of student choice through magnet schools, magnet traditional schools, magnet and optional programs, open enrollment and transfers. Using these principles, JCPS provides a form of managed choice in student assignment for its students individually and for the system as a whole.

A.

The racial guidelines broadly influence the overall student assignment plan. This is not surprising since one of the Board's current stated goals under the 2001 Plan is to provide "substantially uniform educational resources to all students" and to teach basic skills and critical thinking skills "in a racially integrated environment." To accomplish these objectives, the 2001 Plan requires each school to seek

a Black student enrollment of at least 15% and no more than 50%. This reflects a broad range equally above and below Black student enrollment systemwide.

Prior to any consideration of a student's race, a myriad of other factors, such as place of residence, school capacity, program popularity, random draw and the nature of the student's choices, will have a more significant effect on school assignment. The guidelines mostly influence student assignment in subtle and indirect ways. For instance, where the racial composition of an entire school lies near either end of the racial guidelines, the application of any student for open enrollment, transfer or even to a magnet program could be affected. In a specific case, a student's race, whether Black or White, could determine whether that student receives his or her first, second, third or fourth choice of school.

For the most part, the guidelines provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15-50% range.

The Court will discuss the actual assignment process in greater detail in Sections III.D and III.E of this Memorandum.

B.

Geographic boundaries greatly influence student assignments. Each JCPS school, except Central, duPont Manual and YP AS, Male and Butler high schools, the

Brown School, Brandeis Elementary, and the traditional programs at Foster and Maupin, has a designated geographic attendance area, which is called its "resides area." Each student is assigned a "resides school" based upon the residence address of his or her parent(s) or guardian. In 2002-2003, 57.5% of all students attended their resides school.[10]

At the elementary school level, all non-magnet elementary schools are grouped into twelve clusters. The elementary schools in a cluster, which includes a student's resides school, are designated as "cluster resides schools" for that student. Racial demographics have influenced the boundaries for contiguous and non-contiguous resides areas and the composition of some elementary school clusters. Elementary schools are clustered so that combined attendance zones, assuming normal voluntary choices, will produce at each school student populations somewhere within the racial guidelines.

Each non-magnet middle and high school has its own resides area. There are no clusters at those levels. Apart from age, graduation from previous grade and residence, no selection criteria govern admission of any student to his or her resides school or a school within his or

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[10] At the elementary school level, 57% of students attended their resides school. At the middle school level, 67.5% attended their resides school. At the high school level, 49.7% attended their resides school.

her cluster. The geographic boundaries of resides areas and cluster schools determine most school assignments.

C.

Student choice may be the most significant element of the 2001 Plan. In addition to a choice of geographic location, JCPS offers students the choice of numerous and varied specialized schools and programs. The basic settings of specialized curriculum are: (1) magnet schools, (2) magnet and optional programs, and (3) magnet career academies. Differences abound, even within these broad groupings. Virtually all age appropriate students may apply for admission to any of these specialized programs.

JCPS has created thirteen magnet schools. Non-traditional magnet schools do not have a resides area. Any student, regardless of address, may apply to the four non-traditional magnet schools: Brandeis Elementary, duPont Manual (including YPAS), Central, and Brown. These schools offer specialized programs and curricula. The remaining nine magnets are traditional schools that offer regular curriculum in a particular school environment. Although students may only apply to a particular traditional school based on place of residence (except for Butler, Male, and the traditional programs at Foster and Maupin), traditional schools are not resides schools for any student because all students must apply for entry.

The Board has created eighteen magnet programs.[11] These are small, specialized programs within a regular school. The Board has also created optional programs in twenty-two schools.[12] These are small, specialized programs with unique characteristics. A student may apply for admission to any magnet or optional program regardless of his or her resides area. [13]

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[11] Magnet programs are located at the following schools: at the elementary school level, Byck, Coleridge-Taylor Montessori, Foster, Kennedy Montessori, King, Maupin, Wheatley, and Young; at the middle school level, Farnsley, Highland, Thomas Jefferson, Meyzeek, Newburg, and Noe; and at the high school level, Atherton, Doss, Seneca, and Western. Foster and Maupin elementary schools have traditional magnet programs.

[12] Optional programs are located at the following schools: at the elementary school level, Cane Run and Price; at the middle school level, Crosby, Highland, Lassiter, Moore, Southern Leadership Academy, Stuart, and Westport Traditional; and at the high school level, Doss, Eastern, Fern Creek, Iroquois, Jeffersontown, Moore, Pleasure Ridge Park, Seneca, Shawnee, Southern, Valley, Waggener, and Western.

[13] Students who apply to the Math, Science and Technology Program at Farnsley, Meyzeek, or Newburg middle schools and are accepted to the program are

Magnet career academies are high schools that offer programs focusing on a specific technical career. Students must apply to the magnet program at a magnet career academy. The Board has designated thirteen resides high schools, plus Central, as magnet career academies.[14] Except in the case of Central, which has a unique curriculum and is open to students countywide, the majority of students enrolled in a magnet career academy live in that school's resides area.

An important part of student choice is the ability of virtually any student to apply for open enrollment (high school freshmen only) or transfer to any non-magnet school. The process for each is similar. After the initial assignment process is complete, any student may apply for transfer to any non-magnet school.[15] Rising freshmen may

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assigned to one of those schools based upon place of residence.

[14] Magnet career academies are located at Atherton, Central, Doss, Fairdale, Fern Creek, Iroquois, Jeffersontown, Moore, Pleasure Ridge Park, Seneca, Shawnee, Southern, Valley, and Waggener.

[15] A school may approve transfer applications for a variety of reasons, including day care arrangements, medical criteria, family hardship, student adjustment problems, and program offerings. In addition, school capacity, a student's attendance record, behavior, grades

apply for open enrollment to any non-magnet high school. If the student is accepted, the receiving school becomes the student's resides school. In each case, the receiving school makes the original decision to accept or reject the applicant. The number of students actually requesting transfer or open enrollment is quite small.[16]

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and the racial guidelines playa role. Three of Plaintiffs' children applied to transfer out of the schools to which they were assigned. Two were successful; one was not. After Stephen McFarland and Kenneth Aubrey were not accepted to Jefferson County Traditional, they both applied for a transfer to Myers Middle School from their resides school at Newburg, and both were accepted. Joshua McDonald also applied for a transfer to Bloom Elementary School when he could not enroll in his resides school at Breckinridge-Franklin and was assigned to Young. His transfer request was denied under the racial guidelines, but he did not apply for another transfer that year nor did he submit an application for his resides school, another cluster school, a magnet school or program, or a transfer to another school the following year.

[16] Overall, over the past two years, transfer and open enrollment applications together have represented about 7.6% of JCPS students. However, many students apply for both. Therefore, the actual number of students seeking either is probably less than 5%. In 2003-2004,

D.

School geographic boundaries and student choice interact to create a huge array of choices and flexibility within the assignment process.

At the Primary I (or kindergarten) level, a student is assigned to his or her resides school unless that school lacks capacity or the student applies for another school. The racial guidelines do not apply to kindergarten.

An elementary school student has as many as five choices. Normally, that student is assigned to his or her resides school unless that school exceeds its capacity or hovers at the extreme ends of the racial guidelines (except for kindergarten), or the student has been accepted to another school or program in or out of the resides cluster.[17] All parents of incoming kindergarten students, first graders or new elementary school students may select a first and second choice school within their resides cluster and a first and second choice magnet or optional program, including a traditional school. Students may list a traditional school

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JCPS received 1,208 open enrollment applications and accepted 335, or 27.7%. In 2002-2003, JCPS received a total of 6,185 transfer applications and granted 4,061, or 65.7%.

[17] A student could apply for and receive acceptance to a magnet or traditional school, a magnet or optional program, or a cluster or other school by transfer.

only as a first choice magnet program. A student may exercise his or her choices in each successive year.

The principals in each cluster and JCPS administrators jointly determine elementary school assignments based upon student choices, the available space and the racial guidelines. If the student is unhappy with the assignment, the student may request a transfer to another elementary school, in or out of the cluster. Acceptance by transfer depends upon the racial guidelines and program capacity. If a student submits no application, then the student is assigned to a school within his or her resides cluster depending upon capacity and the racial guidelines. Only a small number of elementary students receive an assignment that is not one of their choices.[18]

At the middle school level, students have three choices. Most students choose to attend their resides school, for which the only selection criteria are graduation from an elementary school and place of residence. A student may also apply for a first and second choice magnet middle school or magnet or optional program. Regardless of acceptance to a magnet program, a student may choose to attend either his or her resides school or select a third

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[18] Generally, about 95-96% of all elementary students receive their first or second choice cluster school. In 2003-2004, about 30% of elementary school applicants to magnet or optional programs received their first or second choice.

option, which is to apply for a transfer to another middle school.

At the high school level, students have the same basic three choices. Most high school students choose to attend their resides school for which the only selection criteria are middle school graduation and place of residence. Students may also apply for a first and second choice magnet high school or optional or magnet program. Rising freshmen may also apply for open enrollment to any non-magnet high school of their choice. If a student is accepted to a high school through open enrollment, that high school becomes the student's resides school. Regardless of acceptance to a magnet program, a student may choose to attend either his or her resides school or select a third option, which is to apply for a transfer to another high school.

The admissions process for non-traditional magnet schools, magnet programs and optional programs at all grade levels is relatively straightforward. Admissions decisions for the four non-traditional magnet schools[19] are based upon: (1) objective criteria established by the school or program, such as a survey and/or essay, recommendations by adults, a work sample or audition, attendance data, course grades and CATS and/or standardized test scores; (2) available space in the school or

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[19] The admissions process for the traditional schools will be explained separately.

program; and (3) for students applying to Brown, position on a computer-generated random draw list and residence within a zip code that will make the student body representative of the entire county. In addition to objective criteria and program capacity, the racial guidelines are a factor in admission to all the other magnet and optional programs. Admission to one of the middle school Math, Science and Technology Programs is also based upon position on a computer-generated random draw list.

E.

Traditional schools have a more complex admissions process, which combines elements of student choice, program and school capacity, geographic boundaries, pure chance, broad racial guidelines and the use of racial categories to separate applicants. Some Plaintiffs initiated this litigation because they object to JCPS's use of the racial guidelines in general, and the use of racial categories in particular, in the traditional school admissions process.

JCPS first developed traditional programs for the 1976-1977 school year. Traditional schools offer the same comprehensive curriculum offered by every other non-magnet school. These schools emphasize basic skills in a highly structured educational environment, discipline and dress codes, learning with daily follow-up assignments, and concepts of courtesy, patriotism, morality and respect for others. Parents are expected to monitor their children's

school work, to support their children's academic and extracurricular activities, and to be involved in the school PTA.

The traditional program is offered as the sole structure at nine schools: four elementary, three middle and two high schools.[20] In addition, JCPS offers the traditional program at two resides elementary schools, Foster and Maupin.[21] In 2002-2003, about 9.3% of all JCPS students were enrolled in the traditional program. Application to the traditional program at Foster and Maupin is open to students districtwide. Students apply to the other traditional schools based on place of residence (except at Butler and Male). The traditional schools, including Foster and

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[20] The traditional schools are as follows: at the elementary school level, Audubon, Carter, Greathouse/ Shryock, and Schaffuer; at the middle school level, Barret, Jefferson County Traditional, and Johnson; and at the high school level, Butler and Louisville Male.

[21] Foster is a traditional program within a resides school. In 2003-2004, about half of its students were in the traditional program. Maupin also has a separate traditional program within its resides school, but all students at Maupin receive traditional instruction. Most importantly, as described later, any student attending the traditional program at these schools is part of the traditional school "pipeline."

Maupin, admit students only by application. They do not accept students based on transfer or high school open enrollment applications. In response to the increasing popularity of the traditional school setting, eight other resides schools now offer this learning environment to their Students.[22]

1.

Place of residence and position on the random draw lists are the primary factors for entry into the traditional program. With the exception of the programs at Foster and Maupin, which are open to students districtwide, each traditional elementary and middle school has its own geographic zone. Students attend the traditional school in

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[22] These resides schools have elected to provide instruction to their students in a traditional or structured environment, with the same emphasis on traditional discipline and other instructional concepts as the traditional magnet schools. All eight schools have "turned" traditional in the past ten years: Smyrna and Wilkerson elementary schools, Moore and Westport middle schools, and Fern Creek, Moore, Valley, and Waggener high schools. Each school's SBDM council, with Board approval, made the decision and designed the instructional program and environment at these schools. Students attending these eight resides traditional schools do not become part of the traditional school "pipeline" discussed in Section III.E.1.

their geographic zone. After initial acceptance, the so-called "pipeline" becomes the dominant influence in traditional school assignment. The "pipeline" guarantees each current traditional school student a spot in the next grade level without submitting a new application. The "pipeline" enlarges in each grade, thus creating openings for new applicants to the traditional program.

The traditional program begins in kindergarten. At this grade level, the four traditional elementary schools have a total of 360 openings (96 at each school, except 72 at Schaffner).[23]

These students form the first stage of the traditional program "pipeline." The "pipeline" increases by twenty-four students at the first grade level. The "pipeline" increases by sixty-four students at the fourth grade level and by sixteen students at the fifth grade level, due to increases in the pupil to teacher ratio. After the four traditional elementary schools have filled all their available spaces, Foster and Maupin send letters to the parents of student applicants who were not accepted, offering them the opportunity to apply to those traditional magnet programs. Foster and Maupin also accept additional students to their traditional program between the first and fifth grades. Students who attend Foster and Maupin become part of the traditional school "pipeline" and

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[23] A small number of kindergarten students attend the traditional programs at Foster and Maupin.

therefore gain the right to attend a traditional middle school.

Middle schools are larger than elementary schools. Consequently, the "pipeline" increases by about 450 students at the sixth grade level and by sixty students at the seventh grade level. About 800 students graduate from the three traditional middle schools. These students can state a preference to attend either Butler or Male. The two traditional high schools have available space for 946 ninth graders, 446 at Butler and 500 at Male. Currently, most middle school students choose Male, so that school usually has no spots available for new applicants. On the other hand, Butler typically has about 200 openings for students outside the traditional school "pipeline." Consequently, students not in the "pipeline" may apply for Butler. Their applications are considered to the extent space is available.

Students who are not accepted to a traditional school have other opportunities to join the "pipeline." For instance, a student may elect to apply to the traditional programs at Foster or Maupin. Plaintiff David McFarland's son, Daniel McFarland, chose not to accept his offer to attend Maupin. Students may also reapply each year. Two students in this case, Stephen and Daniel McFarland, applied a second time, and each was accepted to a traditional school. Neither Brandon Pittenger nor Kenneth Aubrey, the other two children challenging the traditional school assignment plan, chose to reapply to a traditional school.

The racial guidelines also apply to the traditional schools. The process for employing the guidelines, however, is significantly different from the process as it is applied to all other schools. Applicants are separated and randomly sorted into four lists at each grade level: Black Male, Black Female, White Male and White Female.

The principal has discretion to draw candidates from different lists in order to stay within the racial guidelines for the entire school student population. The racial guidelines apply to the entire school, not per grade. Generally speaking, depending on how many spaces are available for new applicants,[24] a principal will first take a certain number of applicants from each list—for instance, the first ten names on each list—and notify the parents. If the parent declines to enroll the child in that school, the principal can now move to the next name on one of the four lists, using his or her discretion as to which list to choose from. If all of the parents accept, depending upon space availability, the selection process may be complete or may

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[24] For instance, Schaffuer has 72 slots available at kindergarten, so a principal will be able to take more students at that time. But, as the grades progress, a principal will have fewer and fewer slots available for new applicants because spaces are filled by students already in the "pipeline."

require selection of a few more students. The Office of Demographics gives final approval on a principal's selections to ensure that the school is within the racial guidelines.

A principal may not deviate from the order in which the names appear on the lists. If a principal has chosen all the names on a given list, he or she is not permitted to recruit additional applicants for that race/gender category. Similarly, if few or no Black students apply to a traditional school, a principal would be limited to admitting only those Black students who apply at that time. JCPS, however, makes a concerted effort through the Parent Assistance Center and the Department of Student Assignment to ensure adequate Black student participation in the traditional program.[25]

IV.
THE STANDARD OF REVIEW

The Equal Protection Clause of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the

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[25] In Jefferson County, fewer Black than White students tend to apply to traditional schools so that the lists of Black males and females will be shorter than the lists for White applicants. Black applicants, therefore, generally have a higher chance of acceptance to traditional schools than White applicants because their numbers are smaller.

laws." U.S. Const. amend. XIV, § 1. While everyone agrees that any government action based on race is subject to thorough judicial inquiry, some dispute the exact nature of that inquiry. This Court concludes that the Supreme Court has unequivocally established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995)) (internal quotation marks omitted); *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Supreme Court first stated this view in *Korematsu v. United States*, where it found all racial classifications to be "immediately suspect" and subject to "the most rigid scrutiny." 323 U.S. 214, 216 (1944). In virtually every case since then, in a broad variety of circumstances and despite repeated entreaties to reverse itself, the Supreme Court has applied the same standard.

See, e.g., Grutter, 539 U.S. at 326; *Gratz*, 539 U.S. at 270; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200,227 (1995) (invalidating a federal government contract program giving preference to businesses owned by racial minorities); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (invalidating municipal program requiring all contractors to subcontract at least 30% of each contract to minority-owned businesses); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (invalidating teacher layoff policy that granted racial preferences in making layoff decisions); *Loving v. Virginia*,

388U.S. 1, 11 (1967) (outlawing state anti-miscegenation statute); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (outlawing *de jure* racial segregation in the District of Columbia public school system). Most recently, in *Grutter* and *Gratz*, the Supreme Court explicitly reaffirmed strict scrutiny for review of racial classifications in higher education admissions programs.[26]

Several lower courts have suggested that some form of intermediate scrutiny might be more appropriate when examining the constitutionality of certain affirmative action plans promoting racial integration in housing and among students and teachers in public schools.[27] While the present case is distinguishable in many respects from the Supreme Court's most recent decisions in *Grutter* and *Gratz*, the Supreme Court has always chosen strict scrutiny as the proper standard of review for racial classifications.[28] Given

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[26] No Justice appears to have suggested that a lesser degree of scrutiny was appropriate in either *Grutter* or *Gratz*.

[27] *See Raso v. Lago*, 135 F.3d 11,16-17 (1st Cir. 1998); *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 102-03 (6th Cir. 1992); *Kromnick v. Sch. Dist. of Phila.*, 739 F.2d 894, 902-03 (3d Cir. 1984); *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 364-66 (D. Mass. 2003).

[28] Even when the Supreme Court once approved intermediate scrutiny of "benign" racial classifications, it

our inherent suspicion of racial categories, the utmost level of scrutiny is required.

This Court will therefore apply strict scrutiny to the JCPS student assignment plan.

V.
JCPS HAS ESTABLISHED A COMPELLING INTEREST IN MAINTAINING INTEGRATED SCHOOLS

Strict scrutiny means that racial classifications must further a compelling governmental interest and must be narrowly tailored to meet that interest. Absent searching judicial inquiry, one cannot determine "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Grutter*, 539 U.S. at 326 (quoting *J.A. Croson Co.*, 488 U.S. at 493). Strict scrutiny of all racial classifications will "'smoke out' illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.*

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later overruled that decision, applying strict scrutiny to all racial classifications. *See Metro Broad, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (applying intermediate scrutiny to "benign" race-based measures), *overruled by Adarand*, 515 U.S. 200 (1995).

The Supreme Court has said that universities and graduate schools may state a compelling interest in obtaining "the educational benefits of a diverse student body." *Id* at 328. The Board's interests articulated here overlap with those of the Michigan Law School at the individual student level. In addition, in its statement of interests, the Board has articulated broader concerns in the different context of public elementary and secondary education.[29] The different context "matters" because, under

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[29] Justice Thomas has stated that one proposing to use race must "define with precision the interest being asserted." *Grutter*, 539 U.S. at 354 (Thomas, J., dissenting). No doubt, Justice Thomas articulates a virtually unanimous view of the Court on this point. In view of its importance, this Court has set out the Board's precise statement of its interests at the very beginning of this Memorandum Opinion and repeats it here:

> To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of *Brown's* promise. The benefits the JCPS hopes to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all JCPS schools. Mem. Op., at 1-2.

the Equal Protection Clause, "[n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.* at 327. No particular interest, however, is categorically compelling. The interest asserted must be examined and approved in each case in light of the particular context in which it is asserted.

Whether an asserted interest is truly compelling is revealed only by assessing the objective validity of the goal, its importance to JCPS and the sincerity of JCPS's interest. For the reasons that follow, the Court has no doubt that Defendants have proven that their interest in having integrated schools is compelling by any definition.

A.

Traditionally, Americans consider the education of their children a matter of intense personal and local concern. Not surprisingly, over many years and in a variety of circumstances, the Supreme Court has strongly endorsed the role and importance of local elected school boards as they craft educational policies for their communities. *Freeman v. Pitts*, 503 U.S. 467, 489-90 (1992); *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991); *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 481-82 (1982); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977); *Milliken v. Bradley*, 418 U.S. 717, 741-42

(1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-51 (1973).[30] The historical importance of the

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[30] The Supreme Court has broadly endorsed the importance of local control of public education. This Court agrees with that view. *See Freeman*, 503 U.S. at 490 ("As we have long observed, 'local autonomy of school districts is a vital national tradition.' Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.") (citation omitted); *Dowell*, 498 U.S. at 248 ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."); *Seattle Sch. Dist. No. 1*, 458 U.S. at 481 ("[N]o single tradition in public education is more deeply rooted than local control over the operation of schools...") (quoting *Milliken*, 418 U.S. at 741); *Brinkman*, 433 U.S. at 410 ("[O]ur cases have ... firmly recognized that local autonomy of school districts is a vital national tradition."); *Milliken*, 418 U.S. at 741-42 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the

deference accorded to local school boards goes to the very heart of our democratic form of government. It is conceptually different—though perhaps more accepted—than the deference discussed in *Grutter* and *Bakke*.[31]

Democratically elected school boards across the country are struggling to improve our schools and the education of children in them and to retain the public support of their communities. The Court's deference to

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maintenance of community concern and support for public schools and to quality of the educational process."); *Rodriguez*, 411 U.S. at 49-50 ("[Local control of schools offers] the opportunity... for participation in the decisionmaking process that determines how those local tax dollars will be spent... Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.").

[31] Justice Powell first expressed the idea that a university's right to determine its own student body was accorded some special consideration under the First Amendment. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 312-14 (1978). In *Grutter*, the Supreme Court reaffirmed the idea that academic freedom grounded in the First Amendment supported some deference to the university. *Grutter*, 539 U.S. at 329. In the different context of public school education, that concept of deference is not relevant here.

JCPS's efforts here is neither absolute nor determinative. Rather, offering deference is consistent with the Board's acknowledged responsibilities and complements the basic concepts of democracy. In a different age and under quite different circumstances, the Sixth Circuit observed that

> it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students .... [T]here may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problem[s] must be preserved.

al v. Cincinnati Bd. of Educ., 369 F.2d 55, 61 (6th Cir. 1966). The same advice makes sense today in the aftermath of JCPS's long period of court-ordered integration.

Indeed, the Board has earned at least a small measure of the Court's respect as it chooses the method of organizing the community's schools. TIris Court addressed this very theme in *Hampton II*:

> If JCPS voluntarily chooses to maintain desegregated schools, it acts with the traditional authority invested in a democratically elected school board:
>
> 'School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a

> prescribed ratio of Negro to white students reflecting the proportion of the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities....'

102 F. Supp. 2d at 379 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). Viewing voluntary school integration as an extension of the Supreme Court's school desegregation jurisprudence makes sense. In 1975, an integrated school system and all the benefits it promised were thought so essential that various federal courts required JCPS to create and maintain it. Over the years much has changed. As many school systems escape the mandate of desegregation decrees, they face for the first time a choice of direction. It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law.[32]

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[32] Justice Thomas has argued that deference is contradictory to the very idea of strict scrutiny. *Grutter*, 539 U.S. at 362 (Thomas, J., dissenting). For instance, he said that while a state may opt to create an elite law school, it has no compelling interest to do so. *Id.* at 357-58. He said that "there is no pressing public necessity in maintaining a public law school at all." *Id.* at 357. Public elementary and secondary school education, however, is an entirely different matter. Educating the community's children is not

While some deference is due JCPS in the exercise of its policy choices, the arguments favoring the Board's compelling interest are so objectively overwhelming that deference is immaterial to the result here.

B.

Now removed from the mandate of a federal court decree, the Board has made its choice. This Court must consider the importance and validity of that choice.

Integrated schools, better academic performance, appreciation for our diverse heritage and stronger, more competitive public schools are consistent with central values and themes of American culture. Access to equal and integrated schools has been an important national ethic ever since *Brown v. Board of Education* established what Richard Kluger described as "nothing short of a reconsecration of American ideals."[33] What Kluger and

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optional. It is essential to all facets of this community's growth and future. JCPS's interests are precisely those which Justice Thomas found absent at the Michigan Law School-educating all students who live in the community. This Court therefore concludes that strict scrutiny and limited deference are compatible here.

[33] Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* 710 (1975).

others have articulated is that *Brown's* symbolic, moral and now historic significance may now far exceed its strictly legal importance. Alluding to that very point, this Court has said that "*Brown* and its progeny established a moral imperative to eradicate racial injustice in the public schools." *Hampton II*, 102 F. Supp. 2d at 379. Congress recently affirmed the value of racial integration and interaction by its enactment of the No Child Left Behind Act and by the statements contained in that legislation. *See* 20 U.S.C. § 6301 *et seq.*[34] Likewise, the Supreme Court

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[34] In offering assistance to local educational agencies in setting up magnet schools, Congress specifically noted that

> [i]t is in the best interests of the United States... to continue the Federal Government's support of local educational agencies that are implementing court-ordered desegregation plans and local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds... [;] to ensure that all students have equitable access to a high quality education that will prepare all students to function well in... a highly competitive economy comprised of people from many different racial and ethnic backgrounds; and... to continue to desegregate and diversify schools by supporting magnet schools...

has reiterated that "education... is the very foundation of good citizenship." *Grutter*, 539 U.S. at 331 (quoting *Brown*, 347 U.S. at 493).

Neither Congress's statements nor Supreme Court references are proof that a policy of school integration is a compelling goal. They do reinforce, however, the notion that *Brown's* original moral and constitutional declaration has survived to become a mainstream value of American education and that the Board's interests are entirely consistent with these traditional American values. They reinforce our intuitive sense that education is about a lot more than just the "three-R's."

For the majority in *Grutter*, cross-racial understanding and racial tolerance, preparation for a diverse workplace and training of the nation's future leaders were "substantial" benefits of diversity in higher education. *Id.* at 330-32. Like institutions of higher

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20 U.S.C. § 723 I (a)(4). Congress further noted that the purpose of this particular section of the bill was "to assist in the desegregation of schools... by providing financial assistance to eligible local educational agencies for... the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students" and for "'the development and design of innovative educational methods and practices that promote diversity." *Id.* § 723 I (b)(1), (3).

education, elementary and secondary schools are "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Id.* at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). For that reason, these same benefits accrue to students in racially integrated public schools.[35] Several JCPS witnesses testified that, in a racially integrated learning environment, students learn tolerance towards others from different races, develop relationships across racial lines and relinquish racial stereotypes. These values transcend their experiences in public school and carry over to their relationships in college and in the workplace. As a result, these students are better prepared for jobs in a diverse workplace and exhibit greater social and intellectual maturity with their peers in the classroom and at their job. These benefits that the Board seeks from an integrated school system are precisely those articulated and approved of in *Grutter*. The Court finds that the benefits of racial tolerance and understanding

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[35] Justice Scalia calls these benefits merely "a lesson of life" as opposed to an "educational benefit." *Grutter*, 539 U.S. at 347 (dissenting, Scalia, J.). Such lessons are pretty important for most people who are fortunate enough to learn them early in life. These are precisely the lessons that JCPS hopes its students will absorb. JCPS is not attempting to cure "general societal ills" but, rather, to prepare its students for dealing with them. *Id.* at 371 (dissenting, Thomas, J.).

are equally as "important and laudable" in public elementary and secondary education as in higher education.[36] *Id.* at 330.

Other benefits the Board seeks are quite different from those articulated in *Grutter*. Nevertheless, they seem equally compelling. The Board believes that integration has produced educational benefits for students of all races. Over the past twenty-five years, White and Black students in JCPS have progressed by every measure. In *Hampton II*, this Court found that "the Board is convinced that integrated schools provide a better educational setting for all its students; [and] that concentrations of poverty which may arise in neighborhood schools are much more likely to adversely affect black students than whites." 102 F. Supp. 2d at 371 n.30. The evidence presented in this and earlier cases "seems to suggest that African-American student achievement has improved substantially" during the past twenty-five years. *Id.* at 365 n.12. Indeed, one of enough to learn them early in life. These are precisely the lessons that JCPS hopes its students will absorb. JCPS is not attempting to cure "general societal ills" but, rather, to prepare its students for dealing with them. *Id.* at 371 (dissenting, Thomas, J.).

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[36] Purely as a matter of evidence, JCPS more than carried its burden on this issue. Numerous witnesses testified about the value of these benefits. Plaintiffs offered nothing to the contrary.

Defendants' experts testified that racial integration benefits Black students substantially in terms of academic achievement. The Court cannot be certain to what extent the policy of an integrated school system has contributed to these successes. Opinions surely vary on this issue.[37] The Court certainly need not resolve this ongoing debate. But, the Fourteenth Amendment does not enact any particular

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[37] For instance, in *Grutter*, Justice Thomas strenuously objected to the idea that a diverse student body or integrated school system is necessary for Black students to achieve success. He asserted his own view that "blacks can achieve in every avenue of American life without the meddling of university administrators." *Grutter*, 539 U.S. at 350 (Thomas, J., dissenting). In an earlier desegregation case, he said:

> Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment.

Missouri v. Jenkins, 515 U.S. 70, 121-22 (1995) (Thomas, J., concurring). Justice Thomas's views of educational policy fall among the huge body of conflicting opinions about the benefits of racial integration.

preference of educational policy.[38] As a matter of evidence, however, this Court can find that the Board has valid reasons for believing that its student assignment policies may aid student performance.[39]

The Board also believes that school integration benefits the system as a whole by creating a system of roughly equal components, not one urban system and another suburban system, not one rich and another poor, not one Black and another White. It creates a perception, as well as the potential reality, of one community of roughly equal schools. Student choice and integrated schools, the Board believes, invest parents and students alike with a sense of participation and a positive stake in their schools and the school system as a whole. This is vital to JCPS because, in a very real sense, it competes for students with many types of private and parochial schools throughout Jefferson County. In recent years, it has competed very

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[38] *See Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[39] Once again, Plaintiffs completely failed to introduce evidence that integration is only a neutral factor. All of the testimony of school officials and experts suggested that the fully integrated school system has helped achieve systemwide gains. Plaintiffs introduced no contrary evidence. All that matters is that the Board has valid reasons for believing its policies have succeeded.

successfully. One of the ways JCPS meets the competition is by offering quality education in an integrated setting at every school.[40] Every measure of student and public attitudes on the value of integration completely supports the conclusion that an integrated school system is an advantage for many parents and students.[41]

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[40] Presumably, Plaintiffs could have challenged the argument that integrated schools are not valuable to the system as a whole. No one, however, made that argument, and not one witness came forward to offer such a view. By contrast, JCPS offered numerous of its own witnesses and two expert witnesses to testify that integrated schools strengthen and make the entire school system more attractive. To find otherwise would require the Court to ignore every bit of testimony on the subject. As a matter of evidence, the Court's finding is compelled.

[41] To be sure, the constitutionality of a policy is not determined by its popularity. These numbers merely demonstrate that JCPS's reasons have some validity. In 2000, a confidential survey of high school juniors was conducted for JCPS to record the benefits of a racially integrated school system. Over 90% of the students who received the survey responded. Approximately 92% of White students and 96% of Black students reported that they were "very comfortable" or "comfortable" working with students from different racial and ethnic backgrounds.

The evidence on each of these points demonstrates that maintaining an integrated system may help the Board to achieve its goals for individual students and the system as a whole. The Court concludes, therefore, that the Board's policy of integrated schools is both important and valid.

C.

The final factor of the compelling interest analysis is whether the Board's motives are sincere and not aimed at some improper or illegitimate purpose, or are merely for the purpose of racial balancing.

In *Hampton II*, this Court considered this very question at some length because the Board's commitment to the ideal of an integrated system went to the very essence of whether dissolving the existing desegregation decree was proper. The Court found that the Board had been truly dedicated to quality education, racial equity and integration over the past twenty-five years. The Board's commitment to the idea of an integrated school system was

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Over 80% of Black and White students who responded said their school experience helped them learn how to relate to students from other racial groups. And over 90% of respondents in each group reported that they would be comfortable working under a supervisor of a different race as an adult.

so strong that it continued even after it was unclear whether Supreme Court precedent or the decree required it. The Board took affirmative steps to build strong public support for its policies of an integrated school system, even when it clashed with the changing educational, social, political and legal perspectives of the 80's and 90's. *Hampton II*, 102 F. Supp. 2d at 369-70.

Successive boards and administrations dedicated themselves to integration in a manner thought to be constitutionally acceptable. *Id.* at 370. In the process, the Board treated the idea of an integrated system as much more than a legal obligation. The Board considered it "a positive, desirable policy and an essential element of any well-rounded public school education." *Id.* No one says that the Board somehow intends to discriminate or marginalize either Black or White students. In fact, the Board needs the support of each group to maintain roughly equal schools and a community school system that is attractive to all.

These findings demonstrate conclusively that JCPS is not advancing an interest in racial balancing that the Supreme Court would label as "patently unconstitutional." *Grutter*, 539 U.S. at 330. "Racial balance is not to be achieved for its own sake." *Freeman*, 503 U.S. at 494. And, to use race for this purpose fails for want of a compelling reason. In his *Grutter* dissent, Chief Justice Rehnquist said that, absent an adequate explanation of the law school's interest, its attempts to reach a "critical mass" were nothing more than unconstitutional racial balancing. *Grutter*, 539

U.S. at 378-87 (Rehnquist, J., dissenting). Justice O'Connor distinguished Michigan Law School's use of race as "defined by reference to the educational benefits that [its compelling reason] is designed to produce." *Id.* at 330. In our case, the same distinction applies, but with even greater force. The Board has precisely described the academic, social and institutional benefits it achieves from integrated schools. This is a compelling explanation and one that is supported by overwhelming evidence. Based on the evidence, no one can honestly say that JCPS is asserting an interest in racial balancing merely for its own sake.

Considering all the evidence presented in this and other cases, the Court is convinced that the Board's policy of maintaining an integrated school system is sincerely held and not intended to disadvantage any race.[42] Based on the strong evidence of the Board's sincerity and the importance and validity of its goals, the Court concludes that the Board has met its burden of establishing a compelling interest fu maintaining racially integrated schools.

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[42] Plaintiffs did not introduce evidence in either the *Hampton* case or this case that suggested the Board's motives were illegitimate, improper or insincere in any manner.

VI.
THE 2001 PLAN IS NARROWLY TAILORED IN MOST RESPECTS

Even to achieve a compelling purpose, the Board may use race only by means that are "specifically and narrowly framed to accomplish that purpose." *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)) (internal quotation marks omitted). To be narrowly tailored, the Board's use of race must "'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *J.A. Croson Co.*, 488 U.S. at 493. The Court's narrow tailoring inquiry must be carefully "calibrated to fit the distinct issues raised by the use of race" in this case. *Grutter*, 539 U.S. at 334. Consequently, the Court will evaluate whether the 2001 Plan is narrowly tailored, or is a proper "fit," in light of the factual and analytical differences between this case and the admissions programs reviewed in *Grutter* and *Gratz*.

The complexity of these legal issues and the absence of judicial unanimity mean that fundamental truths about narrow tailoring are difficult to discern. The *Grutter* and *Gratz* opinions reveal a starkly divided court that determines equal protection jurisprudence by a shifting coalition of views in a given context or case. The Court must proceed carefully. For that reason, the Court will not

accord even limited deference to the Board's implementation of its goals.[43]

With these principles in mind, in order to determine whether the 2001 Plan is narrowly tailored, the Court will evaluate the four primary factors that the Supreme Court considered in *Grutter*: (1) whether the 2001 Plan amounts to a quota that seeks a fixed number of desirable minority students and insulates one group of applicants from another, *id.* at 334-35; (2) whether the applicant is afforded individualized review, *id.* at 336; (3) whether the 2001 Plan "unduly harm[s] members of any racial group," *id.* at 341; and (4) whether JCPS has given "serious, good faith

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[43] In his dissent in *Grutter*, Justice Kennedy made this point:

> The [majority] confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued.

539 U.S. at 388 (Kennedy, J., dissenting). The Court agrees with Justice Kennedy's observation and will recognize that distinction in its narrow tailoring analysis.

consideration of workable race-neutral alternatives" to achieve its goals, *id.* at 339.[44]

Together, these factors constitute the "fit" that is so important to the narrow tailoring analysis. *Id.* at 333. The Court's analysis will focus upon elements of the 2001 Plan that govern assignment to non-traditional schools. In a separate section, the Court will consider whether the student assignment process for traditional schools is narrowly tailored.

The Court now considers each of these factors in turn.

A.

The most important narrow tailoring issue, and Plaintiffs' primary argument, concerns whether the 2001 Plan operates as a racial quota. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Id.* at 335 (quoting *J.A. Croson Co.*, 488 U.S. at 496). The Supreme Court said that a race-conscious admissions program cannot use a quota system because it would almost always violate the narrow tailoring requirement. *Id.* at 334-35. As the Supreme Court also wisely noted, however, "'[s]ome attention to numbers,'

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[44] While the Supreme Court often overlapped its discussion of the first and second factors, *see Grutter*, 539 U.S. at 334-39, for the sake of clarity, this Court separately discusses each of those factors.

without more, does not transform a flexible admissions system into a rigid quota." *Id.* at 336 (quoting *Bakke*, 438 U.S. at 323). Common sense and the Supreme Court suggest that any strict or *de facto* racial quota has a couple of known characteristics: it has a precise target, and it insulates some applicants from competition with other applicants. The Court concludes that, for the most part, the 2001 Plan's use of the racial guidelines lacks these attributes.

1.

By definition, a quota must present a relatively precise target.[45] While this would appear clear enough, everyone appears to have different ways of applying this definition to a given set of facts.

The 2001 Plan's racial guidelines for all schools present a quite flexible and broad target range. The Board's goal is to achieve a racial mix of between 15% and 50% Black students at each school. That the actual percentage of Black students at individual schools ranges between 20.1 % and 50.4% demonstrates the extent of the Board's flexibility in achieving its goals. Even within this broad range, the

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[45] A quota is "the share or proportional part of a total that is required" or "the number or percentage of persons of a specified kind pennitted to enroll in a college, join a club, immigrate to a country, etc." *Random House Unabridged Dictionary* 1588 (2d ed. 1993).

Court finds a wide dispersal among the percentages of Black students in JCPS schools. For instance, 62 out of 87 elementary schools, 17 of 23 middle schools, and 15 of 20 high schools have a racial mix of over 40% or under 30% Black students. In other words, only about 30% of all schools show a racial mix within even five percent of either side of the systemwide average. This represents a widely dispersed range in Black students among JCPS schools rather than a precise target.

Everyone seems to have an opinion about the meaning of statistics. In *Grutter*, for instance, Justices O'Connor and Kennedy battled over statistics and what constituted a quota. Justice O'Connor called the Michigan Law School's percentages of minority students, which varied between 13.5% and 20.1%, "a range inconsistent with a quota." *Grutter*, 539 U.S. at 336. Justice Kennedy, however, concluded that the percentage of minority law students fell in a much tighter range that he called a quota. He viewed race as almost "an automatic factor" that made the law school's "numerical goals indistinguishable from quotas." *Id.* at 389 (Kennedy, J., dissenting). He said that "[t]he narrow fluctuation band [among rates of admission for Black applicants] raises an inference that the Law School subverted individual determination, and strict scrutiny requires the Law School to overcome the inference." *Id* at 390-91. Justice Kennedy cited Amherst College, which admitted between about 8.5% (81 out of 950 offers) and 13.2% (125 out of 950 offers) minority

applicants over a ten-year period, as an example of a range not suggestive of a quota. *Id.* In our case, one finds neither an automatic assignment nor a "narrow band" of percentages of Black students among JCPS schools. Indeed, the range in the percentage of Black students among all JCPS schools is much broader than the range in minority admissions at either Amherst College or Michigan Law School.[46] This wide fluctuation suggests a lesser use of race and the absence of a specific target. Finally, even a cursory review of assignment data reveals that neither

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[46] The range in the Black student population in JCPS is between 20.1% and 50.4%, which is much broader numerically than the range in minority admissions at Amherst College. However, that is not a fair comparison because the range in JCPS percentages is larger overall. The best comparison is to determine the percentage deviation of each range from its mean. At Amherst, the mean percentage between 13.1% and 8.5% is 10.8%. The range extends 2.3% on either side, or about 21.2% on either side of the mean. The JCPS mean between 50.4% and 20.1% is 35.2%. The range extends 15.1% either side, or about 43% of either side of the mean. Therefore, the Amherst College range in minority admissions that Justice Kennedy viewed as not constituting a quota is, by comparison, much narrower than the range in the Black student population in JCPS schools.

Black students nor White students are guaranteed assignment to a particular school. Too many race-neutral factors affect assignment for that to be true.

2.

A quota also insulates "each category of applicants with certain desired qualifications from competition with all other applicants." *Id.* at 334 (quoting *Bakke*, 438 U.S. at 315 (Powell, J.)). In other words, it "put[s] members of those groups on separate admissions tracks." *Id.* (citing *Bakke*, 438 U.S. at 315-16 (Powell, J.)). Except for traditional school assignment, all JCPS students are subject to the same criteria within the 2001 Plan. Criteria such as residence, student choice and random lottery are significant assignment factors for every student. No JCPS student is insulated from competition with all other students, and no student is placed on a separate admissions track.

It is constitutionally permissible to set racial goals to achieve truly compelling interests. It is impermissible, however, to seek that racial goal so assiduously and precisely that it amounts to a quota. JCPS's conduct resembles the former because it has set "a permissible goal... requir[ing] only a good-faith effort... to come within a range demarcated by the goal itself." *Id.* at 335 (quoting *Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 495 (1986)). The broad range in the guidelines shows that the Board does not operate a *de facto* quota that imposes or arrives at a "fixed number or percentage which must be

attained." *Id.* (quoting *Sheet Metal Workers Int'l Ass'n*, 478 U.S. at 495). Thus, the evidence simply does not support the conclusion that the broad racial guidelines actually mask a tighter range, create a *de facto* quota or insulate one group of applicants from competition with another group.

B.

In *Grutter*, Justice O'Connor noted that the law school's "highly individualized" review of applications meant that the admissions process did not contain "mechanical" or "predetermined diversity bonuses." *Id.* at 337. For her, the law school's approach was more nuanced than that of the undergraduate admissions program because the law school conducted a meaningful review of the individual candidate's application. In fact, in her *Gratz* concurrence joined by Justice Breyer, she noted the absence of individualized attention when finding the undergraduate program's use of race in its admissions policy impermissible. *Gratz*, 539 U.S. at 276-77 (O'Connor, J., concurring). The switch that Justices O'Connor and Breyer made between *Grutter* and *Gratz* reveals a potential fault line in the narrow tailoring analysis: the presence or absence of individualized review. Consequently, the Court must determine whether the 2001 Plan incorporates some sufficient form of individualized attention in the assignment process.

The Court concludes that it does.

"[H]ighly individualized, holistic review" of each applicant ensures that "each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Grutter*, 539 U.S. at 337. All relevant factors for assignment must be placed "on the same footing for consideration" even though one factor may be accorded more weight in the end. *Id.* (quoting *Bakke*, 438 U.S. at 317) (internal quotation marks omitted). Likewise, the process must ensure that "all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." *Id.* Under those circumstances, race is "one of many factors" to consider and may be used as a permissible "tipping" factor in deciding a particular student's placement. *Id.* at 339 (citing *Bakke*, 438 U.S. at 316).

One must analyze the 2001 Plan in its totally different context. Unlike the law school, JCPS does not deny anyone the benefits of an education. Unlike the law school, JCPS does not have the goal of creating elite and highly selective school communities. Unlike the law school's admissions process, the JCPS assignment process does not involve weighing comparative criteria in a competitive manner. Rather than excluding applicants, the Board's goal is to create more equal school communities for educating all students. But, like the law school, the JCPS assignment process focuses a great deal of attention upon the individual characteristics of a student's

application, such as place of residence and student choice of school or program. It is individualized attention of a different kind in a different context than the Supreme Court found in *Grutter*.

In significant ways, the 2001 Plan actually operates like the "plus" system of which the Supreme Court has spoken so approvingly. *Id.* at 335 (citing *Johnson v. Transp. Agency*, *480* U.S. 616, 638 (1987)). Many factors determine student assignment, including address, student choice, lottery placement, and, at the margins, the racial guidelines. But, race is simply one possible factor among many, acting only occasionally as a permissible "tipping" factor in most of the JCPS assignment process. The Supreme Court has said this narrow use of race is permissible given a compelling reason. Specifically, Justice Powell stated in *Bakke* that "[w]hen the [Harvard] Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor...." 438 U.S. 265, 316 (1978) (quoting from amicus brief regarding aspects of Harvard admissions policy). In *Grutter*, the Supreme Court echoed these sentiments, stating that situations where race makes a difference in admissions could happen in "any plan that uses race as one of many factors," including the Michigan Law School plan. 539 U.S. at 339.

In light of the foregoing analysis, the Court concludes that the 2001 Plan allows for the consideration of

several factors, including race. Moreover, except as to traditional schools, the appropriate consideration of individual factors within the assignment context ensures that race does not become "the defining feature" of a student's application.

C.

Another factor in the narrow tailoring analysis is that the Board's use of race does not "unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. This is neither a new nor surprising concept. Some twenty-six years ago, Justice Powell referenced the same distinction between denial of admission to a selective graduate school and the assignment of a student to an alternative but appropriate public school. *Bakke*, 438 U.S. at 300 n.39.[47] His observation seems applicable here.

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[47] Justice Powell contrasted the situation of the applicant in *Bakke* rejected by his preferred medical school against that of a public school student sent away from his neighborhood school: "[The applicant's] position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. [The medical school] did not arrange for [Allan Bakke] to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may

Justice Powell's observation is consistent with the now well established concept that a student has no constitutional right to attend a particular school. *Johnson v. Bd. of Educ. of Chi.*, 604 F.2d 504, 515 (7th Cir. 1979); *Hall v. St. Helena Parish Sch. Bd.*, 417 F.2d 801, 810 n.15 (5th Cir. 1969); *see Milliken*, 418 U.S. at 746-47; *United States v. S. Bend Cmty. Sch. Corp.*, 692 F.2d 623, 627 (7th Cir. 1982) (citing *United States v. Perry County Bd. of Educ.*, 567 F.2d 277, 279 (5th Cir. 1978)). As this Court explained in *Hampton II*, the consequences of assigning students to various public schools are quite different from denying an applicant admission to a selective college or job placement:

> The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education precisely because they always involve vertical choices—one person is hired, promoted, receives a valuable contract, or gains admission. Ordinarily, when JCPS assigns students to a particular elementary, middle, or high school, the assignment has no qualitative or 'vertical' effects. This is so because the Court concludes that as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible. As a logical consequence, most courts have concluded that there

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have deprived him altogether of a medical education." *Bakke*, 438 U.S. at 300 n.39.

> is no individual right to attend a specific school in a district or to attend a neighborhood school. As among basically equal schools, the use of race would not be a 'preference.' As among basically equal schools, therefore, JCPS's policy is not one of 'affirmative action.'

102 F. Supp. 2d at 380 (citations and footnotes omitted). The difference between the use of race in graduate school admissions and the JCPS student assignment plan results from the vastly different concept of each system. The law school admissions program excludes many applicants because of its goal of creating an elite community. The JCPS policy of creating communities of equal and integrated schools for everyone excludes no one from those communities. Consequently, when the Board makes a student assignment among its equal and integrated schools, it neither denies anyone a benefit nor imposes a wrongful burden.[48]

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[48] Likewise, Plaintiff Crystal Meredith's son, Joshua McDonald, was not unduly harmed when JCPS denied his transfer from Young to Bloom under the racial guidelines. He was not denied any benefit because he was denied a transfer between equal and integrated schools. Furthermore, race was only a "tipping" factor in denying Joshua's transfer request. JCPS took into account his address and school preference when he applied to attend his resides school at Breckinridge-Franklin, a request which was

The Court concludes that the 2001 Plan uses race in a manner calculated not to harm any particular person because of his or her race. Certainly, no student is directly denied a benefit because of race so that another of a different race can receive that benefit. Rather, the Board uses race in a limited way to achieve benefits for all students through its integrated schools.

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denied because the school was full. Next, Joshua had stated no additional preferences for other schools in his cluster, so he was then assigned to Young (he applied right before the school year began and had already missed the deadline for magnet and optional programs). Once he was assigned, he applied to transfer to Bloom, a school outside of his cluster. Here, the racial guidelines factored into his assignment. They did so, however, only with respect to his third choice and after JCPS had already considered other factors in denying his application to Breckinridge-Franklin. There was no evidence that Joshua's transfer request from Young would have been consistently denied under the racial guidelines had he applied for further transfers to different schools that same year. And, there was no evidence that Joshua's transfer request would have been denied had he applied the following year for his resides school at Breckinridge-Franklin, another cluster school, a magnet or optional program or a transfer.

D.

Finally, narrow tailoring requires "serious, good faith consideration of workable raceneutral alternatives that will achieve" the Board's goals. *Grutter*, 539 U.S. at 339. It is apparent that, with the notable exception of the traditional schools, the Board not only considered, but actually implemented, a variety of race-neutral strategies to achieve its goals.

Many aspects of the 2001 Plan have avoided using race at all. About 18,000 students, almost 20% of the system, are not covered by the racial guidelines because they attend special schools, programs or kindergarten. Voluntary student choices for numerous academic concentrations and school settings create a certain degree of integration within different schools and the system as a whole. School geographic boundaries accomplish much the same. These two factors account for a vast proportion of all student assignments.

"Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Id.* For instance, the Board could accomplish its objective through some form of an assignment lottery covering the entire school system. Such a system, however, would require a "dramatic sacrifice" in student choice, geographic convenience and program specialization. *Id.* at 340. Moreover, it could only be achieved at a huge financial cost. This is not required.

In every area of school assignment except the traditional schools, the Board has undertaken considerable effort to achieve its goals without the overt use of race in student assignments. It encourages students of all races to exercise choices. It recruits Black and White students for academic programs that promote educational improvement and enhance school integration. As a consequence, the Board's goal of an integrated school system is achieved primarily through alternative measures that are educationally laudable and restrained in the use of race. The Court concludes that, throughout most of the assignment process, the Board sufficiently considered and used alternatives, which either were race-neutral or made minimal use of race, to meet narrow tailoring requirements.

E.

In summary, except for the traditional school assignment process, which will be discussed separately, the 2001 Plan is a proper "fit" because it is sufficiently flexible to determine school assignments for all students by a host of factors, such as residence, student choice, capacity, school and program popularity, pure chance and race. *Id.* at 337. Data showing that the majority of students attend their resides schools and that only a very small percentage of students are not assigned to one of the schools they preferred suggest the minimal impact of race on this process. Even for those students assigned to a school they did not select, race is not necessarily "a defining feature" in

those assignments. Students may also be enrolled in a particular school because, for instance, (a) they did not make any choices at all or stated only a preference for one particular magnet program that did not accept them, or (b) their preferred or resides school or program was already filled to capacity. Even where race does "tip" the balance in some cases, it does so only at the end of the process, *after* residence, choice and all the other factors have played their part.

The 2001 Plan also "fits" its intended objectives because it does not unduly harm other students. The Plan works so that most students attend a school of their choice. Because all schools have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools, an assignment to one school over another does not cause constitutional harm to any student.

Except as to traditional schools, the Court cannot see that JCPS has any other workable race-neutral alternatives for accomplishing its compelling objective.

VII.
THE TRADITIONAL SCHOOL ASSIGNMENT PROCESS IS NOT NARROWLY TAILORED

The sole exception to the Court's narrow tailoring inquiry concerns the traditional school assignment process. Traditional school enrollment amounts to a small portion of

the overall student census.[49] The assignment process for those schools has features that make it distinct from other aspects of the 2001 Plan and present particularly difficult constitutional questions. In the end, the Court finds that the use of race in the traditional school assignment process is not narrowly tailored.

In some respects, the traditional schools are no different than others throughout JCPS. Traditional schools have the same curriculum, financial resources and student discipline regulations as nearly every other school. They offer a distinct atmosphere for the same educational curriculum available at most other schools. The broad racial guidelines cover traditional schools in the same manner as every other school. Were the traditional school assignment process to function under the same broad racial guidelines and operational principles as previously discussed, it would be entirely permissible.

The traditional school assignment process, however, differs in two respects that have constitutional significance: (1) the assignment process puts Black and White applicants on separate assignment tracks, and (2) its use of the separate lists appears to be completely unnecessary to accomplish the Board's goal.

The significance of separating traditional school applicants into explicit racial categories is that students are

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[49] In 2002-2003, about 9.3% of all JCPS students were enrolled in the traditional program.

placed on separate assignment tracks where race becomes "'the defining feature of his or her application." *Grutter*, 539 U.S. at 334, 337. Elsewhere in the 2001 Plan, the racial guidelines play a muted role in the assignment process along with other factors, such as residence, program capacity and, sometimes, placement in a lottery. True, an individual student's selection to a traditional school depends in some measure upon the luck of the random draw. It is, however, a random draw within each separate racial category. The assignment process insulates one group of applicants from the randomness of choice and "competition" with other applicants. The use of categories, therefore, makes race the "defining feature" rather than merely the "tipping" factor.[50] In this Court's view, the Supreme Court would likely find these racial categories highly suspect.

An even more troublesome aspect of these racial classifications is that they appear entirely unnecessary to achieve the Board's stated goal of racial integration. The Court has compared data regarding the racial make-up of the applicant pools in the last two academic years with the racial make-up of the student populations in individual

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[50] That race becomes more significant in the traditional school assignment process is, overall, borne out by admission statistics. Black applicants generally have a higher chance of acceptance to traditional schools than White applicants because they apply in smaller numbers.

traditional schools at the same time. Overall, the percentage of Black applicants each year to a particular traditional school rather closely approximated the percentage of Black students in that school's population.[51] Under the general

---

[51] For instance, in 2002-2003, 34% of the applicants to Carter were Black, and Blacks made up 35.4% of the students there. At Schaffner, 28% of the applicants were Black, and Black students were 32.2% of the population. At Barret, 24% of the applicants were Black, and Black students were 27.9% of the population. At Jefferson County Traditional, 23% of the applicants were Black, and Blacks made up 26.4% of the student population. In 2003-2004,33% of the applicants to Carter were Black, and Blacks made up 33.1% of the students. At Schafther, 30% of the applicants were Black, and Black students were 32% of the population. At Barret, 30% of the applicants were Black, and Blackstudents were 29.5% of the population. AtJefferson County Traditional, 32% of the applicants were Black, and Blacks made up 29.2% of the student population.

In both years, Johnson was the only school where the percentage of Black applicants was noticeably larger than the percentage of Black students at the school. In 2002-2003, 34% of the applicants were Black, and Blacks made up 28.6% of the students. In 2003-2004, 39% of the applicants were Black, and Blacks made up 28.5% of the students. By contrast, in both years, Audubon and

law of probabilities, if applicants were selected off of one random draw list, the ratio of Black to White students in the applicant pool at a particular school would be reflected in the ratio of Black to White students in the pool of admitted students and, consequently, in the school's student

---

Greathouse/Shryock were the only schools where the percentage of Black applicants was visibly lower. In 2002-2003, 23% of the applicants to Audubon were Black, and Black students were 33.2% of the population-a ten-point difference. At Greathouse, 17% of the applicants were Black, and 24.1% of the students were Black-a seven-point difference. In 2003-2004, 22% of the applicants to Audubon were Black, and 32.9% of the students were Black-nearly an eleven-point difference. At Greathouse, 17% of the applicants were Black, and 22.3% of the students were Black-a five-point difference. In 2002-2003, Blacks likewise applied to Butler in numbers (12%) noticeably lower than their representation in the school population (20.8%). But, Butler rebounded in 2003-2004 when 19% of the applicants were Black, and 20.1 % of the students were Black.

In *all* cases, however, the percentage of Black applicants fell within the racial guidelines (with the one exception of Butler in 2002-2003). Louisville Male was excepted from these statistics because it typically only has enough space for those students already in the "pipeline" and thus rarely accepts new applicants.

population at large. More importantly, given the current numbers of Black students applying to traditional schools, the laws of probability predict that each school would fall within the racial guidelines. This is true even at Greathouse Elementary and Johnson Middle where numbers of Black applicants hover at either end of the guidelines. This evidence suggests that the use of racial categories is completely unnecessary. JCPS says that separate racial lists are necessary to maintain solid levels of Black student participation in traditional schools. JCPS fears that, without the lists, Black students would be admitted in fewer numbers, racial isolation would result, and Black students would be discouraged from applying in the future. Even if this speculation should prove true, the Board has much less intrusive and more precisely targeted means at its disposal to maintain present levels of Black student participation in the traditional program or to rectify decreased future participation at certain schools. JCPS can enhance its recruitment efforts for White and Black students at various traditional schools. It can redraw traditional school boundaries (at least at the elementary and middle school levels) to increase the chances of attracting more Black students from neighborhoods in which Blacks reside and increase outreach to Black families. As the 2001 Plan provides, the Board could then use race as a "'tipping" factor if necessary to achieve its compelling goals.

The Court must conclude that the initial separation of traditional school applicants into racial categories makes

race a defining feature of the student's application and is entirely unnecessary to accomplish the Board's stated objective of racial integration. This use of race in the 2001 Plan therefore is not narrowly tailored. By revising the 2001 Plan in a manner consistent with this Memorandum Opinion, the Board may maintain its current assignment process. Although the Court has found that the use of racial categories under the 2001 Plan violates Plaintiffs' rights under the Equal Protection Clause, their children are not entitled to admission to the school of their choice. First, Plaintiff McFarland's children, Stephen and Daniel, are already enrolled in a traditional school, mooting their particular request for injunctive relief. Second, Plaintiffs Pittenger and Underwood have offered no proof that their children, Brandon Pittenger and Kenneth Aubrey, respectively, were denied entry into a traditional school solely because of their race. Finally, neither has reapplied for the traditional program in a subsequent year. While the Court will enjoin the use of the racial categories in the traditional school assignment process, equity does not require that Plaintiffs' children be admitted to the school of their choice in the upcoming school year. Like all JCPS students, Plaintiffs Pittenger and Underwood may reapply for admission to a traditional school for the 2005-2006 academic year.

The Court will enter an order consistent with this Memorandum Opinion.

/s/ John G. Heyburn II
JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:02CV-620-H

DAVID McFARLAND, Parent
and Next Friend of Stephen and
Daniel McFarland, et al. PLAINTIFFS

V.

JEFFERSON COUNTY
PUBLIC SCHOOLS, et al. DEFENDANTS

ORDER

The Court has issued a Memorandum Opinion setting forth its views on the issues raised in this case. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' request for relief is granted only to the extent that JCPS shall revise the student assignment process for traditional magnet schools in a manner consistent with the accompanying Memorandum Opinion in time for its use in the 2005-2006 school year assignments.

IT IS FURTHER ORDERED that, as to all other aspects of the JCPS student assignment plan, Plaintiffs' requests for relief are DENIED.

This is a final and appealable order.

This 29th day of June, 2004.

/s/ John G. Heyburn II
JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

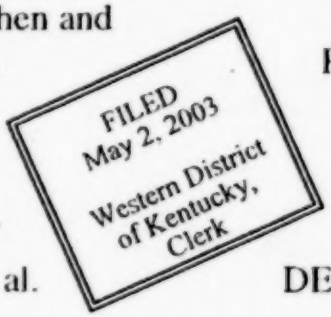
cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:02CV-620-H

DAVID McFARLAND, Parent
and Next Friend of Stephen and
Daniel McFarland, et al. PLAINTIFFS

V.



JEFFERSON COUNTY
PUBLIC SCHOOLS, et al. DEFENDANTS

ORDER

Plaintiff has moved for leave to file First, Second and Third Amended Complaints in this action. With the addition of these parties, it would appear that Plaintiffs may seek the full scope of any requested relief. The Court does not intend to add further parties unless those parties are indispensable. Any ruling would apply to the school system and most all students and parents. The Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' motions to file the First, Second and Third Amended Complaints are hereby GRANTED and those Amended Complaints are hereby deemed filed of record this date.

This 1st day of May, 2003.

D I

/s/ John G. Heyburn II
JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DAVID McFARLAND, Parent
and Next Friend of Stephen
and Daniel McFarland
7317 Mayrow Drive
Louisville, Kentucky 40291

Plaintiffs

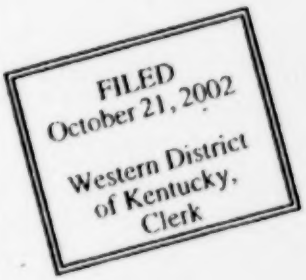
VS.

JEFFERSON COUNTY
PUBLIC SCHOOLS
SERVE: Any Board Member
VanHoose Education Center
3332 Newburg Road
Louisville, Kentucky 40218

-and-

JEFFERSON COUNTY
BOARD OF EDUCATION
SERVE: Any Board Member
VanHoose Education Center
3332 Newburg Road
Louisville, Kentucky 40218

-and-



COMPLAINT

STEPHEN DAESCHNER)
Superintendent)
SERVE: Any Board Member)
VanHoose Education Center)
3332 Newburg Road)
Louisville, Kentucky 40218)
)
Defendants)

****

Come the Plaintiffs, David McFarland, Parent and Next Friend of his sons, Stephen and Daniel McFarland, in person and by counsel; and for their cause of action, state as follows:

1. That Plaintiffs, during all times relevant herein, are students of Defendant, Jefferson County Public School system and/or Jefferson County Board of Education. Stephen McFarland desired attendance to the Jefferson County Traditional Middle School and Daniel McFarland desired attendance to the Shaffner Traditional Elementary School.
2. That both students file this action by and through their Next Friend which is their biological parent (father) to pursue this civil redress herein.
3. That the Defendant, Jefferson County Public Schools and/or Jefferson County Board of

Education, as stated above, is the school system for Jefferson County, Kentucky.

4. That the Defendant, Stephen Daeschner, is the Superintendent for the Jefferson County Public School system and/or Jefferson County Board of Education.

5. That jurisdiction herein is based upon Title VI and Title VII of the Civil Rights Act of 1964; 42 USC 2000 Section 703(a)(I); the Civil Right Act of 1991; Title IX of the Educational Amendment of 1972; 20 USC Section 1681; KRS 344, et seq.; and the First and Fourteenth Amendment to the Constitution of the United States of America; and the appropriate paragraphs of the Constitution of the Commonwealth of Kentucky.

6. That the actions of the Defendants have violated the civil rights of the Plaintiffs.

7. That the Plaintiff, Stephen McFarland, was denied entry into the Jefferson County Traditional Middle School due to racial and/or gender guidelines established by the Defendant, Jefferson. County Public School system and/or Jefferson County Board of Education. (See Exhibit 1.)

8. That the Plaintiff, Daniel McFarland, was denied entry into the Shaffuer Traditional Elementary School due to racial and/or gender guidelines established by the Defendant, Jefferson County

Public School system and/or Jefferson County Board of Education. (See Exhibit 2.)

9. That there is no compelling, constitutional, permissive reason for the Plaintiffs, Stephen and Daniel McFarland, to be discriminated against because of race and/or gender, and therefore, be denied entrance because of race and/or gender into the Jefferson County Traditional Middle School and Shaffiter Traditional Elementary School. (See Exhibit 3.)

10. That both Jefferson County Traditional Middle School and Shaffiter Traditional Elementary School are magnet schools that offer each student a special benefit and, therefore, the use of quotas and/or racial and/or gender guidelines by the Defendant, Jefferson County Public Schools and/or Jefferson County Board of Education, no longer apply to these magnet schools to which the Plaintiffs have sought enrollment for the 2002-2003 school year.

11. To be fair to all students and to eradicate all racial and gender quotas, a lottery system should be used.

WHEREFORE, Plaintiffs, Stephen and Daniel McFarland, by and through their Next Friend and Parent, David McFarland, demand judgment against the Defendants, Jefferson County Public Schools, Jefferson

County Board of Education and Stephen Daeschner, Superintendent, jointly and severally liable, as follows:

1. A finding of deprivation of the Plaintiffs' civil rights pursuant to the Civil Rights Act of 1964, Title VI and Title VII, Section 1703, et seq.; 42 USC 2000 Section 703(a)(1); the Civil Right Act of 1991; Title IX of the Educational Amendment of 1972; 20 USC Section 1681; KRS 344, et seq.; the First and Fourteenth Amendment to the Constitution of the United States of America; and all applicable constitutional provisions of the Constitution of the Commonwealth of Kentucky.
2. Damages both actual, incidental and punitive and/or exemplary where allowed by law in a sum not to exceed $100,000.00.
3. Attorney's fees where allowed by law.
4. All court costs herein expended.
5. A trial by jury herein where allowed bylaw.
6. Any and all other relief to which the Plaintiffs may appear entitled.

/s/ Teddy B. Gordon
TEDDY B. GORDON
Attorney for Plaintiffs
807 West Market Street
Louisville, KY 40202
(502) 585-3534

Plaintiff, David McFarland, Parent and Next Friend of Stephen and Daniel McFarland, states that he has read the allegations of the foregoing Complaint, and the statements contained herein are true and correct as he verily believes.

/s/ David McFarland
David McFarland

SUBSCRIBED AND SWORN to before me by David McFarland, Parent and Next Friend of Stephen and Daniel McFarland, Plaintiffs on this ____ day of October, 2002.

My commission expires: _____.

NOTARY PUBLIC, State at Large, KY

FILED
FEB 2 1 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-915

In the Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed, *per curiam*, a thorough and well-reasoned District Court opinion which held that the student assignment plan of the Jefferson County, Kentucky public schools -- which provides that the schools shall be racially integrated -- complies with the Equal Protection Clause of the Fourteenth Amendment as construed by this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

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STATEMENT OF THE CASE[1]

I. Procedural History

The Jefferson County, Kentucky public school district (the "School District") encompasses the state's largest city, Louisville. Trial transcript ("Tr.") 2-72. Respondent Jefferson County Board of Education (the "Board") operates preschool programs, 87 elementary schools, 23 middle schools, 20 high schools, and alternative and special schools in the School District. About 97,000 students were enrolled in those schools in 2003-2004. Stip. pars. 10-16, 34[2]. Those students were about 66% white and 34% black. Stip. par. 36.

The School District had a long history of *de jure* racial segregation. In 1973, the Sixth Circuit held that "all vestiges of state-imposed segregation must be eliminated" in the School District. *Newburg Area Council, Inc. v. Board of Education of Jefferson County*, 489 F. 2d 925, 932 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918 (1974), *reinstated*, 510 F. 2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). In 1975, the District Court entered a decree which established racial guidelines for all schools and required countywide busing. Stip. Exh. 66. This student assignment plan remained in effect, with some court-ordered modifications, until 1984. Stip. Exhs. 67, 68, 69.

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[1] Petitioner did not completely or accurately describe either the context and breadth of the District Court's opinion or the scope and complexity of the challenged student assignment plan. Respondents therefore submit their own more detailed statement of the case.

[2] In District Court, the plaintiffs and defendants entered into a 47-page stipulation of facts ("Stip.") with 75 exhibits ("Stip. Exh.").

In 1984, 1991 and 1996, the Board modified the court-ordered student assignment plan to enhance stability, expand choice and relax the racial guidelines, while maintaining racially integrated schools. The Board believed when it took those actions that it was no longer subject to the 1975 decree. *See*, Stip. Exhs. 67, 69 and 70. In 1999, however, the District Court held when the question was presented to it that the Board remained subject to the decree. *Hampton v. Jefferson County Board of Education*, 72 F. Supp. 2d 753 (W.D. Ky. 1999) ("*Hampton I*"). In 2000, the District Court dissolved the decree when it decided a challenge to the 1996 plan. *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358 (W.D. Ky. 2000) ("*Hampton II*").

In 2001, the Board adopted the current student assignment plan (the "Plan") in response to *Hampton II*.[3] Stip. Exh. 74. The Plan uses multiple strategies to achieve racially integrated schools: extensive school choice; automatic approval of majority-to-minority transfers; the grouping of elementary schools into clusters to facilitate integration; the periodic adjustment of attendance areas and programs to facilitate integration; staff training and orientation programs; administration, monitoring and accountability systems; and broad racial guidelines. Stip. Exh. 74.

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[3] The District Court held in *Hampton II* that one magnet school should not be subject to the racial guidelines because it offered programs not available at other schools, and thus assignment to that school involved the distribution of a limited government benefit among competing applicants. 102 F. Supp. 2d at 380-81. The Board modified the 1996 plan to provide that three other magnet schools are not subject to the guidelines, for the same reason. The remaining magnet schools, which are subject to the guidelines, are basically similar to non-magnet schools in instruction, curriculum, policies and resources.

This action was brought by Petitioner Crystal D. Meredith and three other parents. The parents other than Meredith claimed that their children were unlawfully denied entry into magnet "traditional program" schools, which are subject to the Plan's racial guidelines. Meredith claimed that her son was denied entry into his "neighborhood school." All plaintiffs requested injunctive relief and damages. Appendix to Petition for Certiorari ("Pet. App.") E-1; the record below, 8, 15, 16.

The District Court held that the Plan satisfied the "compelling interest" requirement of this Court's equal protection decisions. The District Court also held that the Plan satisfied the "narrow tailoring" requirement of those decisions, except for one aspect of the application process at magnet traditional program schools. The District Court ordered the Board to change that process, but it did not grant any other relief to any plaintiff. Pet. App. C-1 to C-79.

Only Meredith appealed. The Court of Appeals affirmed the District Court in a *per curiam* opinion which held, "Because the reasoning which supports judgment for defendants has been articulated in the well-reasoned opinion of the district court, the issuance of a detailed written opinion by this court would serve no useful purpose." Pet. App. B-3. The Court of Appeals denied Meredith's subsequent petition for rehearing in an order which noted that "[n]o judge of this court ... requested a vote on the suggestion for rehearing en banc." Pet. App. A-2.

II. The Challenged Student Assignment Plan

The Plan provides that each school (except preschools, kindergartens, alternative and special schools, and the four exempted magnet schools) shall have not less than 15% and

not more than 50% black students. Stip. Exh. 74. The Plan achieves racial integration by a system of "managed choice." Each elementary, middle and high school (except for magnet schools, described below) has an attendance area. Some attendance areas have noncontiguous boundaries. Each non-magnet school is the "resides school" for students who reside in its attendance area. Of 130 elementary, middle and high schools, 118 are resides schools. Stip. par. 61. Elementary schools, except for five magnet schools, are grouped into 12 clusters. Each cluster contains at least five schools; some clusters contain more, up to 10. Stip. par. 62. The elementary schools in the cluster that includes a student's resides school are that student's "cluster resides schools."

The resides schools are supplemented by magnet schools and magnet and optional programs. Magnet schools do not have attendance areas, and students are admitted to those schools only by application. Magnet and optional programs are special programs offered by many resides schools. Stip. pars. 70, 72; Stip. Exh. 45. Even students who attend such a school as a resides student must apply to participate in a magnet or optional program. Stip. par. 67.

All schools in the School District are basically equal in the financial resources provided by the Board. The Board allocates funds to individual schools under a formula that is applied in the same manner to all schools. Stip. par. 27; Stip. Exh. 16: Tr. 1-130 to 1-131. All schools are basically equal in the instructional staff provided by the Board. All principals and teachers are hired and assigned in the same manner. Stip. pars. 29, 30. Although the exempted magnet schools offer certain programs not available at other schools, all schools are basically equal in the curriculum provided by the Board in compliance with state law, and in the quality of the instruction that is provided to students. Tr. 1-119 to 1-120, 2-152 to 2-

158, 4-92, 4-103 to 4-104, 4-139 to 4-140; Stip. Exhs. 29, 30 and 31. All schools are subject to the same student progression, promotion and grading handbooks, which contain the criteria for grading and promotion as reflected in state law. Tr. 2-157; Stip. Exh. 32. All schools are basically equal in matters such as discipline, dress codes, homework policies and extracurricular activities. All schools are subject to the same code of conduct and student bill of rights. Stip. pars. 28, 57.

Beginning in November, middle and high school students can apply to attend a school other than their resides school. On the applications, students can indicate a first and second choice among magnet schools and schools that offer magnet or optional programs. Stip. par. 66. Students entering the ninth grade can also submit an "open enrollment" application to attend any high school (except a magnet school). Stip. par. 73. Students who do not submit applications are assigned to their resides school.

Beginning in February, elementary students can apply to attend a school other than their resides school. On the applications, students can indicate a first and second choice among their cluster resides schools, and a first and second choice among magnet schools and schools that offer magnet or optional programs. Stip. par. 64. Students who do not submit applications are assigned to their resides school or one of their cluster resides schools.

Assignment decisions are made by school principals. The bases for assignment decisions vary depending upon the school or program, but they include: for all schools and programs, available space; for some schools and programs, computer-generated random draw lists; and for some schools and programs, objective requirements such as an essay,

recommendations, a work sample or audition, attendance data, grades or test scores. Stip. par. 77. For students in grades other than kindergarten and for schools other than the exempted magnet schools, an assignment decision cannot place the school outside the racial guidelines. However, compliance with the guidelines generally is assured in any event, by other means. *Infra*, pg. 7.

After assignments are made, students can apply to transfer to a school other than their assigned school (except a magnet school, magnet program or optional program). Transfer applications can be based on day care arrangements, medical criteria, family hardship, student adjustment problems and program offerings. Transfer applications are generally granted on a space-available basis, if the transfer assignment would not place the receiving school outside the guidelines. Stip. pars. 78, 86, 87, 88.

In 2003-2004, the School District enrolled about 89,000 elementary, middle and high school students. Stip. par. 34. About 9,300 students applied to attend a magnet school, magnet program or optional program. Stip. par. 79. About 1,200 ninth grade students applied for high school open enrollment. Stip. par. 80. About 6,200 students made transfer requests (which may overlap with magnet and option applications, because transfer is a second or third level choice). Stip. par. 81. Thus, only a small percentage of students applied to attend a school other than their resides school or a cluster resides school. Nevertheless, all students participated in the choice process, because a decision not to submit an application is itself a choice. However, most

students were assigned by default to their resides school or a cluster resides school.[4]

At resides middle and high schools, which enroll the great majority of middle and high school students, the racial guidelines are irrelevant as a practical matter. Racial integration at those schools is guaranteed by their attendance areas, some of which include noncontiguous boundaries. Racial integration at resides elementary schools is achieved by offering students a first and second choice among from five to 10 basically equal schools, and by granting nearly all of those choices. At the magnet schools which remain subject to the guidelines, and at magnet programs and optional programs, applications are typically denied for reasons other than the guidelines, most often lack of space. Tr. 2-84 to 2-85, 2-90 to 2-91, 2-98 to 2-99.

For these reasons, the impact of the racial guidelines on individual student assignments is minimal. Tr. 2-166 to 2-168, 5-109 to 5-114. As the District Court said, "[t]he guidelines mostly influence student assignment in subtle and indirect ways." Pet. App. C-18. Nonetheless, because the guidelines provide a firm definition of the Board's goal of racially integrated schools, they "provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15-50% range." *Id.*

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[4] In 2003-2004, about 57% of elementary, 67% of middle and 50% of high school students attended their resides school. Stip. pars. 34, 89. About 95% of elementary students attended either their resides school or their first choice cluster resides school. Only about 3% of elementary students were assigned to a cluster resides school by the Board. TR 2-98 to 2-99, 5-109 to 5-114.

The number and percentage of Jefferson County students enrolled in the School District declined dramatically after the 1975 desegregation decree. The School District's "market share" has stabilized since the Board began its periodic revisions to the court-ordered plan in 1984, and the percentage of white students has stabilized despite a relative decline in white births in Jefferson County. Tr. 3-92 to 3-96, 3-100 to 3-102.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS

The thorough and well-reasoned opinion of the District Court, which was affirmed *per curiam* by the Sixth Circuit, does not conflict with any decision of this Court. The District Court meticulously tested the Plan against each guiding principle stated in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). The District Court concluded that the Plan met that test. Pet. App. C-1 to C-79. The Sixth Circuit had no reason to issue its own opinion. Pet. App. B-3.

Two other Courts of Appeals recently upheld similar race-conscious voluntary integration plans in K-12 schools in the light of *Grutter and Gratz*, and this Court recently denied a petition for a writ of certiorari in one of those cases. *Comfort v. Lynn School Committee*, 418 F. 3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (Dec. 5, 2005) (No. 05-348); *Parents Involved in Community Schools v. Seattle District No. 1*, 426 F. 3d 1162 (9th Cir. 2005), *pet. for cert. filed*, No. 05-908 (Jan. 18, 2005). Moreover, in *Brewer v. West Irondequoit Central School District*, 212 F. 3d 738 (2d Cir. 2000), which

predated *Grutter* and *Gratz*, the Second Circuit concluded that there is a compelling interest in reducing racial isolation in K-12 schools.

The purportedly conflicting Fourth and Fifth Circuit decisions cited by Meredith – *Tuttle v. Arlington County School Board*, 195 F. 3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000); *Eisenberg v. Montgomery County Public Schools*, 197 F. 3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); and *Cavalier v. Caddo Parish School Board*, 403 F. 3d 246 (5th Cir. 2005) -- involved an unequal distribution of educational benefits and burdens that is not present in *Comfort*, *Parents Involved* and this case. *Tuttle* involved admission to kindergarten in a special alternative school; *Eisenberg*, transfer to a math and science magnet school; and *Cavalier*, transfer to a performing arts magnet school.

Tuttle, *Eisenberg* and *Cavalier* are thus similar to *Wessman v. Gittens*, 160 F. 3d 790 (1st Cir. 1989), in which the First Circuit held unconstitutional a race-preferential admissions plan at a selective high school. In *Comfort*, the First Circuit expressly distinguished that prior decision: "The denial of a transfer under the [Lynn] Plan is ... markedly different from the denial of a spot at a unique or selective educational institution .... *Wessman*, 160 F. 3d at 793 (Boston Latin School)." 418 F. 3d at 20. In *Parents Involved*, the Ninth Circuit quoted this statement from *Comfort* in support of its own conclusion that "[T]he [Seattle] District's Plan imposes a minimal burden that is shared equally by all of the District's students." 426 F. 3d at 1191.

The purportedly conflicting Ninth Circuit decisions cited by Meredith -- *Smith v. University of Washington*, 392 F. 3d 367 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 334 (Oct. 3,

2005) (No. 04-1408), and *Doe v. Kamehameha Schools*, 416 F. 3d 1025 (9th Cir. 2005) -- are inapplicable for similar reasons. *Smith* involved the constitutionality of a competitive, race-preferential admissions program to a state law school. *Doe* involved the validity under 42 U.S.C. § 1981 of a race-preferential private school policy that limited admission to students of native Hawaiian ancestry. Both *Smith* and *Doe* predated the Ninth Circuit's recent decision in *Parents Involved*.

Thus, all of the purportedly conflicting decisions cited by Meredith involved the distribution of limited educational benefits among competing K-12 students, not the assignment or transfer of students generally among educationally comparable schools. The three Court of Appeals decisions which recently addressed voluntary integration plans in the latter context -- *Comfort*, *Parents Involved* and the Sixth Circuit's decision in this case -- are consistent in their application of *Grutter* and *Gratz* to K-12 schools in that context.

There is no conflict among circuits or with any decision of this Court. There is no reason for this Court to review the Sixth Circuit's decision.[5]

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[5] A petition for review of the *Parents Involved* decision was docketed on the same day as the petition in this case. No. 05-908 (Jan. 18, 2005). There is no reason for this Court to review either decision. Nevertheless, a review and subsequent decision by this Court in only one case would likely be followed by further litigation below in the other case. Although both cases involve similar issues, the operative facts in each are somewhat different. Thus, if this Court found some unlikely reason to grant the petition in *Parents Involved*, Respondents suggest that the interests of judicial economy and the provision of useful guidance on these issues to all K-12 school districts would be served by the simultaneous grant of the petition in this case as well.

II. THE STUDENT ASSIGNMENT PLAN COMPLIES WITH THE EQUAL PROTECTION CLAUSE AS CONSTRUED BY THIS COURT IN *GRUTTER* AND *GRATZ*

A. The Board Has A Compelling Governmental Interest In Maintaining Racially Integrated Schools

When federal courts review race-based governmental action, "it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts." *Grutter*, 539 U.S. at 327, quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960). The District Court properly contextualized its equal protection analysis by first "defin[ing] with precision the interest being asserted." Pet. App. C-37, n. 29, quoting *Grutter*, 539 U.S. at 354 (Thomas, J., dissenting). The District Court twice noted "the Board's precise statement of its interests," which is "[t]o give all students the benefit of an education in a racially integrated school." Pet. App. C-2 and C-37, n. 29.

That, of course, is the goal that this Court sought for all students in *Brown v. Board of Education*, 347 U.S. 483 (1954). That goal is different from, and much more precisely focused than, the goal of "true diversity" in higher education that was held to be compelling in *Grutter*.[6] The District Court noted that "*Brown*'s original moral and constitutional

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[6] "True diversity" includes, but encompasses more than, racial integration. *See, e.g.*, the Harvard College program discussed in *Regents of University of California v. Bakke*, 438 U.S. 265, 316 (1978). *See also, Brewer v. West Irondequoit Central School District, supra*, at 752-53.

declaration has survived to become a mainstream value of American education." Pet. App. C-45. The Board's goal is compelling because it is "consistent with central values and themes of American culture." Pet. App. C-43.

This Court said in *Grutter* that the Michigan Law School's goals for minority enrollment were "defined by reference to the educational benefits that diversity is designed to produce." 539 U.S. at 330. Those benefits, which this Court held to be "substantial," included promoting cross-racial understanding, helping to break down racial stereotypes, and enabling students to better understand persons of different races. Racial diversity in a law school "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals" because "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* The District Court found that "the same benefits accrue to students in racially integrated public schools." Pet. App. C-45 to C-46.

The District Court observed that the interests identified by the Board "overlap with those of the Michigan Law School at the individual student level," but that "the Board has articulated broader concerns in the different context of public elementary and secondary education." Pet. App. C-37. Accordingly, the District Court found certain compelling benefits of the Plan "that were not relevant in the law school context but are relevant to public elementary and secondary schools." Pet. App. C-4. Although improved academic performance of minority students was not a benefit mentioned in *Grutter*, the District Court found "equally compelling" the Board's good faith belief that racial integration has reduced the "achievement gap" between white and black students. Pet. App. C-47 to C-49.

And, the District Court found that community support for public schools is a compelling benefit of racial integration. The Plan has enabled the Board to reach the difficult goal of maintaining a system of racially integrated schools with a stable percentage of middle-class white students in a county which had a long history of *de jure* segregation and still has substantially segregated housing. Tr. 3-100. The Board's ability to maintain its "market share" in competition with private and parochial schools is greatly enhanced by the public perception that the School District offers a public school education in substantially equal schools in all parts of the county. Pet. App. C-49 to C-50.

The Board presented overwhelming factual evidence and expert opinion that racial integration in its schools furthers compelling educational, social, political and economic interests of the Board and the community. "Plaintiffs offered nothing to the contrary." Pet. App. C-47, n. 36. Thus, the District Court had "no doubt that Defendants have proven that their interest in having integrated schools is compelling by any definition." Pet. App. C-38.

B. The Student Assignment Plan Is Narrowly Tailored To Accomplish Its Purpose

The means chosen to accomplish the Plan's purpose must be "specifically and narrowly framed to accomplish that purpose." *Grutter,* 539 U.S. at 333. This requirement "ensure[s] that 'the means chosen 'fit' ... th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Id.*, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

In the case of a recently adopted government program involving public employment, public contracting or even university admissions, a court might need to search the record closely to disprove the possibility of improper motive. Here, given the Board's 30-year history of good faith efforts to provide racially integrated schools,[7] the District Court rightly concluded that "no one can honestly say that [the Board] is asserting an interest in racial balancing merely for its own sake." Pet. App. C-53. Indeed, "Plaintiffs did not introduce any evidence in either the *Hampton* case or this case that suggested the Board's motives were illegitimate, improper or insincere in any manner." Pet. App. C-53, n. 42.

In *Grutter*, this Court's narrow tailoring inquiry was "calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education," because "the very purpose of strict scrutiny is to take such 'relevant differences into account.'" 539 U.S. at 334, quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995). Likewise, the District Court measured the Plan for narrow tailoring "in light of the factual and analytical differences between this case and the admissions programs reviewed in *Grutter* and *Gratz*." Pet. App. C-54.

Meredith's principal argument with respect to the tailoring of the Plan is that it imposes a "mechanical and inflexible quota system." Petition for Certiorari ("Pet.") 7. The District Court correctly disagreed. Under *Grutter*, *Gratz* and other decisions of this Court, a quota "has a precise target, and it insulates some applicants from competition with other applicants." Pet. App. C-57. The Plan does neither.

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[7] *See, Hampton II*, 102 F. Supp. 2d at 369-70.

The racial guidelines encompass a range of 35 percentage points, from 15% above to 20% below the average black enrollment. The actual black enrollment among schools in 2003-2004 varied widely within this range, from 20.1% to 50.4%. Stip. Exh. 21. The District Court noted that "only about 30% of all schools show a racial mix within even five percent of either side of the systemwide average," indicating "a widely dispersed range in Black students among JCPS schools rather than a precise target." Pet. App. C-58. Indeed, "the range in the percentage of Black students among all JCPS schools is much broader than the range in minority admissions at either Amherst College [cited in Justice Kennedy's dissent in *Grutter* as not involving a quota] or Michigan Law School." Pet. App. C-59.

The Plan applies in an even-handed manner to both black and other students, and it does not operate to exclude or include either group absolutely from schools or programs. A student's assignment is determined by "a host of factors, such as residence, student choice, capacity, school and program popularity, pure chance and race." Pet. App. C-69. Because non-racial criteria are significant factors in assigning students, the District Court concluded that "[n]o JCPS student is insulated from competition with all other students, and no student is placed on a separate admissions track." Pet. App. C-60.

The District Court noted that *Grutter*'s "requirement of individualized consideration," 539 U.S. at 336-37, must be applied in the "totally different context" of a K-12 school system which "does not have the goal of creating elite and highly selective school communities" but instead seeks to "create more equal school communities for educating all students." Pet. App. C-62. "Individualized consideration" ensures that a university's stated goal of "true diversity" is

not a pretext for the use of race as the sole criterion for decision. *Grutter*, 539 U.S. at 337; *Bakke*, 438 U.S. at 316. Because the Board's openly stated (and constitutionally compelling) goal is racial integration, there is no need to guard against pretext.

The decisive question under *Grutter* is whether the Plan is "flexible." 539 U.S. at 334-37. In higher education, an admissions process is flexible if it does not define applicants by race or ethnicity, because that "ensure[s] that each applicant is evaluated as an individual." 539 U.S. at 337. In the Plan, flexibility is provided by the many opportunities for individual students to attend a school other than their resides school. Student choice is an important tool for maintaining racially integrated schools, because it helps the Board attract and retain the white students who make integration possible. However, it is not the exercise of the relatively small number of choices that achieves integration. That is achieved largely by the use of attendance areas and school clusters. *Supra*, pg. 7.

Given this framework, the District Court found that the decisions on the small number of individual applications can be and are made for reasons other than race, and "[e]ven where race does 'tip' the balance in some cases, it does so only at the end of the process, *after* residence, choice and all the other factors have played their part." Pet. App. C-70. (emphasis in original) Thus, "the appropriate consideration of individual factors within the assignment context ensures that race does not become 'the defining feature' of a student's application." Pet. App. C-64.

Narrowly tailored government action does "not unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. The Plan has a different goal, and presents different

issues, than the "affirmative action" programs in which this principle is most often tested. Those programs seek to include minorities in venues such as public employment,[8] public contracting[9] and public higher education[10] in which government is the source of valuable and limited goods and services. In those programs, tangible benefits might be granted to minorities to the detriment of other applicants. The Michigan Law School, for example, "excludes many applicants because of its goal of creating an elite community." Pet. App. C-66. Under the Plan, however, "no student is directly denied a benefit because of race so that another of a different race can receive that benefit." Pet. App. C-67. Instead, "the Board uses race in a limited way to achieve benefits for all students" by "creating communities of equal and integrated schools for everyone." Pet. App. C-67, C-66.

Meredith did not present any meaningful evidence that her son was unduly, or at all, harmed by his assignment to kindergarten in 2002-2003.[11] Lacking proof of harm, Meredith argued simply that some schools in the District offer a better education than other schools because they report

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[8] *E.g.*, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[9] *E.g.*, *Adarand, supra.*

[10] *E.g.*, *Gratz* and *Grutter, supra.*

[11] Meredith stipulated that her son did not submit a choice application for kindergarten for 2002-2003, attempted to enroll late at his resides school, was assigned to another school because there was no space at his resides school, did not appeal the denial of his application to transfer to a third school, and did not submit a choice application for first grade for 2003-2004. Stip. par. 5.

higher average test scores. Tr. 1-25 to 1-28, 1-35; *cf.*, Pet. 13. That argument is both factually[12] and legally inadequate.

Meredith and the other plaintiffs had a strong preference for the schools to which their children were not assigned. But the children who were not assigned to the school of their choice did not lose public employment as in *Wygant*, or a government contract as in *Adarand*, or an education at a prestigious public college or law school as in *Gratz* and *Grutter*, or even an education at a "unique or selective" secondary school as in *Wessman, supra*. The children were not denied an education, only a choice. *See, e.g.*, *Bakke*, 438 U.S. at 300 n. 39 (1978). The District Court correctly concluded that "[b]ecause all schools have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools, an assignment to one school over another does not cause constitutional harm to any student." Pet. App. C-70.

The Board has considered other methods of reaching its goal, thereby satisfying this Court's requirement that it consider "lawful alternative and less restrictive means." *Grutter*, 539 U.S. at 339-40, quoting *Wygant*, *supra*, 476

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[12] The Board's unrebutted evidence showed that average test scores are overwhelmingly correlated with the "social capital" of students, and that some schools rank higher than others with respect to average social capital. Tr. 3-145 to 3-151, 3-174 to 3-177. Nevertheless, the Board has had substantial success with its efforts to increase the achievement of its "at risk" and low performing students. Tr. 1-122 to 1-129, 3-25 to 3-30. Racial integration under the Plan plays an important role in those efforts. Tr. 5-16 to 5-20. In any event, the average of a wide range of scores says nothing about the performance of any individual student. Tr. 2-46 to 2-49.

U.S. at 280 n. 6. This aspect of narrow tailoring "does not require exhaustion of every conceivable" substitute, only a "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339. The Board concluded that socioeconomic criteria would not provide an adequate substitute for racial guidelines. Tr. 1-137 to 1-138, 2-188 to 2-189. The District Court found that a system-wide assignment lottery "would require a 'dramatic sacrifice' in student choice, geographic convenience and program specialization" and "could only be achieved at a huge financial cost." Pet. App. C-68. More importantly, the District Court concluded that the schools would not long remain racially integrated in the absence of the guidelines, because they provide the student assignment staff with an essential "yardstick" that gives them "moral authority ... to facilitate, negotiate and work collaboratively with principals and district staff to ensure that the plan is implemented." Tr. 2-134, 2-143; *see also*, Pet. App. C-18. The District Court noted that "a vast proportion of all student assignments" under the Plan are made in a manner that "avoid[s] using race at all," because of exemptions from the guidelines, voluntary student choices and the resides school attendance areas. Pet. App. C-68. Thus, the Board has not only "sufficiently considered" but has actually "*used* alternatives, which either were race-neutral or made minimal use of race, to meet narrow tailoring requirements." Pet. App. C-69. (emphasis added)

Finally, "race-conscious admissions policies must be limited in time." *Grutter,* 539 U.S. at 342. This Court has suggested that this aspect of narrow tailoring can be satisfied by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* Any action taken by an elected local board of education is inherently subject to change, as the members of the Board and

public perceptions change. The Board has regularly and frequently revisited the necessity for, and the scope of, its use of race in student assignment. The Board modified its student assignment plan in 1984, 1991, 1996 and 2001, and the Board will modify the Plan in the future as required by new circumstances. Tr. 2-189.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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No. 05-915

In the

Supreme Court of the United States

CRYSTAL D. MEREDITH, Custodial Parent
and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether achieving racial diversity is a compelling governmental interest sufficient to permit race-based restrictions on school assignments in public elementary and secondary schools.

2. Whether school districts' educational judgment is entitled to deference under strict scrutiny review when analyzing the use of a student's race in public elementary and secondary schools to achieve racial diversity or racial integration.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), the Center for Equal Opportunity (CEO), and the American Civil Rights Institute (ACRI) submit this brief amicus curiae in support of Petitioner Crystal D. Meredith.[1] Letters of consent to file this brief were obtained from all parties and have been lodged with the clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. PLF participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

CEO and ACRI are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. Amici have participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case.

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity in elementary and secondary (K-12) public schools may be deemed a compelling governmental interest sufficient to justify discriminatory school assignments based solely on the students' race. Specifically, Amici will show that the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Gratz* and *Grutter*, simply has no counterpart in the context of elementary and secondary public schools. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Sixth Circuit issued a *per curiam* decision adopting the reasoning of the district court, which held that the assignment of Jefferson County's students to elementary and secondary public schools on the basis of their race does not violate the Equal Protection Clause. *McFarland v. Jefferson County Pub. Schools*, 416 F.3d 513 (6th Cir. 2005). In issuing this far-reaching decision, the court below extended unjustifiably the principles established in *Grutter* for competitive law school admissions, into the context of K-12 public school assignments. By doing so, the Sixth Circuit has reopened the permissibility of allocating educational opportunities on the basis of race throughout this country's 94,000 K-12 public schools, which educate approximately 47.7 million students ranging from 5 to 18 years of age, at an annual cost to taxpayers of more than $400 billion.[2] Discounting the

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[2] Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and School Districts in the United States*, CCD Quick Facts, *at* http://

(continued...)

core concept of equal protection, Jefferson County's public schools are sending the wrong message to our children—that racial identification is more important than respect for individual rights and liberties in today's society.

No decision from this Court sanctions discriminatory student assignments to achieve racial balancing in K-12 public schools. *See Grutter*, 539 U.S. at 330. After *Grutter*, however, the lower courts are in disarray on whether classifying and assigning public school students on the basis of their race satisfies strict scrutiny. The First, Ninth, and now the Sixth Circuits have misapplied *Grutter*'s recognition of the educational benefits of diversity in competitive university admissions to K-12 student assignment plans and ignore the well-established narrow tailoring principles set out in *Gratz*. In contrast, prior to *Grutter*, the First and Fourth Circuits observed that whether racial diversity was a compelling governmental interest remained an open question, but found that such programs were not narrowly tailored.

Grutter's viewpoint diversity rationale cannot be extended to racial diversity in noncompetitive, compulsory K-12 public schools. Racial diversity in K-12 is based on the idea that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. *Grutter*, 539 U.S. at 328-29. This Court should grant the Petition for Writ of Certiorari to ensure that public schools provide educational opportunities to all their students without regard to irrelevant, immutable characteristics such as race. In so doing, the Court should clarify that *Grutter* does not sanction naked racial balancing as a compelling state interest, and that public school administrators should be required to pursue the many innovative, *non-race-based* policies at their disposal to avoid de facto re-segregation of their schools.

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[2] (...continued)
nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 17, 2005).

REASONS FOR GRANTING REVIEW

I

THIS COURT MUST RESOLVE THE CONFLICT AMONG THE CIRCUITS ON WHETHER RACE-BASED ASSIGNMENTS TO ACHIEVE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS CAN SURVIVE STRICT SCRUTINY

This case raises important, recurring questions relating to the scope of the Equal Protection Clause's prohibition of state-imposed racial discrimination in K-12 public schools. According to David J. Armor and Christine H. Rossell, nearly 1,000 school districts have some type of race-based assignment plan.[3] The goal of these plans is to achieve racial balancing so that each school's racial composition matches the district wide racial composition for a given race. This is achieved by sorting, assigning, and busing students according to their racial grouping. Such plans are mere proportional representation by pigmentation to achieve the public school administrator's preferred racial mix of students. The question of whether such discrimination is permissible in the context of K-12 public school assignments has hopelessly divided the Federal Circuit Courts of Appeals, and urgently demands resolution by this Court.

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[3] David J. Armor & Christine H. Rossell, *Desegregation and Resegregation in the Public Schools*, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 226 (Abigail Thernstrom & Stephen Thernstrom, eds. 2002) *available at* http://www.google.com/search?q=cache:CWbm4yL_ROYJ:www.hoover.org/publications/books/fulltext/colorline/219.pdf+David+Armor+and+Christine+Rossell+%22Desegregation+and+Resegregation&hl=en

The Sixth Circuit's holding in the present case validating racial balancing is consistent with recent decisions of the First and Ninth Circuits, but conflicts with the pre-*Grutter* decisions of the First and Fourth Circuits condemning such racial balancing as violating the Equal Protection Clause.

Last year in *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (2005), the First Circuit upheld a race-based public school transfer program which, on its face, provided for none of the individualized consideration of the plan approved in *Grutter*. As the appellate court noted, *Grutter* "focused on the advantages of viewpoint diversity in the classroom," *id.* at 16, whereas in the Lynn plan, "[t]he only relevant criterion . . . is a student's race." *Id.* at 18. Nevertheless, the court extended *Grutter*'s finding of a compelling governmental interest in racial diversity to cover the race-based classification and assignment of public school students. *Id.* at 16.

Similarly, in *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (*en banc*) (petition for writ of certiorari pending, No. 05-908) (*PICS*), the Ninth Circuit examined a program that employed a series of tiebreakers to determine which students would be admitted to oversubscribed public high schools. The ultimate tiebreaker was race. Like the Sixth Circuit in the case at bar, the *PICS* court relied on *Grutter* as providing the necessary rationale for allowing K-12 public school administrators to employ racial preferences for nonremedial purposes:

> [I]t would be a perverse reading of the Equal Protection Clause that would allow a university . . . to use race when choosing its student body but not allow a public school district . . . to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

Id. at 1176. Picking and choosing from *Grutter*'s hallmarks of narrow tailoring analysis, the Ninth Circuit found the school district's racial tiebreaker program to be narrowly tailored. *Id.* at 1179.

In contrast, prior to *Grutter*, three federal appellate court cases held that nonremedial use of racial preferences in public schools violated the Equal Protection Clause. Those cases are *Wessmann v. Gittens*, 160 F.3d 790 (lst Cir. 1998); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), and *Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123 (4th Cir. 1999). Each case observed that whether racial diversity was a compelling governmental interest remained an open question.

In *Wessmann*, the First Circuit examined a race-based admissions policy at three "examination schools," where race was made a determining factor. As the *Wessmann* court stated: "The question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled." *Wessmann*, 160 F.3d at 795. The First Circuit assumed, without deciding, that racial diversity may in some cases be a compelling interest sufficient to justify the use of racial preferences in making student assignments. *Id.* at 796. The First Circuit then rejected the schools' claim:

> The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden. Nor does the School Committee's reliance on alleviating underrepresentation advance its cause. Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.

Id. at 799 (citations omitted).

In *Tuttle*, 195 F.3d 698, the Fourth Circuit examined whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body. The court stated that "[u]ntil the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest and proceed to examine whether the Policy is narrowly tailored to achieve diversity." *Id.* at 705.

In *Eisenberg*, 197 F.3d 123, the court addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. The court stated: "*Tuttle* notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved." *Id.* at 130.

Both the First Circuit in *Wessmann* and the Fourth Circuit were careful to point out that the type of racial diversity that may be constitutional was different from racial balancing pursued for its own sake. As explained in *Wessmann*:

> "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." A single-minded focus on ethnic diversity "hinders rather than furthers attainment of genuine diversity."

Wessmann, 160 F.3d at 798 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., opinion)).

Applying this analysis, *Wessmann*, *Eisenberg*, and *Tuttle* held that the racial preferences at issue were not narrowly tailored to serve the potentially compelling interest of student body diversity. The Fourth Circuit in *Eisenberg* found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing. As we have only recently held in *Tuttle*, "such nonremedial racial balancing is unconstitutional." . . . Although the transfer policy does not necessarily apply "hard and fast quotas," its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

The conflict in the Circuits over the constitutionality of race-based public school assignments highlights an issue of pressing national importance that must be—and can only be—resolved by this Court.

II

K-12 PUBLIC SCHOOLS CANNOT MEET THE NARROW TAILORING PRINCIPLES SET OUT IN *GRATZ* AND *GRUTTER*

Too many K-12 administrators in charge of assigning students to public schools assume that the use of race is permissible after *Grutter*. J. Kevin Jenkins, Ed.D., *Grutter, Diversity, and Public K-12 Schools*, 182 Ed. Law. Rep. 353, 354 (2004) (*Grutter* provides "clear guidance from the Court: Diversity can be a compelling state interest. That's the green flag."). Not only does this view reflect an unjustified extension of this Court's holding in *Grutter*, it completely ignores the well-established narrow tailoring principles set out in *Gratz*.

Gratz invalidated an undergraduate admissions program that automatically awarded 20 points of the 100 needed to guarantee admission to every applicant from an

underrepresented racial or ethnic minority group. This mechanical application of race violated the Equal Protection Clause because it did not consider each applicant as an individual. As this Court emphasized in *Grutter*, "[T]he hallmarks of a narrowly tailored plan [is that there be] truly individualized consideration [in which race is only] used in a flexible, nonmechanical way." *Grutter*, 539 U.S. at 334.

Public school administrators are not set up to give individual consideration to students in assigning them to public schools. It would be administratively impossible to give individualized consideration to the 97,000 students in Jefferson County when assigning them to a public school. Jefferson County does not consider test scores, grades, letters of recommendation, or personal statements on how the individual student will contribute to student body diversity. Instead, the assignment is based simply on the racial classification listed for the child. Like the undergraduate admissions program in *Gratz*, race completely overrides any other factor in K-12 public schools. A child who belongs to the "wrong" race cannot overcome his or her pedigree by receiving "points" for other characteristics. Racial diversity or racial integration as applied in K-12 education, is based on stereotypes that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. Such plans are mere proportional representation by pigmentation to achieve the public school administrator's preferred racial mix of students. This is nothing more than racial balancing, which is constitutionally forbidden. As mentioned in *Goss v. Lopez*, 419 U.S. 565 (1975),

> The Court has repeatedly condemned racial balancing [and] held that a State's creation of a system of compulsory public education endows *students* (not schools) with a constitutionally-protected interest, and has pointedly reminded school authorities that "[t]he Fourteenth Amendment . . .

> protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."

Id. at 574.

As discussed above, *Wessmann*, *Eisenberg*, and *Tuttle*, together with *Gratz*, *Grutter*, and *Bakke*, lead to the conclusion that narrowly tailoring a racial preference program at the K-12 level is impossible.

> It is challenging enough to determine what elements of "diversity" a young adult, who has had time to gain some modicum of life experience, might bring to a law school class. It would be absurd to presume the ability to make such a determination for students in the public K-12 setting. Instead of conducting a thorough examination of relevant individual characteristics, schools would likely resort to race as a proxy for "the diversity that furthers a compelling state interest which encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

Jenkins, *supra*, at 368 (citation omitted). Certainly when racial balancing becomes a permissible government objective, few of the narrowly tailoring requirements of strict scrutiny apply in any meaningful way. If racial balance is a permissible goal, there is no need for individualized consideration of applicants or consideration of other ways in which a student could contribute to diversity—race becomes the sole factor.

To remove this uncertainty and confusion, this Court should clarify for the benefit of lower courts and the public schools how *Grutter* and *Gratz* affect the Equal Protection rights of students in K-12 public schools.

III

REVIEW IS NECESSARY TO CLARIFY THAT *GRUTTER* DOES NOT COUNTENANCE RACIAL DISCRIMINATION IN K-12 PUBLIC SCHOOL ASSIGNMENTS

The Sixth Circuit's opinion in this case, deferring to the judgment of public school administrators engaged in the race-based classification and assignment of students, is fundamentally incompatible with this Court's Equal Protection doctrine. This Court has repeatedly and definitively required the strictest judicial scrutiny of governmental policies that classify and subject Americans to differential treatment according to their race. This unwavering standard of scrutiny was reaffirmed in *Grutter*:

> [A]ll racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.

Grutter, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); *Gratz*, 539 U.S. at 270. This Court applies "strict scrutiny to ***all*** racial classifications to 'smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" *Grutter*, 539 U.S. at 326 (quoting *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989) (emphasis added). Strict scrutiny applies to ***any*** race-based classification, regardless of the race of those burdened or benefitted by a particular classification. *See Gratz*, 539 U.S. at 270. Thus any person, of whatever race, has the right to demand that any government actor subject to the Constitution justify, under the strictest of judicial scrutiny, any racial classification subjecting that person to unequal treatment. Under a consistent application of the Equal Protection Clause, strict judicial scrutiny is required when reviewing "even benign

racial classifications designed to benefit racial minorities." Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loy. U. Chi. L.J. 21, 28 (2004).

As this Court has repeatedly recognized, the Equal Protection Clause prohibits the state from employing policies that look only at skin color and that fail to afford any individualized consideration to persons in recognition that they likely have relevant qualities other than skin color. *See Gratz*, 539 U.S. at 270-71. Racial balancing for its own sake has never been recognized as a compelling state interest sufficient to meet the requirements of strict scrutiny. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992). *Accord*, *Grutter*, 539 U.S. at 330. *Grutter* cannot be construed as abandoning the requirement of strict scrutiny, especially when the challenged decision involves racial policies in K-12 public schools, given this nation's history of racial stigmatization and discrimination in that context. Nothing in *Grutter* supports a more deferential posture toward school administrators under the Equal Protection Clause than that applied in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and its progeny.

In *Grutter*, this Court upheld the consideration of race among other factors in competitive admissions to an elite law school, as meeting the requirement of a compelling state interest under strict scrutiny. However, this exception to this Court's general equal protection jurisprudence was based on two factors present in the facts of *Grutter* that are never applicable in the context of K-12 public education. First was the Court's concern for the academic freedom of institutions of higher learning, grounded in the First Amendment. *Grutter*, 539 U.S. at 329. Second, the Court found that a racially diverse student body in the intellectually interactive setting of an elite law school would contribute to educational values by promoting a diversity of viewpoints. *Id.* at 329-30. Neither of these factors has any application in the context of K-12 public schooling.

On its face, of course, *Grutter* did not address whether the employment of race-driven admission policies in elementary and secondary schools similarly qualifies as a compelling state interest. *See* Ancheta, *supra*, at 36 (noting that one question left open by *Grutter* is, "[s]hould elementary and secondary school districts that employ race-conscious diversity plans be granted the same level of deference as institutions of higher education?"). *See also* Jay P. Lechner, *Learning from Experience: Why Racial Diversity Cannot Be a Legally Compelling Interest in Elementary and Secondary Education*, 32 Sw. U. L. Rev. 201, 209 (2003) ("The Supreme Court has never considered whether educational diversity could be a compelling goal of public elementary or secondary education."). To the contrary, the *Grutter* Court was careful to restrict its holding to the narrow context of higher education, a contextual qualification that the court below—like the courts of the First, Sixth, and Ninth Circuits—simply ignored. *See Grutter*, 539 U.S. at 328 ("[T]he law school asks us to recognize, *in the context of higher education*, a compelling state interest in student body diversity"); *id.* (*Grutter*, like *Bakke*, "addressed the use of race *in the context of public higher education*") (emphasis added). *See also* Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. Rev. 461, 464 (2005) (*Grutter* "asked only whether there is a 'compelling state interest in student body diversity' in 'the context of higher education' ").

Interpreting *Grutter* as authorizing widespread deference to public administrators engaged in the classification and disparate treatment of citizens on the basis of their race would constitute a sharp break with this Court's prior equal protection jurisprudence.

The inapplicability of *Grutter*'s First Amendment rationale to K-12 schools has been capably explained by Professor Ancheta, who notes that *Grutter*'s rationale "may be difficult to extend beyond academic decision making and outside of the higher education context because of the key

element of academic freedom under the First Amendment." Ancheta, *supra*, at 47. Although courts have sometimes deferred to public school administrators, this deference, unlike that of *Grutter*, "has not been rooted in academic freedoms typically ascribed to higher education, where the free exchange of ideas and viewpoints is highly valued; indeed, K-12 education is often highly standardized and regimented, particularly in the lower grade levels." *Id.* at 47.

As for viewpoint diversity, the transference of this value from the context of graduate legal studies to elementary and secondary schools borders on the nonsensical. The educational mission of K-12 public schools is different from that of universities. The purpose of American public schools is to *teach* fundamental values necessary to maintain a democratic system. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). *See, e.g.*, Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003) (Public school "[e]ducation is inculcation, not exposure."). K-12 public schools prepare students for citizenship, which includes teaching the principles of our Constitution. *Bethel Sch. Dist.*, 478 U.S. at 681. Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Jan. 23, 2006).

This Court's analysis in *Grutter* has resulted in confusion as to the permissible boundaries for race-conscious educational policies. Some of the questions that were left unresolved are identified by Professor Ancheta:

> If, as the *Grutter* analysis implies, courts may on occasion employ more deferential versions of strict scrutiny, what contexts determine such occasions? Was the Court's contextual scrutiny in *Grutter* specific to higher education when the Court deferred to policy making that was associated with academic freedoms rooted in the First Amendment? Or, was context grounded in a distinction between exclusionary and subordinative legislation on the one hand and inclusionary and interactive policies on the other—a distinction that the Court ostensibly rejected in *Croson* and *Adarand* when it ruled that both "invidious" and "benign" racial classifications are subject to strict scrutiny? Or is context to be addres on an ad hoc, case-by-case basis? Moreo , assuming that context properly determines the rigor of strict scrutiny, how should courts customize their analyses to fit a given context?

Ancheta, *supra*, at 23. This Court should grant the petition for certiorari in this case to clarify the narrow reach of *Grutter* in determining the special circumstances in which racial diversity qualifies as a compelling state interest.

IV

THIS COURT SHOULD REQUIRE THE NATION'S PUBLIC SCHOOLS TO SHOW THE INFEASIBILITY OF ADDRESSING THE PROBLEMS ASSOCIATED WITH RACIALLY IMBALANCED SCHOOLS *THROUGH RACE-NEUTRAL MEANS* BEFORE TURNING TO A SYSTEM OF NAKED RACIAL PREFERENCES

Deferring to public school administrators engaged in the race-based classification and assignment of students not only subverts this Court's equal protection jurisprudence; it does so

prematurely and unnecessarily. The requirement of narrow tailoring "dictates that the government use race ***only when necessary*** to achieve a compelling interest," *Comfort*, 418 F.3d at 22 (emphasis added). Public school administrators should not be allowed to invoke *Grutter* as carte blanche to avoid the necessity of determining whether their goals can be achieved through race-neutral means.

> Perhaps in lieu of spending time and money on racial balancing schemes, public school officials could better use the resources trusted to their care by focusing on the problems that currently exist in many schools serving disadvantaged students. Addressing deficiencies in neighborhood schools would allow interested students the opportunity to prepare for higher education and to compete for admission on equal footing, without the accompanying stigma and resentment associated with racial preferences.

Jenkins, *supra*, at 369-70.

There was no showing in the record below that Jefferson County was unable (or even attempted) to address the issue of racially imbalanced student populations through race-neutral means. The United States Department of Education, Office for Civil Rights has identified numerous "innovative 'race-neutral' alternatives" to promote student body diversity while avoiding the sort of blatantly discriminatory policies adopted by Jefferson County's public schools. Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004), *available at* http://www.ed.gov/about/offices/list/ocr/raceneutral.html (overview) and http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html (report) (last visited Oct. 25, 2005). Perhaps the foremost example of such a race-neutral alternative would be providing preferential assignments on the basis of socioeconomic status.

Such plans seek to reduce concentrations of poverty by providing

> all students a chance to attend middle-class schools, in which a majority of students set the tone that academic achievement is to be valued and that aspirations should be set high, students learn from one another's differences, misbehavior is kept under control and does not become contagious, and teachers are not overwhelmed by large numbers of high-need students.

Id. at 34 (citation omitted).

To the extent racially imbalanced schools are merely a side effect of poor student achievement, other race-neutral strategies can be brought to bear on the problem. These might include:

- Creating new "skills development" programs—projects designed to improve educational achievement among students who attend traditionally low-performing schools.

- Low performing schools entering into partnership with universities to strengthen their students' ability to succeed in college.

The requirement of narrow tailoring should receive more than mere lip service when a government proposes the classification and differential treatment of children on the basis of their race. This Court should grant certiorari to remind the Nation's public school administrators that adopting a system of naked racial preferences should be the last, not the first, alternative when seeking to remedy problems associated with racial imbalances in K-12 public schools.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant the writ of certiorari.

DATED: February, 2006.

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No. 05-915

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Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT
AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

CASE NO. 3:02-CV-00620-JGH

DAVID MCFARLAND, Parent and Next Friend of Stephen and Daniel McFarland, *et al.*

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*

RELEVANT DOCKET ENTRIES

DATE	DESCRIPTION
Oct. 21, 2002	COMPLAINT filed; (Summons(es) issued) filing fee pd (Entered: 10/22/2002)
Nov. 8, 2002	MOTION by defendant to reassign/transfer case to Chief Judge Heyburn; Memorandum in Support; order tendered (Entered: 11/12/2002)
Nov. 13, 2002	ANSWER by defendants Jefferson Cty Public, Jefferson Cty Bd Ed, Stephen Daeschner (Entered: 11/15/2002)
Dec. 17, 2002	ORDER by Judge Jennifer B. Coffman granting motion to reassign/transfer case to Chief Judge Heyburn; case reassigned to Chief Judge John G. Heyburn II, for further proceedings (Entered: 12/17/2002)
Jan. 23, 2003	ORDER ON CONFERENCE by Chief Judge John G. Heyburn II; plaintiff granted till 3/4/03 to add parties; pretrial conference held on 1/21/03, CASE STAYED pending a

DATE	DESCRIPTION
	decision by the US Supreme Court (Entered: 01/23/2003)
Mar. 5, 2003	AMENDED COMPLAINT by David McFarland; adding Ronald Jeffrey Pittenger (Entered: 03/06/2003)
May 2, 2003	ORDER by Chief Judge John G. Heyburn II granting motion for leave to file 3rd amd cmp, granting motion for leave to file 2nd amd cmp (Entered: 05/02/2003)
May 2, 2003	SECOND AMENDED COMPLAINT by plaintiff; adding Anthony Underwood (Entered: 05/02/2003)
May 2, 2003	THIRD AMENDED COMPLAINT by plaintiff; adding Crystal D. Meredith (Entered: 05/02/2003)
May 7, 2003	ANSWER by defendants to First Amended Complaint (Entered: 05/07/2003)
May 7, 2003	ANSWER by defendants to Second Amended Complaint (Entered: 05/07/2003)
May 7, 2003	ANSWER by defendants to Third Amended Complaint (Entered: 05/07/2003)
May 28, 2003	MOTION by plaintiff for order to end the use of racial quotas; Memorandum in Support; order tendered (Entered: 05/29/2003)
July 24, 2003	ORDER by Chief Judge John G. Heyburn II denying motion for leave to file fourth amended cmp, denying motion for order to end the use of racial quotas, denying motion to extend time for additional plaintiffs to join action to 5/9/03; pretrial conferenceheld

DATE	DESCRIPTION
	on 7/21/03; pretrial conf set for 9:30 11/10/03 before Chief Judge John G. Heyburn II; evidentiary hearing set for 1:30 12/8/03 and 12/9/03 at 9:30 before Chief Judge John G. Heyburn II (Entered: 07/24/2003)
Nov. 21, 2003	STIPULATION of Facts by Stephen W. Daeschner; Jefferson County Board of Education; Jefferson County Public Schools; David McFarland; Crystal D. Meredith; Ronald Jeffrey Pittenger; Anthony Underwood. (Attachments: #(1) Table of Contents #(2) Exhibit List (Exhibits in separate folders)) (Entered: 11/21/2003)
Jan. 7, 2004	ORDER for proceedings held before John G. Heyburn II: Evidentiary Hearing held December 8,9,10,11 & 12, 2003. Transcript testimony due by 1/13/2004. Simultaneous briefs due by 1/30/2004, replies by 2/15/2004. (Entered: 01/08/2004)
June 29, 2004	MEMORANDUM OPINION AND ORDER by John G. Heyburn II on 6/29/04; for the reasons set forth, Plaintiffs' request for relief is granted only to the extent that JCPS shall revise the student assignment process for traditional magnet schools in a manner consistent with the accompanying memorandum opinion in time for its use in the 2005-2006 school year assignments; as to all other aspects of the JCPS student assignment plan, plaintiffs' requests for relief are denied; this is a final and appealable order. (Entered: 06/29/2004)

DATE	DESCRIPTION
July 23, 2004	NOTICE OF APPEAL by Crystal D. Meredith. Filing fee $ 255, receipt number 108234. (Entered: 07/26/2004)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 04-5897

DAVID MCFARLAND, Parent and Next Friend of Stephen and Daniel McFarland, *et al.*

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*

RELEVANT DOCKET ENTRIES

DATE	DESCRIPTION
Aug. 5, 2004	Civil Case Docketed. Notice filed by Appellant Crystal D. Meredith.
June 9, 2005	CAUSE ARGUED by Teddy B. Gordon for Appellant Crystal D. Meredith, Francis J. Mellen for Appellee Stephen W. Daeschner, Appellee Jefferson County Bd, Appellee Jefferson County Pub before Judges Norris, Daughtrey, Jordan.
July 21, 2005	Per Curiam OPINION filed: AFFIRMED, decision for publication pursuant to local rule 206. Alan E. Norris, Circuit Judge, Martha C. Daughtrey, Circuit Judge, R. L. Jordan, U.S. District Judge for the Eastern District of Tennessee.
Aug. 4, 2005	PETITION for en banc rehearing filed by Teddy B. Gordon for Appellant Crystal D. Meredith.

DATE	DESCRIPTION
Oct. 21, 2005	ORDER filed denying petition for en banc rehearing filed by Teddy B. Gordon. Alan E. Norris, Martha C. Daughtrey, Circuit Judges; R. L. Jordan, District Judge.
Oct. 31, 2005	MANDATE ISSUED with no cost taxed

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NO. 3:02CV-620-C

DAVID MCFARLAND, Parent and Next Friend of Stephen and Daniel McFarland

-and-

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald
1025 E. Caldwell Street
Louisville, KY 40202

Plaintiffs,

vs.

JEFFERSON COUNTY BOARD OF EDUCATION AND STEPHEN DAESCHNER

Defendants.

THIRD AMENDED COMPLAINT

Come the Plaintiffs, David McFarland, Parent and Next Friend of Stephen and Daniel McFarland; Ronald Pittenger, Parent and Next Friend of Brandon Pittenger; Anthony Underwood, Custodial Parent and Next Friend of Max Aubrey, and Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald, and for their amended cause of action, state as follows:

1. Reiterate each and every allegation of the Plaintiff's original Complaint, Amended Complaint, and Second Amended Complaint.

2. That the Plaintiff, Joshua Ryan McDonald, was denied entry into his neighborhood school due to racial

guidelines established by the Defendant, Jefferson County Public School system and/or Jefferson County Board of Education. (See Exhibit 1) That Joshua Ryan McDonald is unable to attend the school of his choice due to unconstitutional racial quotas and based on those unconstitutional racial quotas now is forced and compelled Whitney Young Elementary School.

3. That all elementary schools should be returned to "neighborhood" elementary schools with an open enrollment policy so that a child can go to a school closest to their home or next closest to their home, regardless of race.

4. That in regard to the "special programs," such as the traditional schools, all openings should be open to all applicants regardless of race or gender. That said names should be drawn at random from a common pool to all openings to Jefferson County Traditional Middle School.

5. That the Defendant, JCBE, has admitted that they continue to use racial quotas as a criterion, if not the sole criterion, for placement of our children in the public schools of Jefferson County, Kentucky.

6. That further, the Defendants, JCBE, has admitted in a publication previously attached as Exhibit 5 that the first criterion for those helping parents to apply for choosing a school for the 2003 school year is to check the race code.

7. That the use of race is constitutionally prohibited and a continued violation of the constitutional and due process rights of the Plaintiffs herein for which the Plaintiffs ask for immediate relief in the form of a restraining order and/or injunction enjoining and restraining the Defendants herein from further use of the unconstitutional assignment plan with the use of race.

8. That race should no longer be the primary factor in determining where a child does or does not go to school anywhere in Jefferson County, Kentucky.

9. That the Plaintiffs will suffer immediate and irreparable harm in the continued violation of their constitutional rights if said restraining order and/or injunctive relief is not granted to them for the upcoming 2003-2004 school year.

10. That Plaintiffs request that their children be admitted to the school of their choice for the 2003-2004 school year, regardless of their race or gender.

11. That Plaintiffs herein specifically reserve the right to amend this Complaint as other Plaintiffs become known to them.

WHEREFORE, the Plaintiffs, David McFarland, Parent and Next Friend of Stephen and Daniel McFarland; Ronald Pittenger, Parent and Next Friend of Brandon Pittenger; Anthony Underwood, Custodial Parent and Next Friend of Max Aubrey, and Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald, demand as follows:

1. Reiterate each and every demand as stated in the original Complaint of David McFarland, and all Amended Complaints previously filed of record.

2. That the Defendants, JCBE, immediately be restrained and enjoined from continued implementation of the Student Assignment Plan per race/gender for the upcoming 2003-2004 school year.

3. Damages for this Plaintiff in the sum of $25,000.00.

4. Attorney's fees where allowed by law.

5. Order directing that this Plaintiff and all other Plaintiffs may attend their neighborhood school and/or

school of their choice without regard to race and/or gender.

6. Any and all other relief to which this Plaintiff may appear entitled.

/s/ Teddy B. Gordon

TEDDY GORDON
Attorney for Plaintiffs
807 West Market Street
Louisville, KY 40202
(502) 585-3534

CERTIFICATION

It is hereby certified that a copy of the foregoing was mailed this 8th day of April, 2003, to the Hon. Francis J. Mellen, Jr., Hon. Byron E. Leet and Hon. Pamela J. Ledford, Wyatt, Tarrant & Combs, LLP, 500 W. Jefferson Street, PNC Plaza, Louisville, KY 40202.

/s/ Teddy B. Gordon

TEDDY B. GORDON
Attorney for Plaintiffs

Plaintiff, Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald, states that she has read the allegations of the foregoing Amended Complaint, and the statements contained herein are true and correct as she verily believes.

/s/ Crystal Meredith

CRYSTAL MEREDITH

SUBSCRIBED AND SWORN to before me by Crystal D. Meredith, Custodial Parent and Next Friend of Joshua Ryan McDonald, Plaintiff on this 3rd day of April, 2003.
My commission expires: September 25, 2004

/s/ Teddy B. Gordon

NOTARY PUBLIC, State at Large, KY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:02CV-620-C

DAVID MCFARLAND, Parent and Next Friend of Stephen and Daniel McFarland,

and

RONALD PITTENGER, Parent and Next Friend of Brandon Pittenger

and

ANTHONY UNDERWOOD, Custodial Parent and Next Friend of Max Aubrey

and

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald

Plaintiffs,

v.

JEFFERSON COUNTY PUBLIC SCHOOLS, JEFFERSON COUNTY BOARD OF EDUCATION, and STEPHEN DAESCHNER,

Defendants.

ANSWER TO THIRD AMENDED COMPLAINT

Defendants Jefferson County Public Schools, Jefferson County Board of Education, and Superintendent Stephen Daeschner (collectively "JCBE"), by counsel, hereby tender their Answer to the Third Amended Complaint and state as follows:

FIRST DEFENSE

1. Defendants incorporate their responses to the original and First and Second Amended Complaints.

2. Defendants deny the allegations contained in Paragraph 2 of the Third Amended Complaint.

3. Defendants deny the allegations contained in Paragraph 3 of the Third Amended Complaint.

4. Defendants deny the allegations contained in Paragraph 4 of the Third Amended Complaint.

5. Defendants deny the allegations contained in Paragraph 5 of the Third Amended Complaint.

6. Defendants deny the allegations contained in Paragraph 6 of the Third Amended Complaint and affirmatively state the referenced document speaks for itself.

7. Defendants deny the allegations contained in Paragraph 7 of the Third Amended Complaint.

8. Defendants deny the allegations contained in Paragraph 8 of the Third Amended Complaint.

9. Defendants deny the allegations contained in Paragraph 9 of the Third Amended Complaint.

10. Defendants deny the allegations contained in Paragraph 10 of the Third Amended Complaint.

11. Defendants deny the allegations contained in Paragraph 11 of the Third Amended Complaint.

12. All allegations of the Third Amended Complaint not specifically admitted or otherwise answered herein are hereby denied.

SECOND DEFENSE

13. The "Jefferson County Public Schools" is not a legal entity capable of being sued in this action.

THIRD DEFENSE

14. The Third Amended Complaint fails to state a claim against these Defendants upon which relief may be granted.

FOURTH DEFENSE

15. Some or all of the claims in the Third Amended Complaint are barred by the Eleventh Amendment to the United States Constitution.

FIFTH DEFENSE

16. Some or all of the claims in the Third Amended Complaint are barred by this Court's ruling in the action styled *Sandra Hampton, et al. v. Jefferson County Board of Education, et al.*, Civil Action No. C:98CV-262-H.

SIXTH DEFENSE

17. Some or all of the claims in the Third Amended Complaint are barred by the doctrine of sovereign immunity and by Kentucky Constitution §231.

SEVENTH DEFENSE

18. Plaintiffs are not entitled to trial by jury on their claims.

EIGHTH DEFENSE

19. Plaintiffs are not entitled to an award of damages of any type on their claims.

NINTH DEFENSE

20. The Third Amended Complaint fails to state a claim against Defendant Stephen Daeschner in his individual capacity.

WHEREFORE, Defendants demand as follows:

A. Judgment dismissing the Complaint and Amended Complaints with prejudice;

B. Their costs herein expended; and

C. Any and all other relief to which they may be entitled.

Respectfully submitted,

/s/ Byron E. Leet

Francis J. Mellen, Jr.
Byron E. Leet
WYATT, TARRANT & COMBS, LLP
500 West Jefferson Street
PNC Plaza
Louisville, Kentucky 40202-2898
502.589.5235

Counsel for Jefferson County Board of Education, Jefferson County Public Schools, and Superintendent Stephen Daeschner

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served upon the following, by U.S. mail, on this the 7th day of May, 2003:

Teddy B. Gordon, Esq.
807 West Market Street
Louisville, Kentucky 40202

/s/ Byron E. Leet

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:02-CV-620-H

DAVID MCFARLAND, Parent and Next Friend of Stephen and Daniel McFarland, *et al.*,
Plaintiffs,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,
Defendants.

STIPULATION OF FACTS

The parties, by counsel, submit the attached joint Stipulation of Facts and agree that they will not introduce any evidence inconsistent with the Stipulation of Facts.

HAVE SEEN AND AGREE:

/s/ Teddy B. Gordon

TEDDY B. GORDON
807 West Market Street
Louisville, Kentucky 40202
(502) 585-3534

Counsel for Plaintiffs

/s/ Byron E. Leet

FRANCIS J. MELLEN, JR.
BYRON E. LEET
WYATT, TARRANT & COMBS, LLP
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel for Defendants, Jefferson County Board of Education and Stephen Daeschner

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I. THE PLAINTIFFS

1. David McFarland is parent and next friend of Stephen McFarland. Stephen McFarland resides at 7317 Mayrow Drive, Louisville, Kentucky 40291, in the Newburg Middle School ("Newburg") geographic attendance area. He attended Fern Creek Elementary School for Primary 1 (kindergarten) and Primary 2 (first grade). He attended Audubon Traditional Elementary School for Primary 3 (second grade) and Primary 4 (third grade). He attended a school in Fayette County, Kentucky for fourth grade. He attended Fern Creek Elementary School for fifth grade. On November 1, 2001, he applied for a sixth grade school assignment for the 2002-2003 school year. *See* paragraphs 61 to 78 below for a description of the application process for elementary, middle and high school students. His first choice was Jefferson County Traditional School ("JCTMS"). He did not indicate a second choice. He was not accepted into JCTMS, and he was assigned to Newburg. On May 8, 2002, he applied for a transfer to Myers Middle School ("Myers"), which was granted, and he was enrolled at Myers for the sixth grade. On November 14, 2002, he applied for a seventh grade school assignment for the 2003-2004 school year. His first choice was JCTMS. He did not indicate a second choice. He was accepted into JCTMS. He is currently enrolled in JCTMS for the seventh grade.

2. David McFarland is parent and next friend of Daniel McFarland. Daniel McFarland resides at 7317 Mayrow Drive, Louisville, Kentucky 40291, in the Bates Elementary School ("Bates") geographic attendance area. Bates is in the Price Elementary School Cluster ("Price Cluster"). *See* paragraph 62 below for a description of elementary school clusters. Daniel McFarland attended Fern Creek Elementary School ("Fern Creek"), which is in the Price Cluster, for Primary 1 (kindergarten). On February 19, 2002, he applied for a Primary 2 (first grade) school assignment for the 2002-

2003 school year. For schools in the Price Cluster, his first choice was Fern Creek and his second choice was Luhr Elementary School. For magnet schools, magnet programs and optional programs, his first choice was Schaffner Traditional Elementary School ("Schaffner"), and he did not indicate a second choice. He was not accepted into Schaffner. On April 29, 2002, Maupin Elementary School ("Maupin") sent to David McFarland a letter offering Daniel McFarland possible placement for the 2002-2003 school year in the Traditional School program at Maupin. A copy of this letter is attached as *Exhibit 1*. David McFarland did not accept this offer, and Daniel McFarland was assigned to Fern Creek, where he was enrolled for the first grade. On February 29, 2003, he applied for a Primary 3 (second grade) school assignment for the 2003-2004 school year. His first choice was Schaffner. He did not indicate a second choice. He was accepted into Schaffner. He is currently enrolled in Schaffner for the second grade.

3. Ronald Pittenger is parent and next friend of Brandon Pittenger. Brandon Pittenger resides at 8401 Cedar Creek, Louisville, Kentucky 40291, in the Newburg geographic attendance area. He attended Bates for Primary 1 (kindergarten) through fifth grade. On November 1, 2001, he applied for a sixth grade school assignment for the 2002—2003 school year. His first choice was JCTMS. His second choice was the Math, Science, Technology Magnet Program at Newburg ("Newburg MST program"). He was not accepted into JCTMS. His second choice application to the Newburg MST program was not processed, because that program accepts students only from first choice applications. (*See* the instructions on the middle and high school application form for magnet schools, magnet programs and optional programs (Exhibit 48)). He enrolled in Evangel Christian School for the sixth grade. He is currently enrolled in Evangel Christian School for the seventh grade.

4. Anthony Underwood is parent and next friend of Kenneth Maxwell ("Max") Aubrey. Max Aubrey resides at 6404 By Way Lane, Louisville, Kentucky 40218, in the Newburg geographic attendance area. He attended Tully Elementary School for Primary 1 (kindergarten) through Primary 3 (second grade). He was not enrolled in the Jefferson County Public Schools for Primary 4 (third grade). He attended Jeffersontown Elementary School for fourth grade. He attended Cochrane Elementary School for fifth grade. On December 27, 2001, he applied for a sixth grade school assignment for the 2002-2003 school year. His first choice was JCTMS. He did not indicate a second choice. He was not accepted into JCTMS and he was assigned to Newburg. On May 5, 2002, he applied for a transfer to Myers, which was granted, and he was enrolled in Myers for the sixth grade. He did not apply for a seventh grade school assignment for the 2003—2004 school year. He is currently enrolled in Myers for the seventh grade.

5. Crystal Meredith is parent and next friend of Joshua McDonald. Joshua McDonald resides at 1025 Caldwell Street, Louisville, Kentucky 40204, in the Breckinridge-Franklin Elementary School ("BFES") geographic attendance area. BFES is in the Young Elementary School cluster ("Young Cluster"). Joshua McDonald did not submit an application in the early months of 2002 to indicate his choice for enrollment in Primary 1 (kindergarten) for the 2002-2003 school year. In August 2002, Crystal Meredith requested that Joshua McDonald be enrolled in kindergarten at BFES for the 2002-2003 school year. Because BFES is a "year-round" school which had already commenced the school year in July 2002, and BFES had no available space for late enrollees, BFES could not enroll him. He was assigned to Young Elementary School ("Young"), which is the "head of cluster" school for the Young Cluster, where he was enrolled for kindergarten. On August 9, 2002, he applied for a transfer to Bloom Elementary School, which is not in the Young Cluster.

The transfer application was denied because the transfer would have had an adverse effect on the compliance of Young with the racial guidelines contained in the student assignment plan described in paragraph 134 of this Stipulation. Crystal Meredith did not appeal the denial of transfer. He did not submit an application in the early months of 2003 to indicate his choice for enrollment in Primary 2 (first grade) for the 2003-2004 school year. He currently attends Young for the first grade.

II. THE DEFENDANTS

6. Defendant, Jefferson County Board of Education (the "Board"), manages and controls the public schools in the Jefferson County Public School District (the "District"). The Board is a body politic and corporate which is organized and exists pursuant to KRS 160.160. The Board has the powers and duties stated in KRS 160.290 and other applicable statutes. Copies of KRS 160.160 and 160.290 are attached as *Exhibit 2* and *Exhibit 3*.

7. Defendant, Stephen Daeschner, is the Superintendent of the District. Under KRS 160.370, the Superintendent is the executive officer of the Board and has general supervision, subject to the control of the Board, of the general conduct of the schools in the District, the course of instruction, the discipline of pupils and the management of business affairs. A copy of KRS 160.370 is attached as *Exhibit 4*.

III. THE JEFFERSON COUNTY PUBLIC SCHOOLS

A. Board Goals.

8. Under state law, the Board is required to submit to the Kentucky Department of Education ("KDE") a biennial consolidated plan, as a condition to the receipt of various state and federal grants administered by the KDE. The consolidated plan includes a statement of the Board's overarching goals for the Jefferson County Public Schools ("JCPS").

Since 1984, the Board's goals have included the education of all JCPS students in a racially integrated environment. The current Board goals, which were adopted in June and November 1998, are as follows:

> [1] All JCPS students will become critical thinkers and lifelong learners who are academically prepared in a racially integrated environment to be successful in the post-secondary education programs or careers of their choice.
>
> [2] All JCPS students will be safe, supported, respected, and confident in racially integrated schools, classrooms, and student activities.
>
> [3] All JCPS parents and community members will be urged and welcomed to actively participate in the education of our students.
>
> [4] All JCPS employees will contribute to and be accountable for the success of our students through higher levels of performance in supportive work environments.

Copies of the Board resolutions adopting the 1984 Board goals and the current Board goals are attached collectively as *Exhibit 5*.

B. Schools and Programs

9. JCPS distributes each year a publication titled "A Guide to the Jefferson County Public Schools," which contains information about JCPS schools and programs. A copy of the current Guide to the Jefferson County Public Schools is attached as *Exhibit 6*.

10. JCPS offers preschool education for children four years old and younger through several programs, including Head Start/Early Head Start, KERA Prekindergarten, the Three-Year-Old Program, Tuition-Based Preschool, Child

Care, Early Childhood Special Services, and Family Education/Even Start. *See* page 8 of Exhibit 6.

11. JCPS offers education for students from grade Primary 1 (kindergarten) through grade five in its 87 elementary schools. *See* pages 9-24 of Exhibit 6.

12. JCPS offers education for students from the sixth grade through the eighth grade in its 23 middle schools. *See* pages 25-30 of Exhibit 6.

13. JCPS offers education for students from the ninth grade through the twelfth grade in its 20 high schools. *See* pages 31-38 of Exhibit 6.

14. The school numbers listed in paragraphs 11 to 13 do not include the Brown School ("Brown"), at which JCPS offers education for students from Primary 1 (kindergarten) through the twelfth grade in one building. Brown is the only JCPS school which contains all grade levels in one building. *See* pages 23, 26 and 33 of Exhibit 6. With some exceptions, the data in this Stipulation concerning JCPS elementary, middle and high schools count the kindergarten through fifth grade of Brown as a separate elementary school, the sixth through eighth grade of Brown as a separate middle school, and the ninth through twelfth grade of Brown as a separate high school.

15. The high school numbers listed in paragraph 13 do not include the Youth Performing Arts School ("YPAS"), a JCPS high school which is located on the campus of dupont Manual High School ("Manual"). Students at YPAS receive training in the performing arts, and also take classes in academic areas at Manual. *See* page 37 of Exhibit 6. For purposes of this Stipulation, YPAS is counted together with Manual as a single high school.

16. In addition to the schools described in paragraphs 10 to 15, JCPS operates alternative schools and special education

centers. The alternative schools provide an alternative learning environment for students who have demonstrated inappropriate behavior at school, students who have not had academic success in high school, and pregnant and parenting students. *See* page 39 of Exhibit 6. The special education centers provide a learning environment for students identified with disabilities and who cannot be served at a regular school. In addition, JCPS supplies teachers for on-site instruction of students at various state and private facilities which serve disabled and other children.

17. A map of Jefferson County which shows the locations of the 87 elementary schools and Brown is attached as *Exhibit 7.*

18. A map of Jefferson County which shows the locations of the 23 middle schools and Brown is attached as *Exhibit 8.*

19. A map of Jefferson County which shows the locations of the 20 high schools and Brown is attached as *Exhibit 9.*

20. A map of Jefferson County which shows the locations of the alternative schools, the special education centers and the principal facilities at which JCPS provides on-site instruction is attached as *Exhibit 10.*

21. JCPS prepares each year a publication titled "School Profiles" which contains various data about each of the JCPS elementary, middle and high schools, including programs offered at the school, enrollment, instructional staff, student demographics and achievement, and budget data. A copy of the 2002-2003 School Profiles is attached as *Exhibit 11.*

22. JCPS prepares each year three publications titled "Elementary Schools Data Book," "Middle Schools Data Book" and "High Schools Data Book." These publications contain various data about each of the JCPS elementary, middle and high schools and also various aggregated data about all JCPS schools at each level. Copies of the 2002-

2003 Data Books for elementary schools, middle schools and high schools are attached as *Exhibit 12*, *Exhibit 13* and *Exhibit 14*.

23. JCPS offers several instructional programs at the elementary schools, middle schools and high schools. The Comprehensive Program is the main instructional program. The Advance Program provides a curriculum for gifted or talented students. The Honors Program provides intensive academic preparation for students in Comprehensive Program middle and high schools. The Exceptional Child Education ("ECE") program offers services to students with identified disabilities. *See* page 4 of Exhibit 6 for a brief description of these programs. *See* the applicable pages for each school in Exhibit 11 for a list of the programs offered at each school.

24. Each JCPS school building has a program capacity, which is the number of students that the building can accommodate, consistent with the programs offered to students in that building. *See* the applicable pages for each school in Exhibit 11 for the program capacity of each school.

C. Funding of Schools and Programs

25. The Board receives education funds from state taxes, local taxes, federal aid, grants, partnerships with corporations and other entities, donations and fees. The Board spends these funds for educational purposes within the District as needed.

26. A table which shows the sources of the District's total funds and the principal categories of the District's educational expenditures for the most recent (2002-2003) Board fiscal year is attached as *Exhibit 15*.

27. A table which shows the budgeted allocation of the District's funds to JCPS schools for the most recent (2002-2003) Board fiscal year, and a copy of the JCPS 2002-2003 School Allocation Formula handbook, which contains the

formula and instructions for the budgeted allocations, are attached collectively as *Exhibit 16*. A table which shows the per-pupil expenditure at each JCPS school is attached as *Exhibit 17*. The per-pupil expenditure is calculated by dividing the school's average daily attendance for the fiscal year into the actual dollars spent by the District at the school during the fiscal year. For purposes of this calculation, the dollars spent at the school include actual salaries of staff, categorical programs in the school, ECE programs, and English as a Second Language programs. The dollars spent at the school do not include the costs of certain central office services provided to schools by JCPS, including but not limited to transportation, computer/technology services, district wide staff development, magnet and optional programs, substitute teachers, testing, payroll, purchasing, summer school and early childhood instruction.

D. School-Based Decision Making Councils

28. KRS 160.345 requires each public school, with certain exceptions including alternative schools and special education centers, to form a school-based decision making council ("SBDM council") composed of parents, teachers and the principal or administrator. All JCPS schools which are subject to this requirement, with the exception of Butler High School ("Butler"), have formed an SBDM council. *See* the applicable pages of Exhibit 11 for the composition of the SBDM council at each JCPS school. KRS 160.345 provides that each SBDM council has authority to determine which textbooks, instructional materials and student support services shall be provided in its school. KRS 160.345 further provides that each SBDM council must adopt policies to govern various aspects of its school, including the following:

a. Determination of curriculum including needs assessment and curriculum development.

b. Assignment of all instructional and non-instructional staff time.

c. Assignment of students to classes and programs within the school.

d. Determination of the schedule of the school day and week, subject to the beginning and ending times of the school day and school calendar year as established by the local board.

e. Determination of use of school space during the day.

f. Planning and resolution of issues regarding instructional practices.

g. Selection and implementation of discipline and classroom management techniques as a part of the comprehensive school safety plan, including responsibilities of the student, parent, teacher, counselor and principal.

h. Selection of extracurricular programs and determination of policies relating to student participation based on academic qualifications and attendance requirements, program evaluation and supervision.

i. Procedures consistent with local school board policy, for determining alignment with state standards, technology utilization, and program appraisal.

A copy of KRS 160.345 is attached as *Exhibit 18.*

E. School Staff

29. Each JCPS school is supervised by a principal. The minimum qualifications for employment as a principal by JCPS are a master's degree with Kentucky certification in administration and supervision; a principalship certificate; three years of successful teaching experience in public schools; and satisfactory performance in the application process, including interviews, record of job history and perform-

ance, and job references. JCPS maintains a current list of persons who possess the qualifications for employment as a principal, and have been screened by the JCPS human resources staff. When a school has a vacancy in the principal's position, JCPS reviews this list for potential applicants for the vacancy. JCPS also publishes a notice of the vacancy, and qualified applicants for the position who are not on the current JCPS list can submit applications to the Superintendent. As provided in KRS 160.345(2)(h), the principal at each school which has formed an SBDM council is appointed by the SBDM council, from a list of applicants recommended by the Superintendent. *See* Exhibit 18. The principal at a school which has not formed an SBDM council (in the case of JCPS, only Butler and the alternative schools and special education centers) is appointed by the Superintendent.

30. JCPS employs about 6,200 persons as teachers for the 2003-2004 school year. The minimum qualifications for employment as a teacher by JCPS are Kentucky certification appropriate to the grade level and curricular assignment, and the level of experience and preparation required by the Board. As provided in KRS 160.345 (2)(h), teachers are hired by the principal of each school, after consultation with the SBDM council, from a list of qualified applicants submitted to the principal by the Superintendent. As provided in KRS 160.345 (2)(h), teachers may request a transfer to another JCPS school in accordance with the collective bargaining agreement between the Board and the Jefferson County Teachers Association ("JCTA"). A copy of the current JCTA collective bargaining agreement is attached as *Exhibit 19*.

31. The budgeted funds for teacher salaries that are allocated to each school in the District's budget for each fiscal year are determined by the Superintendent, using a formula which estimates the number of teachers that will be required at the school based on the number of students projected to attend the school and other relevant data. *See* Exhibit 16.

However, under KRS 160.345 (2)(h) and (i), each SBDM council can decide either to reduce the number of teachers at the school and apply budgeted teacher salary funds to other purposes, or to hire additional teachers and use other budgeted funds to pay their salaries.

32. The applicable pages of Exhibit 11 show the number of teachers employed at each JCPS school and their professional degrees. A table which shows the percentage of courses taught at each JCPS middle and high school by teachers with a college major or minor in that subject is attached as *Exhibit 20.*

33. In addition to a principal and teachers, most JCPS schools have other administrative and/or instructional staff, including assistant principals, guidance counselors and librarians. These employees are hired by the principal of each school, after consultation with the SBDM council. *See* the applicable pages of Exhibit 11 for the other administrative and instructional staff employed at each JCPS school.

F. Students

34. About 97,000 students are enrolled in the JCPS for the 2003-2004 school year. Of these students, about 5,000 are enrolled in preschool programs; about 42,500 are enrolled in elementary schools; about 21,650 are enrolled in middle schools; about 24,750 are enrolled in high schools; about 2,100 are enrolled in alternative schools; and about 1,000 are enrolled in special schools and special education centers.

35. For purposes of the JCPS student assignment plan described in paragraph 134 of this Stipulation, JCPS records the race of students as Black (African-American) and Other (all students who are not African-American). The student assignment plan does not apply to the preschool students described in paragraph 34, to students in Primary 1 (kindergarten), to students who are enrolled in an elementary, middle or high school but attend classes in a self-contained special

education unit within the building, and to students in alternative schools and special education centers.

36. Of the elementary students described in paragraph 34 who are subject to the student assignment plan (*i.e.*, excluding the categories described in paragraph 35), 12,192 (36%) are Black and 22,086 (64%) are Other. Of the middle school students described in paragraph 34 who are subject to the student assignment plan, 7,418 (36%) are Black and 12,998 (64%) are Other. Of the high school students described in paragraph 34 who are subject to the student assignment plan, 7,640 (31%) are Black and 17,145 (69%) are Other. Of all students enrolled in JCPS elementary, middle and high schools who are subject to the student assignment plan, 27,250 (34%) are Black and 52,229 (66%) are Other. *See* copy of JCPS report attached as *Exhibit 21*. *See* the applicable pages of Exhibit 11 for data concerning the percentages of Black and Other students at each JCPS school.

37. Under federal regulations, students from families whose total household income is below a defined threshold are eligible to receive a free or reduced price lunch ("FRL"). Participation in the FRL program is voluntary. Of all students who were enrolled in JCPS during the 2002-2003 school year and were subject to the student assignment plan, 49.4% participated in the FRL program at JCPS. By grade level, the percentages of such students who participated in the FRL program were as follows: elementary, 57.3%; middle, 52%; high school, 35.7%. Of all such Black students enrolled in JCPS at all grade levels, 76.5% participated in the FRL program. Of all such Other students enrolled in JCPS at all grade levels, 35.4% participated in the FRL program. *See* copy of JCPS report attached as *Exhibit 22*.

38. Each year, JCPS conducts a comprehensive survey of students, parents and school staff. Copies of the survey questionnaire forms for the 2002-2003 survey and summaries

of the results of the 2002-2003 survey for elementary, middle and high schools are attached collectively as *Exhibit 23.*

39. JCPS collects various data which reflects the involvement of parents and other volunteers at JCPS schools. JCPS believes that the most reliable data regarding parental involvement at each school is the level of voluntary attendance by parents and guardians at the two teacher-parent conference days held each year at each JCPS school. A table which shows the ratio of conferences to students for the 2002-2003 school year at each JCPS school is attached as *Exhibit 24.*

G. Curriculum

40. KRS 158.645, which is part of the Kentucky Education Reform Act of 1990, as amended ("KERA"), provides that it is the intent of the Kentucky General Assembly to create a system of public education which shall allow and assist all students to acquire eight capacities, which are listed in the statute. A copy of KRS 158.645 is attached as *Exhibit 25.*

41. KRS 158.6451, which is part of KERA, states the Kentucky General Assembly's goals for Kentucky public schools. KRS 158.6451 further provides that the Kentucky Department of Education ("KDE") shall disseminate to local school districts and schools a model curriculum framework which is directly tied to the goals, outcomes and assessment strategies developed under KRS 158.645, 158.6451 and 158.6453. KRS 158.6451 further provides that the model curriculum framework shall provide direction to local school districts and schools as they develop their curriculum. A copy of KRS 158.6451 is attached as *Exhibit 26.*

42. KRS 158.6453, which is part of KERA, provides that KDE shall create and implement a statewide assessment program for elementary and secondary school students known as the Commonwealth Accountability Testing System ("CATS"). KRS 158.6453 further provides that the CATS

assessments shall measure core academic content, basic skills, and higher-order thinking skills and their application. A copy of KRS 158.6453 is attached as *Exhibit 27.*

43. To implement KRS 158.6451 and 158.6453, KDE has published and distributed to local school districts various documents including Kentucky's Learning Goals and Academic Expectations (the "Goals and Expectations"), which all Kentucky students are expected to achieve; the Program of Studies for Kentucky Schools, Primary-12 (the "Program of Studies"), which is intended to insure that students in all Kentucky public schools are provided with a coordinated curriculum, so that all students have the opportunity to succeed in meeting the Goals and Expectations; the Implementation Manual for the Program of Studies, which provides information on implementing educational programs and designing courses using the content from the Program of Studies; the Core Content for Assessment (the "Core Content"), which states the content that is essential for all students to know and will be included on the CATS assessments; and the Student Performance Standards, which define the standards for determining when a student has performed at the "novice," "apprentice," "proficient" or "distinguished" level on CATS assessments. A copy of the Learning Goals and a summary of the other KDE curriculum documents published on KDE's website is attached as *Exhibit 28.*

44. JCPS has prepared numerous Core Content Guides which are based on the Goals and Expectations, the Program of Studies and the Core Content. The Core Content Guides contain the curriculum, teaching strategies, instructional resources and teaching sequences for each content area that is tested on the CATS assessments at each grade level within JCPS. The purpose of the Core Content Guides is to enable JCPS teachers and students to meet the goals established by KERA, including successful performance on the CATS assessments. The Core Content Guides are distributed by JCPS

to each school in the District, for use by all teachers in the District. As examples, the Core Content Guides for Reading and Writing at the elementary school level are attached as *Exhibit 29*, the Core Content Guides for Language Arts and Reading at the middle school level are attached as *Exhibit 30*, and the Core Content Guides for Mathematics at the high school level are attached as *Exhibit 31*.

H. Progression, Promotion and Grading

45. JCPS has prepared three Student Progression, Promotion and Grading ("SPPG") handbooks, one each for elementary schools, middle schools and high schools. The SPPG handbooks state the criteria for grading, progression and promotion within JCPS as reflected in KERA. The appropriate SPPG handbook is distributed by JCPS to each school in the District, for use by all teachers in the school. As an example, a copy of the current SPPG handbook for elementary schools is attached as *Exhibit 32*.

I. Student Achievement

46. The CATS assessment program developed by KDE includes the Kentucky Core Content Test (the "KCCT"), the Comprehensive Test of Basic Skills ("CTBS"), writing portfolios and writing on-demand prompts, and alternate portfolios for students with severe or profound disabilities. The CATS assessment program also includes a Nonacademic Index which measures attendance and retention at the elementary school level; attendance, retention and dropout rates at the middle school level; and attendance, retention, dropout rates and successful transition to adult life at the high school level. *See* copy of a summary of the CATS assessment program published on KDE's website, attached as *Exhibit 33*.

47. Public school students in Kentucky take the KCCT in the spring of each year, at the end of the fourth, fifth, seventh, eighth, tenth and eleventh grades. Reading is tested during the fourth, seventh and tenth grades. Writing is tested during

the fourth, seventh and twelfth grades. Science is tested during the fourth, seventh and eleventh grades. Mathematics, social studies and arts & humanities are tested during the fifth, eighth and eleventh grades. Practical Living/Vocational Studies is tested during the fifth and eighth grades. *See* Exhibit 33.

48. Public school students in Kentucky take the CTBS in the spring of each year, at the end of the Primary 4 (third grade), sixth and ninth grade levels. The CTBS is a national norm referenced test, which allows comparison between the performance of Kentucky students and students in other states. *See* Exhibit 33.

49. The results of the KCCT academic index and the CATS accountability score from 1999 to 2003 for each JCPS school are listed in the attached *Exhibit 34*. The scores reported for each school include the scores of students in self-contained special education units in the school. The scores reported for each school may include the scores of some students not enrolled in the school. Under KDE regulations, the score of a student attending an alternative school or special education center is reported under the name of either (a) the last school attended by that student before his or her assignment to the alternative school or special education center, or (b) the student's resides school.

50. The results of the CTBS total battery from 1997 to 2003 for each JCPS school are listed in the attached *Exhibit 35*. The scores reported for each school include the scores of students in self-contained special education units in the school. The scores reported for each school may include the scores of some students not enrolled in the school. Under KDE regulations, the score of a student attending an alternative school or special education center is reported under the name of either (a) the last school attended by that student before his or her assignment to the alternative school or special education center, or (b) the student's resides school.

51. The scores of each JCPS elementary, middle and high school, excluding alternative schools and special education centers, for attendance, retention and dropout rates from 1999 through 2002 are listed in the attached *Exhibit 36*. The 2002 scores of each JCPS high school for successful transition to adult life are listed in the attached *Exhibit 37*. The scores reported for each high school on Exhibit 37 include the scores of students in self-contained special education units in the school. The scores reported for each high school on Exhibit 37 may include the scores of some students who did not graduate from the school. Under KDE regulations, the score of a student graduating from an alternative school or special education center is reported on Exhibit 37 under the name of either (a) the last school attended by that student before his or her assignment to the alternative school or special education center, or (b) the student's resides school.

52. Under KERA and regulations adopted by the KDE, each school in Kentucky has a CATS assessment baseline, a two-year CATS goal, an accountability index, a combined growth index, and a classification based on the school's progress in meeting its current two-year CATS goal. *See* pages 1 and 2 of Exhibit 11 for the definitions of these terms. *See* the applicable pages of Exhibit 11 for data concerning each JCPS school's progress in meeting its current two-year CATS goal.

53. KRS 158.649, which is part of KERA, defines the term "achievement gap" as a substantive performance difference on CATS assessments between groups of students, including male and female students, students with and without disabilities, students with and without English proficiency, minority and nonminority students, and students who are and are not eligible for FRL. KRS 158.649 provides that local boards of education and SBDM councils shall identify achievement gaps and set biennial targets for eliminating them. A copy of KRS 158.649 is attached as *Exhibit 38*.

54. JCPS has identified achievement gaps under KRS 158.649, including an achievement gap at some JCPS schools between Black and Other students, and between FRL students and non-FRL students. A copy of a JCPS report which contains data regarding achievement gaps between Black and Other students, and between FRL students and non-FRL students, at JCPS schools (excluding alternative schools, special education centers and students in self-contained special education units) on the 2003 CATS assessments is attached as *Exhibit 39*.

J. Discipline; Suspensions

55. KRS 158.148(4), which is part of KERA, provides that each local board of education shall formulate a code of acceptable behavior and discipline to apply to the students in each school operated by the board. A copy of KRS 158.148(4) is attached as *Exhibit 40*.

56. To implement KRS 158.148 (4) within JCPS, the Board has adopted a Code of Acceptable Behavior and Discipline (the "Code") which applies to all JCPS schools and students. The Code is distributed to each student in JCPS. A copy of the Code is attached as *Exhibit 41*.

57. The responsibility for implementing the Code within each school, as well as the responsibility for determining disciplinary and classroom management techniques as part of a school safety plan, is assigned by KERA to each school's SBDM council. *See* KRS 160.345 (2)(i)(7).

58. The disciplinary authority assigned to SBDM councils includes the authority to require students to comply with a restrictive dress code or wear uniforms. For the 2003-2004 school year, students are required to comply with a restrictive dress code at five of the 20 JCPS high schools, two of the 23 JCPS middle schools and nine of the 87 JCPS elementary schools. For the 2003-2004 school year, students are required to wear uniforms at nine of the 20 JCPS high schools, 20 of

the 23 JCPS middle schools and 62 of the 87 JCPS elementary schools. Brown does not require a restrictive dress code or uniforms. A chart which lists the dress code or uniform requirements at each JCPS elementary, middle and high school is attached as *Exhibit 42*.

59. The Board has adopted a Student Bill of Rights, which defines the rights and responsibilities of JCPS students. The Student Bill of Rights is included in Exhibit 41.

60. Exhibit 11 contains data about attendance, absences, suspensions and mobility at each JCPS school.

K. Student Assignment

61. Each JCPS school, except for 13 elementary, middle and high schools, and the Brown, which have been designated by the Board as magnet schools, has a designated geographic attendance area, which is called the "resides area" of the school. Each such school is the "resides school" for those students whose parent's or guardian's residence address is within the school's geographic attendance area.

62. JCPS elementary schools, with the exception of the five elementary magnet schools, and the Brown elementary school, are grouped into 12 elementary school clusters. All of the elementary schools that are in the elementary school cluster that includes a student's resides school are "cluster resides schools" for that student. Each elementary school cluster is named after one or two of the schools within the cluster, which is called the "head of cluster" school. For example, King Elementary School is the head of cluster school for the King Cluster. *See* pages 11 to 22 of Exhibit 6 for descriptions of the 12 elementary school clusters. Copies of 12 maps which show the locations of the schools within each of the elementary school clusters are attached as *Exhibit 43*.

63. There are no selection criteria for admission of an elementary school student into an elementary school in his or her elementary school cluster, other than age and residence in the geographic attendance area of one of the schools in the cluster. There are no selection criteria for admission of a middle school student into his or her resides middle school, other than graduation from an elementary school and residence in the resides middle school's geographic attendance area. There are no selection criteria for admission of a high school student into his or her resides high school, other than graduation from a middle school and residence in the resides high school's geographic attendance area.

64. Beginning in February of each year, the parents of students who will enter Primary 1 (kindergarten) in the Fall, the parents of students who will enter Primary 2 (first grade) in the Fall, and the parents of elementary students who are new to the District, are asked to submit an application in which they can indicate a first choice and a second choice among the student's cluster resides schools. The deadline for elementary school cluster applications is March 1. A copy of the elementary school application form, which includes the elementary school cluster application, is attached as *Exhibit 44*.

65. The elementary school cluster applications described in paragraph 64 are processed and assignment decisions are made by the District's Director of Elementary Student Assignment and the principals of the schools within each cluster. Assignment decisions are also made for students who failed to submit an elementary school cluster application. Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District's current student assignment plan. Typically, parents are notified of their child's school assignment for the next school year by May 1.

66. Parents and students can make the choice to submit an application for admission to an elementary school other than one of the student's cluster resides schools, and to a middle or high school other than the student's resides school. The applications that can be submitted are: an application for admission to a magnet school; an application for admission to a school other than the student's resides school that offers magnet programs or optional programs; and a high school open enrollment application. With the exception of high school open enrollment applications, these applications can be submitted by students in any grade from Primary 1 (kindergarten) through twelfth grade. A high school open enrollment application can only be submitted for ninth grade admission.

67. Parents and students can also make the choice not to submit any of the applications described in paragraph 66. In that case, if the student is an elementary school student, he or she will be assigned to one of his or her cluster resides schools, under the application process described in paragraphs 64 and 65. If the student is a middle or high school student, he or she will be assigned to attend his or her resides school. *See* pages 5-7 of Exhibit 12, page 4 of Exhibit 13 and page 5 of Exhibit 14 for data regarding the number of the resides students at each JCPS school who attend that school and the number who attend other JCPS schools. A student who is assigned to his or her resides school because the student did not submit one of the applications described in paragraph 66 will not be enrolled in any magnet or optional programs offered at that school.

68. The District's magnet schools, magnet programs, optional programs and high school open enrollment are described in detail in a booklet which is attached as *Exhibit 45*. JCPS prints this booklet each year and distributes it to all eighth graders, to elementary counselors for use with parents of fifth graders, and in packets for newcomers to the District.

69. Magnet schools feature unique, school-wide curricula that are determined by the Board when a school is designated as a magnet school. Students are admitted to magnet schools only by application. Therefore, a magnet school is not a resides school for any student. The Board has designated four high schools, three middle schools and five elementary schools, and the Brown, as magnet schools. *See* pages 23-24, 25 and 31-32 of Exhibit 6. A map which shows the locations of the magnet schools is attached as *Exhibit 46*.

70. Magnet programs are specialized programs placed within a resides school by the Board. Students are admitted to magnet programs only by application. The Board has created magnet programs (other than the magnet programs at the magnet career academies, described below) at four resides high schools, six resides middle schools and eight resides elementary schools. *See* pages 23-24, 25 and 31 of Exhibit 6. Typically, the majority of students enrolled in a high school or middle school with a magnet program are students who reside within the school's designated geographic attendance area. Typically, the majority of students enrolled in an elementary school with a magnet program are students who reside within the geographic attendance area of one of the schools in that school's cluster.

71. Magnet career academies are high schools which contain magnet programs in which students can focus on a specific technical career while still being prepared to pursue a post-secondary education in a college, university or technical school. Students are admitted to the magnet program at a magnet career academy only by application. The Board has designated 13 resides high schools, plus Central High School ("Central"), as magnet career academies. *See* page 32 of Exhibit 6. Typically, except in the case of Central, the majority of students enrolled in a magnet career academy are students from the school's designated geographic attendance area. Because Central is a magnet high school which does

not have a designated geographic attendance area, students are admitted to Central only by application.

72. Optional programs are small, specialized programs with unique characteristics, developed by local school staffs and approved by the Board. Students are admitted to an optional program only by application. The Board has created optional programs at 13 resides high schools, five resides middle schools and two resides elementary schools. *See* pages 23-24, 25 and 32 of Exhibit 6. Typically, the majority of students enrolled in a high school or middle school with an optional program are students from the school's designated geographic attendance area. Typically, the majority of students enrolled in an elementary school with an optional program are students who reside within the geographic attendance area of one of the schools in that school's cluster.

73. JCPS offers open enrollment to all incoming ninth graders who wish to apply to any high school other than their resides school, except the five magnet high schools (Brown, Central, Manual, Butler and Louisville Male High School ("Male")). *See* page 32 of Exhibit 6. The applicant must agree to a four-year placement at the school. When a student is enrolled in a high school under ninth grade open enrollment, that high school is thereafter considered to be the student's resides school.

74. The process for submitting the applications described in paragraph 66 begins in October of each year. During October, the Board hosts the "Showcase of Schools" at the Kentucky International Convention Center or similar location to give parents and students an opportunity to learn more about JCPS and the programs that are available in JCPS schools. *See* copy of news story from the JCPS publication Parent Connection attached as *Exhibit 47*.

75. Middle and high school students who wish to submit one of the applications described in paragraph 66 can begin

applying for their first and second choice schools in November. A copy of the middle and high school application form is attached as *Exhibit 48*. The deadline for middle and high school applications is mid-January.

76. When the elementary school cluster applications described in paragraph 64 are submitted, elementary school students can also use the elementary school application form (Exhibit 44) to request assignment to an elementary magnet school, or to a school other than the student's resides school that offers a magnet program or an optional program. Unlike the elementary school cluster applications described in paragraph 64, which are submitted by students who are entering Primary 1 (kindergarten) and Primary 2 (first grade), applications for admission to an elementary magnet school, magnet program or optional program can be submitted by students at any grade level within elementary school.

77. After all applications described in paragraph 75 and 76 have been submitted, the applications are processed by the District's Optional, Magnet and Advance Program Office and assignment decisions are made by school principals. Decisions to admit or not admit a student to a magnet school or magnet or optional program are based upon the following: (1) any objective criteria established by the school or program, such as a survey and/or essay, recommendations by adults, a work sample or audition, attendance data, course grades, and CATS and/or standardized test scores; (2) available space in the school or program; (3) for students applying to Brown, a middle school MST program, or one of the Traditional Program magnet schools listed in paragraph 96, position on a computer-generated random draw list, (4) for students applying to Brown, residence within a ZIP code that will make the student body representative of the entire county; and (5) for students in grades other than Primary 1 (kindergarten) and for schools other than Brandeis Elementary School, Brown, Central and Manual, the racial guidelines

in the District's current student assignment plan. Typically, parents are notified of their child's school assignment for the next school year by May 1.

78. After school assignments have been made as described in paragraphs 64 through 77, students may apply for a transfer to a school other than their assigned school, except a magnet school, a magnet program or an optional program. Transfer applications can be submitted for any valid reason, including day care arrangements, medical criteria, family hardship, student adjustment problems, and program offerings. Transfer applications can be denied because of lack of available space or, for students in grades other than Primary 1 (kindergarten), the racial guidelines in the District's current student assignment plan. A copy of the transfer application form, which includes the District's policies regarding transfer applications, is attached as *Exhibit 49*.

80. During the application process for the 2003-2004 school year, JCPS received applications for admission to a magnet school, magnet program or optional program (not including open enrollment applications and transfer applications) as follows: 3,662 applications for admission to a high school; 2,925 applications for admission to middle school; and 2,687 applications for admission to an elementary school. *See* copy of JCPS report attached as *Exhibit 50*.

81. During the application process for the 2003-2004 school year, JCPS received 1,208 applications for admission to a high school other than the student's resides school under ninth grade open enrollment. *See* copy of JCPS report attached as *Exhibit 51*.

82. During the application process for the 2002-2003 school year, and throughout the remainder of that school year, JCPS received 3,284 applications for transfer to another elementary school, 1,423 applications for transfer to another

middle school, and 1,478 applications for transfer to another high school. *See* copy of JCPS report attached as *Exhibit 52*.

82. Of the 3,662 high school students who submitted magnet or option applications (not including open enrollment applications and transfer applications) for admission to a high school, 1,792 students were accepted by their first choice school and 254 students were accepted by their second choice school. *See* Exhibit 50.

83. Of the 2,925 middle school students who submitted magnet or option applications (not including transfer applications) for admission to a middle school, 1,418 students were accepted by their first choice school and 125 students were accepted by their second choice school. *See* Exhibit 50.

84. Of the 2,687 elementary school students who submitted magnet or option applications (not including transfer applications) for admission to an elementary school, 942 students were accepted by their first choice school and 57 students were accepted by their second choice school. *See* Exhibit 50.

85. Of the 1,208 students who submitted ninth grade open enrollment applications, 335 students were accepted by the school to which they applied. *See* Exhibit 51.

86. Of the 3,284 elementary school students who submitted transfer applications during the 2002-2003 school year, 2,447 students were granted a transfer. The total number of elementary school students attending a school other than their resides school on a transfer as of December 2, 2002, including students who had been granted a transfer in previous years, was 4,033 students. *See* Exhibit 52.

87. Of the 1,423 middle school students who submitted transfer applications during the 2002-2003 school year, 776 students were granted a transfer. The total number of middle school students attending a school other than their resides

school on a transfer as of December 2, 2002, including students who had been granted a transfer in previous years, was 976 students. *See* Exhibit 52.

88. Of the 1,478 high school students who submitted transfer applications during the 2002-2003 school year, 838 students were granted a transfer. The total number of high school students attending a school other than their resides school on a transfer as of December 2, 2002, including students who had been granted a transfer in previous years, was 1,419 students. *See* Exhibit 52.

89. For the 2002-2003 school year, there were 12,313 high school students who were assigned to their resides high school; 14,612 middle school students who were assigned to their resides middle school; and 24,205 elementary school students who were assigned to their resides elementary school. *See* copy of JCPS report attached as *Exhibit 53.*

90. The application process described in paragraphs 64 to 65 and 75 to 76 does not apply to the alternative schools and special education centers described in paragraph 16, or to self-contained special education units. Generally, students are assigned or referred to those schools or units on an individual basis because of their educational needs, behavior or personal circumstances. For the 2003-2004 school year, about 2,100 students are enrolled in the alternative schools and about 1,000 students are enrolled in special education centers and self-contained special education units.

91. A student who is accepted into a JCPS school, either because it is his or her resides school or because he or she submitted one of the applications described in paragraph 66 which was granted, or a transfer application described in paragraph 78 which was granted, will be enrolled in that school when the school year begins. Upon successful completion of the academic program for that school year and subsequent years, the student will be promoted to the next

grade in the same school for the following school year, without the need to submit any subsequent applications to attend that school, until the student graduates from the school.

92. A student can be involuntarily exited from his or her resides middle or high school for certain violations of the Code. A student who is exited from his or her resides middle or high school will be assigned to one of the alternative schools described in paragraph 16. Depending on the severity of the violation, a student who is exited from his or her resides middle or high school may not be permitted to return to the resides middle or high school.

93. A student who attends a school other than his or her resides school can be involuntarily exited from that school, in certain circumstances. A student who attends a magnet school, a magnet program or an optional program can be exited from the school or program for academic, behavior or attendance problems. A student who attends a school other than his or her resides school on a transfer application can be exited for academic, behavior or attendance problems or if there is a change in the circumstances on which the transfer was based. A student who is exited from a magnet school, magnet program, optional program or transfer school will be assigned to his or her resides school.

L. Traditional Program and Traditional Schools

JCPS adopted a program known as the Traditional Program beginning with the 1976-1977 school year. The Traditional Program is summarized in Exhibit 45 as follows:

The Traditional Program emphasizes the following:

- Basic skills in a highly structured educational environment
- Discipline and dress codes
- Learning with daily follow-up assignments

- Concepts of courtesy, patriotism, morality, and respect for others.

The key to successful students is parents. Within the Traditional Program, parents are expected to monitor their children's school work and to support academic and extracurricular activities. Traditional school PTA membership is always high, and all parents are encouraged to be involved.

See pages 8, 14 and 35 of Exhibit 45.

95. The current guidelines for the Traditional Program were adopted by the Board on January 26, 1998. A copy of the current Traditional Program Guidelines is attached as *Exhibit 54*.

96. The Traditional Program is offered at four magnet elementary schools, three magnet middle schools and two magnet high schools. These schools admit students only by application. These schools do not accept students based on transfer applications or high school open enrollment applications. Transportation is provided to all students who are accepted. The magnet schools which offer the Traditional Program, and the dates when each school first offered the Traditional Program, are:

Audubon Traditional Elementary School (1976)
Carter Traditional Elementary School (1977)
Greathouse/Shryock Traditional Elementary School (1978)
Schaffner Traditional Elementary School (1992)

Barrett Traditional Middle School (1986)
Jefferson County Traditional Middle School (1976)
Johnson Traditional Middle School (1992)
Butler Traditional High School (1988)
Louisville Male High School (1977)

See pages 8, 14 and 35 of Exhibit 45.

97. The nine Traditional Program magnet schools listed in paragraph 96 use a random-draw process to admit students. There are no selection criteria for admission into any of these schools, other than age, residence in Jefferson County and position on the random draw lists. For purposes of applications to the magnet elementary Traditional Program schools, the county is divided into four geographic zones. Elementary school students whose residence is within each zone and who are accepted into the Traditional Program will be assigned to attend the magnet elementary Traditional Program school located within that zone. For purposes of applications to the magnet middle Traditional Program schools, the county is divided into three geographic zones. Elementary school graduates whose residence is within each zone and who are accepted into the Traditional Program will be assigned to attend the magnet middle Traditional Program school located within that zone.

98. The Traditional Program is also offered to elementary school students at Foster Traditional Academy ("Foster") and Maupin. Foster and Maupin are resides schools, and the Traditional Program is offered at these schools as a magnet program. Foster first offered the Traditional magnet program in 1992, and Maupin first offered the Traditional magnet program in 1992. At Foster, the Traditional magnet program is operated as a "school within the school." For the 2003-2004 school year, 286 of the 560 students at Foster are enrolled in the Traditional magnet program. At Maupin, all students receive instruction based on the Traditional Program Guidelines. Students can be admitted into the school at either Foster or Maupin because they reside within the designated geographic attendance area of the school; because they reside within the geographic attendance area of another school in the Foster Cluster or the Maupin Cluster but they submit an elementary school cluster application to attend Foster or Maupin which is granted; because they submit an application to the Traditional magnet program at one of these schools

which is granted; or because they submit a transfer application to one of these schools which is granted. Transportation is provided to all students who are accepted into Foster and Maupin, except students who are accepted on a transfer from a school outside the Foster Cluster or the Maupin Cluster. *See* pages 14 and 17 of Exhibit 6.

99. When the four magnet elementary schools listed in paragraph 96 which offer the Traditional Program have accepted all applicants for which they have available space, Foster and Maupin send letters to the parents of Other student applicants who were not admitted to these schools, offering them the opportunity to apply to the Traditional magnet program at Foster or Maupin. Exhibit 1 is an example of this letter. The purpose of this practice is to provide an alternative to Other students who are not accepted into one of the four magnet elementary schools which offer the Traditional Program, and to help desegregate Foster and Maupin.

100. In addition to the nine magnet schools listed in paragraph 96, and Foster and Maupin, at which the Traditional Program is offered, there are eight resides schools which provide instruction to all students in the school in a traditional or structured environment, with an emphasis on traditional discipline and dress codes or uniforms, regularly assigned homework, and a stress on concepts of patriotism, morality, respect for others and personal integrity. The decision to provide instruction in a traditional or structured environment at each of these schools, and the particular characteristics of that environment at that school, was made by each school's SBDM council, and was approved by the Board. The instructional program and environment in these schools is governed by each school's individual guidelines, instead of the Traditional Program Guidelines described in paragraph 95. As an example, a copy of the guidelines for the traditional instructional program that was submitted to the Board and approved for Wilkerson Traditional Elementary School is attached as

Exhibit 55. These schools, and the dates when each school first included "Traditional" in its name, are:

Smyrna Traditional Elementary School (2002)
Wilkerson Traditional Elementary School (2002)

Moore Traditional Middle School (1998)
Westport Traditional Middle School and
Fine Arts Academy (1999)

Fern Creek Traditional High School (1997)
Moore Traditional High School (1997)
Valley Traditional High School (2000)
Waggener Traditional High School (1994)

See pages 15, 21, 28, 29, 34, 35, 36 and 37 of Exhibit 6 for a description of these schools and their programs.

101. Because the eight schools listed in paragraph 100 are resides schools, students can be admitted into one of those schools by their residence within the school's geographic attendance area, or in the case of one of the elementary schools by the application process described in paragraphs 64 and 65 if their residence is within the geographic attendance area of another school in the same cluster. Students can be admitted into one of the middle and high schools listed in paragraph 100 by acceptance of an application for admission into a magnet or optional program offered at the school, as described in paragraph 75, or in the case of one of the high schools by acceptance of a ninth grade open enrollment application, as described in paragraph 73. Students can be admitted into any of the eight schools listed in paragraph 100 by acceptance of a transfer application, as described in paragraph 78. Most of the students enrolled in the eight schools listed in paragraph 100 are admitted as resides students or cluster resides students. *See* copy of JCPS report attached as *Exhibit 56.*

M. Traditional Program "Pipeline"

102. Students who are enrolled in one of the nine magnet schools listed in paragraph 96 are coded as "traditional" students on their Integrated Student Record. Students who are accepted into the Traditional magnet program at Foster and Maupin are also coded as "traditional" students. Students who are enrolled at Foster or Maupin because it is their resides school, or because their resides school is in the Foster or Maupin cluster, or because they submitted a transfer application which was granted, are not automatically coded as "traditional" students, but they are so coded if they submit an application for admission into the Traditional Program which is granted. Students who are enrolled in the eight resides schools listed in paragraph 101 are not coded as "traditional" students.

103. The beginning grade level in the Traditional Program is grade Primary 1 (kindergarten). At this grade level, the four magnet elementary Traditional Program schools listed in paragraph 97 have 360 students (96 at each school, except 72 at Schaffner) who are coded as "traditional" students. In addition, a small number of kindergarten students at Foster and Maupin are accepted into the Traditional Program and are coded as "traditional" students. These students form the first stage of what is sometimes called the Traditional Program "pipeline."

104. The Traditional Program "pipeline" increases by 24 students at the Primary 2 (first grade) level, because Schaffner adds one first grade classroom. In addition, more students at Foster and Maupin may have been accepted into the Traditional Program during their first grade year.

105. The Traditional Program "pipeline" increases by 64 students at the fourth grade level, and by 16 students at the fifth grade level, because the pupil:teacher ratio ("PTR") increases from 24:1 to 28:1 at fourth grade, and from 28:1 to

29:1 at fifth grade. In addition, more students at Foster and Maupin may have been accepted into the Traditional Program during their second, third and fourth grade years.

106. The Traditional Program "pipeline" increases by about 450 students at the sixth grade level, even though the PTR at sixth grade remains at 29:1, because middle schools are larger than elementary schools and can accommodate more classrooms. The Traditional Program "pipeline" increases by 60 students at the seventh grade level, because the PTR increases from 29:1 to 31:1.

Paragraph 106 is agreed to by counsel for Plaintiffs subject to adding the following language to the paragraph: "Still determined by racial guidelines."

107. The two magnet high Traditional Program schools have available space for 946 ninth grade students, 446 at Butler and 500 at Male.

108. All students who complete kindergarten at one of the four magnet elementary Traditional Program schools listed in paragraph 96, and the Foster or Maupin Traditional magnet program, will progress to first grade at the same school without submitting an application, and will continue to progress through the remaining grades at that school, unless they are involuntarily exited from the Traditional Program or they choose to attend another school. Graduates of any other kindergarten may apply for admission to the first grade or subsequent grade at one of the four magnet elementary Traditional Program schools, or the Foster or Maupin Traditional magnet program, and their applications will be considered to the extent space is available after the admission of the "pipeline" students.

109. All students who graduate from one of the four magnet elementary Traditional Program schools, and students who graduate from Foster or Maupin and are coded "traditional," will be admitted without submitting an application to

the sixth grade at one of the three magnet middle Traditional Program schools listed in paragraph 96 and will progress through the remaining grades at that school, unless they are involuntarily exited from the Traditional Program or they choose to attend another school. Graduates of any other elementary school may apply for admission to the sixth grade or subsequent grade at one of the three magnet middle Traditional Program schools, and their applications will be considered to the extent space is available after the admission of the "pipeline" students.

110. The three magnet middle Traditional Program schools graduate a total of about 800 students. These students can state a preference to attend either Butler or Male. Graduates of any other middle school who wish to attend a magnet high Traditional Program school can apply to attend either Butler or Male. All students who graduate from one of the three magnet middle Traditional Program schools, and who wish to attend a magnet high Traditional Program school, typically will be admitted to either Butler or Male. Butler typically has about 200 openings for students who did not graduate from one of the three magnet middle Traditional Program schools. Male typically does not have any openings for those students.

Paragraph 110 is agreed to by counsel for Plaintiffs subject to adding the following language to the paragraph: "Still determined by racial guidelines."

N. Transportation

111. JCPS provides transportation for students who wish to receive transportation and live more than one mile from their assigned school, students who reside less than one mile from their assigned school but would encounter unsafe walking conditions such as railroad tracks or major highways, and students with disabilities whose Individual Education Plan requires transportation. This policy is subject to certain exceptions in cases when the student's assigned school is not

his or her resides school, as follows: At schools with optional programs, transportation is provided only to students who live in the school's designated geographic attendance area. Transportation is provided to students who attend a high school under an open enrollment application, if the student qualifies for FRL. Transportation may or may not be provided to students who attend an elementary, middle or high school under a transfer application, depending on availability. Transportation is not provided to any students at Brown, except ECE students. For the 2002-2003 school year, JCPS provided transportation to 58,053 students as outlined in paragraphs 112 to 119 below.

112. For the 2002-2003 school year, JCPS provided transportation to 4,194 students who attended the preschool programs described in paragraph 10. *See* copy of JCPS report attached as *Exhibit 57.*

113. For the 2002-2003 school year, JCPS provided transportation to 10,918 students who attended their resides elementary school, 10,068 students who attended their resides middle school, and 6,715 students who attended their resides high school. *See* copy of JCPS report attached as *Exhibit 58.*

114. For the 2002-2003 school year, JCPS provided transportation to 7,733 students who attended an elementary school other than their resides school, but within their resides cluster. *See* copy of JCPS report attached as *Exhibit 59.*

115. For the 2002-2003 school year, JCPS provided transportation to 1,919 students who attended a magnet elementary school, 2,078 students who attended a magnet middle school, and 3,423 students who attended a magnet high school. *See* copy of JCPS report attached as *Exhibit 60.*

116. For the 2002-2003 school year, JCPS provided transportation to 2,531 students who attended magnet programs (including magnet career academies) at a high school other than their resides school, 1,875 students who attended magnet

programs at a middle school other than their resides school, and 750 students who attended magnet programs at an elementary school other than their resides school. *See* copy of JCPS report attached as *Exhibit 61*.

117. For the 2002-2003 school year, JCPS provided transportation to 583 students who attended a high school other than their resides school under the high school open enrollment program. *See* copy of JCPS report attached as *Exhibit 62*.

118. For the 2002-2003 school year, JCPS provided transportation to 2,547 students who attended the alternative schools and special education centers described in paragraph 16. *See* copy of JCPS report attached as *Exhibit 63*.

119. For the 2002-2003 school year, JCPS provided transportation to 2,719 students who attended a school other than their resides school under a transfer application. *See* copy of JCPS report attached as *Exhibit 64*.

O. Annual Progress Report

JCPS publishes and distributes to parents and the community an annual progress report, which contains information about activities of the District within the school year. A copy of the 2002-2003 annual progress report is attached as *Exhibit 65*.

IV. PREVIOUS DESEGREGATION LITIGATION

In 1973, two lawsuits were filed against the Board and the former Louisville Board of Education in this Court alleging that the defendants maintained segregated school systems, and requesting this Court to order the defendants to desegregate the Jefferson County and Louisville schools. The lawsuits were consolidated into *Newburg Area Council, Inc., et al. v. Board of Education of Jefferson County, et al.*, Nos. 7045 and 7291, which later was styled *John E. Haycraft, et al. v. Board of Education of Jefferson County, et al.*, Nos.

7045 and 7291, assigned to Judge James F. Gordon (the "*Haycraft* Litigation").

122. On December 28, 1973, on appeal from Judge Gordon's dismissal of both lawsuits, the U.S. Court of Appeals for the Sixth Circuit issued an order which directed this Court to eliminate all vestiges of state-imposed segregation in the Jefferson County and Louisville schools, by whatever means this Court deemed appropriate, without regard to school district lines. *Newburg Area Council, Inc. v. Board of Education of Jefferson County*, 489 F.2d 925, 932 (6th Cir. 1973).

123. On July 30, 1975, Judge Gordon entered a Judgment and related Findings of Fact and Conclusions of Law in the *Haycraft* Litigation, which adopted, and ordered the Board to implement, a plan to desegregate the Jefferson County Public Schools. A copy of the Judgment and the Findings of Fact and Conclusions of Law is attached as *Exhibit 66*.

124. On June 15, 1978, Judge Gordon entered a Memorandum Opinion and Order and a Final Judgment in the *Haycraft* Litigation, which ruled that the Jefferson County Public Schools had become a "unitary" school system, and that the *Haycraft* Litigation was stricken from this Court's active docket for all purposes. A copy of the Memorandum Opinion and Order and the Final Judgment is attached as *Exhibit 67*.

125. On November 16, 1978, the U.S. Court of Appeals for the Sixth Circuit issued an order reversing this Court's May 10, 1977 order which had exempted first graders from the cross-district transportation plan. On May 3, 1979, Judge Gordon entered an Order regarding the assignment of first graders. In the May 3, 1979 Order, Judge Gordon ruled that he would retain jurisdiction of the *Haycraft* Litigation to monitor compliance with the Order until the end of the 1979-1980 school year. A copy of the May 3, 1979 Order is attached as *Exhibit 68*.

126. On December 4, 1981, Judge Gordon entered an Order in the *Haycraft* Litigation, stating that the *Haycraft* Litigation was stricken from the active docket for all purposes on all issues. A copy of the December 4, 1981 Order is attached as *Exhibit 69*.

127. In 1985, after the Board had adopted the voluntary student assignment plan described in paragraph 131 of this Stipulation, certain plaintiffs in the *Haycraft* Litigation filed a motion in this Court to restore the case to the active docket for purposes of modification of this Court's July 30, 1975 Judgment, to add an additional party plaintiff, and to designate a class representative. On September 24, 1985, Judge Ballantine entered a Memorandum Opinion and an Order denying the motion. A copy of the Memorandum Opinion and the Order is attached as *Exhibit 70*.

128. In April 1998, a lawsuit was filed in this Court against the Board and the Superintendent by the parents of students who alleged that they had been denied admission to Central High School because of their race. *Hampton v. Jefferson County Board of Education*, No. 3:98CV-262-H (the "*Hampton* Litigation"). The *Hampton* Litigation was assigned to Judge John G. Heyburn, II.

129. In June 1999, Judge Heyburn issued an opinion concluding that the original desegregation decree issued by Judge Gordon in the *Haycraft* Litigation in 1975 was still in effect, and inviting any party to move to dissolve that decree if it chose to do so. *Hampton v. Jefferson County Board of Education*, 72 F.Supp.2d 753 (W.D. Ky. 1999). The plaintiffs in the Hampton Litigation filed such a motion.

130. In June 2000, Judge Heyburn issued an opinion which dissolved the 1975 desegregation decree; ordered JCPS to admit to Central High School any African-American students denied enrollment on account of their race for the 2000-2001 school year; and ordered JCPS to complete any reevaluation

and redesign of the admissions procedures in other magnet schools before the beginning of the 2002-2003 school year. *Hampton v. Jefferson County Board of Education*, 102 F.Supp.2d 358 (W.D. Ky. 2000).

V. STUDENT ASSIGNMENT PLANS

131. In April 1984, the Board approved and adopted a student assignment plan for JCPS effective for the 1984-85 school year (the "1984 Plan"). The 1984 Plan was the first significant modification by the Board to the desegregation plan ordered by Judge Gordon in the Haycraft Litigation. A copy of the 1984 Plan, including the Board's findings, is attached as *Exhibit 71*.

132. In December 1991, in the wake of passage of KERA, the Board approved and adopted a revised student assignment plan effective for the 1992-93 school year (the "1991 Plan"). A copy of the 1991 Plan, including the Board's findings, is attached as *Exhibit 72*.

133. In August 1996, based upon the input received from a consultant, JCPS committees and a public opinion survey, the Board approved and adopted a revised student assignment plan effective for the 1996-1997 school year (the "1996 Plan"). A copy of the 1996 Plan, including the Board's findings, is attached as *Exhibit 73*.

134. In April 2001, in response to Judge Heyburn's June 2000 ruling in the Hampton Litigation, and after considering the results of a public opinion survey, public forums and other community input, the Board approved and adopted a revised student assignment plan effective for the 2001-2002 school year (the "2001 Plan"). A copy of the 2001 Plan, including the Board's findings, is attached as *Exhibit 74*.

135. A copy of the summary of the results of the public opinion survey described in paragraph 134 is attached as *Exhibit 75*.

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JEFFERSON COUNTY PUBLIC SCHOOLS

Louisville, Kentucky

Elementary Schools

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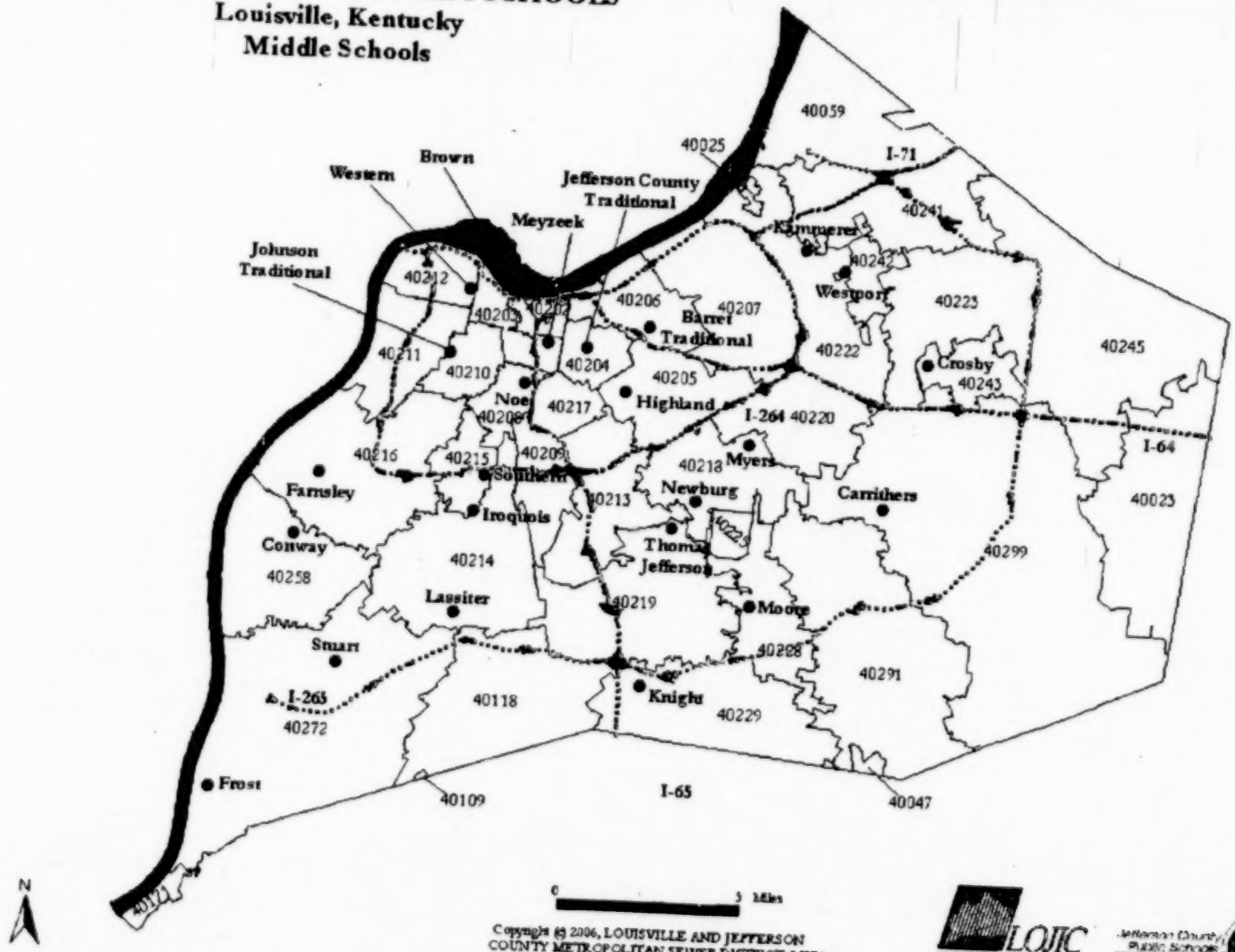
Shaping the Future

Accountability, Research & Planning
RJR, gmd 12/1/2003

JEFFERSON COUNTY PUBLIC SCHOOLS
Louisville, Kentucky
Middle Schools



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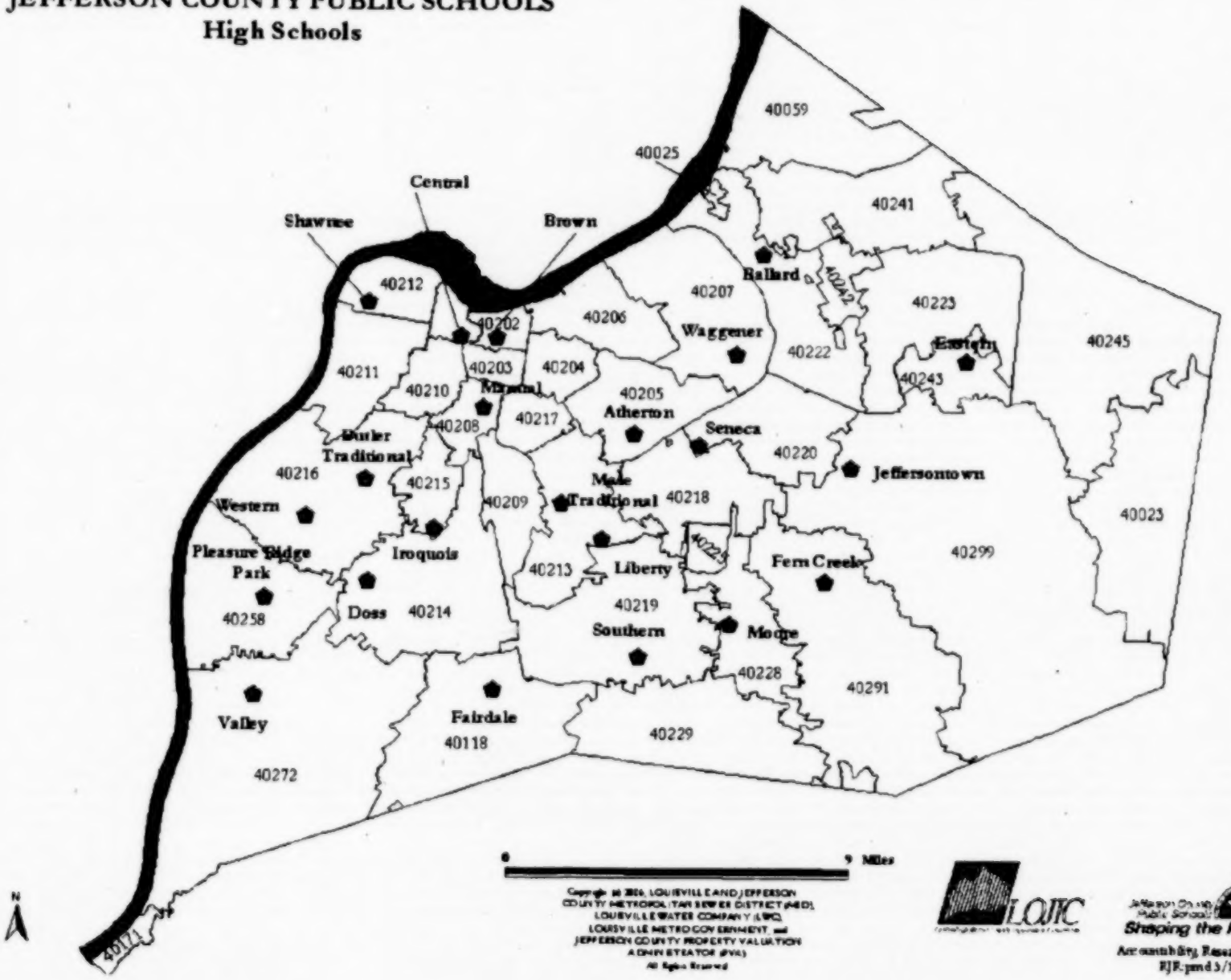
Shaping the Future
Accountability, Research & Planning
RJF jmd 5/2/2002

JEFFERSON COUNTY PUBLIC SCHOOLS
High Schools



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JEFFERSON COUNTY PUBLIC SCHOOLS
COMPREHENSIVE TEST OF BASIC SKILLS (CTBS/5)
ACHIEVEMENT GAP
Mean Normal Curve Equivalent (NCE)
SPRING 2002
Elementary Schools

	Reading		Language		Mathematics		Total Battery	
SCHOOL	White	African-American	White	African-American	White	African-American	White	African-American
Atkinson	37.7	31.4	37.3	32.4	37.2	31.8	36.3	30.8
Auburndale	51.8	52.2	53.4	48.5	55.4	48.7	54.2	49.8
Audubon Traditional	63.7	54.4	67.4	58.2	68.4	53.1	68.4	55.8
Bates	52.3	46.2	51.6	[illegible]	53.8	44.0	53.2	45.8
Blake	41.8	36.7	42.6	[illegible]8	42.7	35.4	42.1	34.5
Bloom	68.6	44.2	71.4	44.3	69.8	48.4	73.2	45.6
Blue Lick	43.1	29.3	42.7	30.7	43.8	32.5	43.2	28.7
Bowen	64.2	42.6	64.1	48.5	65.0	46.4	66.6	45.8
Brandeis	68.9	46.2	71.6	47.7	71.1	45.7	73.4	46.5
Breckinridge-Franklin	53.9	39.3	53.3	36.6	49.7	34.7	52.9	36.2
Brown	55.0	45.9	51.0	40.9	5[illegible]3	40.3	55.2	41.7
Byck	52.0	42.9	49.3	43.6	54.2	44.6	52.4	43.7
Camp Taylor	45.7	32.0	47.2	37.9	485.0	33.7	47.2	33.6
Cane Run	49.9	43.0	46.3	42.5	47.3	40.3	48.2	41.3
Carrithers	50.5	34.4	48.6	33.4	51.1	31.3	49.8	31.1
Carter Traditional	70.0	58.0	71.8	62.3	71.8	60.0	73.9	61.2
Chancery **	NA	NA	NA	NA	NA	NA	NA	NA
Chenoweth	60.6	44.0	58.0	42.0	60.7	44.0	61.0	43.2
Cochran	45.3	40.4	48.5	42.5	47.0	37.8	46.9	39.2
Cochrane	51.0	38.6	53.8	40.9	52.2	36.1	53.0	37.6
Coleridge-Taylor	67.1	40.9	62.1	43.1	65.0	42.5	67.1	41.7
Coral Ridge	49.8	36.0	48.3	40.5	45.6	36.2	48.0	36.9
Crums Lane	51.0	49.2	49.0	50.2	49.8	46.8	50.1	48.9
Dixie	48.1	41.1	49.3	38.4	49.9	37.9	49.3	38.6
Dunn	68.5	42.6	67.7	43.8	70.5	44.3	71.3	43.7
Eisenhower	58.9	36.8	64.6	38.4	58.1	38.0	62.0	36.5
Engelhard	59.5	51.7	53.9	50.1	58.0	49.4	58.3	50.8
Fairdale	47.6	32.8	45.5	35.5	45.9	34.6	46.3	32.8
Fern Creek	62.8	48.0	63.3	44.8	61.3	47.0	64.2	46.4
Field	58.3	33.6	65.0	36.0	60.8	33.7	63.3	33.2
Foster	53.0	55.7	53.8	57.8	58.6	55.1	56.3	57.0
Frayser	58.9	44.1	59.0	43.1	59.7	46.5	61.3	44.3
Gilmore Lane	45.4	45.7	54.6	40.5	55.0	42.1	52.2	42.7
Goldsmith	51.5	38.4	48.2	39.5	49.8	38.1	50.3	38.2
Greathouse/Shryock Traditional	68.8	52.5	69.7	48.8	66.8	51.9	70.6	51.4
Greenwood	60.8	42.3	66.2	46.7	64.5	44.6	65.7	44.1
Gutermuth	60.1	49.4	59.3	48.2	65.4	49.8	63.8	49.1
Hartstern	54.4	41.3	56.7	41.4	56.4	41.3	56.5	40.6

JEFFERSON COUNTY PUBLIC SCHOOLS
COMPREHENSIVE TEST OF BASIC SKILLS (CTBS/5)
ACHIEVEMENT GAP
Mean Normal Curve Equivalent (NCE)
SPRING 2002
Elementary Schools

	Reading		Language		Mathematics		Total Battery	
SCHOOL	White	African-American	White	African-American	White	African-American	White	African-American
Hawthorne	65.1	40.9	58.3	37.2	58.6	38.4	62.3	38.2
Hazelwood	42.7	38.7	41.4	39.9	40.9	35.4	41.3	37.4
Hite	65.3	42.9	62.8	44.8	68.5	48.2	67.8	44.8
Indian Trail	56.5	46.4	50.5	49.0	58.9	53.9	56.5	50.1
Jacob	54.4	48.1	52.7	45.1	49.3	47.0	52.7	46.9
Jeffersontown	57.3	44.8	58.1	43.6	58.1	48.3	59.1	45.7
Johnsontown	50.0	38.8	53.1	36.2	52.0	37.1	51.9	36.4
Kennedy	65.0	56.6	64.9	58.6	59.2	54.8	65.0	57.9
Kenwood	58.6	40.1	54.9	40.2	56.9	41.8	57.9	39.6
Kerrick	56.1	44.8	58.7	42.5	59.1	46.4	59.0	44.4
King	63.2	45.7	63.0	45.7	63.9	45.4	65.0	45.1
Klondike	60.6	45.3	57.2	45.2	63.2	46.3	61.7	45.5
Laukhuf	53.8	43.0	56.3	45.4	54.4	43.9	55.5	43.5
Layne	52.5	43.7	52.1	40.2	54.4	37.8	53.7	40.6
Lincoln	50.1	38.9	49.2	36.3	49.5	38.0	49.8	37.2
Lowe	61.1	51.0	61.7	48.2	57.0	47.3	61.3	49.6
Luhr	60.0	44.5	61.2	46.3	58.8	43.1	61.4	44.3
Maupin	50.4	39.4	47.7	40.3	47.6	35.7	48.7	37.6
McFerran	45.8	40.1	45.2	37.8	45.1	37.2	45.2	37.6
Medora	64.8	50.4	68.0	56.5	65.9	47.8	68.2	51.5
Middletown	68.3	40.7	65.0	42.5	62.6	40.6	67.4	41.0
Mill Creek	48.3	53.2	48.6	58.0	46.1	44.6	47.8	52.3
Minors Lane	40.5	36.3	39.0	34.5	39.6	34.4	39.3	33.8
Norton	63.2	47.4	67.2	49.8	63.1	42.4	66.5	46.6
Okolona	54.6	41.8	52.1	44.3	55.0	38.6	54.8	41.0
Portland	37.6	41.8	39.2	42.2	38.6	41.2	38.1	41.2
Price	54.7	50.9	48.8	47.0	51.4	49.0	52.1	49.0
Rangeland	59.5	55.3	60.6	53.6	72.2	64.2	66.1	58.5
Roosevelt Perry	39.3	29.7	42.8	30.4	43.5	30.8	41.5	28.0
Rutherford	48.4	41.3	48.6	39.7	49.8	39.3	48.7	39.3
Sanders	50.5	37.0	49.6	39.7	48.9	35.5	49.9	36.9
Schaffner Traditional	67.0	63.7	69.7	66.7	70.0	66.2	71.5	68.2
Semple	43.6	37.4	44.3	36.0	42.7	38.7	42.9	36.7
Shacklette	54.1	41.3	54.4	40.4	55.6	42.5	55.6	40.9
Shelby	36.2	34.2	38.2	38.0	35.5	33.8	35.5	34.0
Slaughter	39.6	35.9	39.3	35.5	38.4	35.5	37.9	34.9
Smyrna	61.0	49.3	60.5	48.1	57.6	42.1	61.0	46.9
St. Matthews	58.0	44.6	57.1	46.4	62.4	41.7	60.6	43.9
Stonestreet	55.0	39.1	53.9	45.8	57.6	39.1	56.8	40.9

JEFFERSON COUNTY PUBLIC SCHOOLS
COMPREHENSIVE TEST OF BASIC SKILLS (CTBS/5)
ACHIEVEMENT GAP
Mean Normal Curve Equivalent (NCE)
SPRING 2002
Elementary Schools

	Reading		Language		Mathematics		Total Battery	
SCHOOL	White	African-American	White	African-American	White	African-American	White	African-American
Trunnell	54.4	39.2	55.8	37.7	58.3	39.9	**57.1**	**37.6**
Tully	61.4	44.7	64.2	41.6	61.7	38.8	**64.1**	**41.6**
Watson Lane	46.8	38.8	46.7	41.6	49.5	40.1	**47.6**	**39.6**
Watterson	54.8	40.9	51.5	41.2	58.0	39.8	**55.4**	**39.8**
Wellington	44.5	40.1	43.8	35.9	47.6	34.3	**45.0**	**35.9**
Wheatley	*	40.2	*	41.3	*	40.9	*	**40.4**
Wheeler	60.3	45.6	57.0	46.6	60.6	45.0	**60.3**	**45.5**
Wilder	66.4	48.4	66.9	50.5	65.1	47.8	**68.6**	**49.5**
Wilkerson	50.4	34.6	49.5	39.7	52.7	37.6	**51.4**	**36.7**
Wilt	51.7	41.7	50.8	43.0	56.8	44.5	**53.7**	**42.9**
Young	57.3	46.7	52.0	43.5	55.4	47.4	**56.0**	**45.8**
Zachary Taylor	56.7	44.4	56.1	45.1	57.9	47.4	**58.0**	**45.5**
Elementary District Totals	**55.7**	**43.4**	**55.7**	**43.7**	**56.3**	**42.9**	**56.9**	**43.0**

* To protect anonymity, no performance data are reported if category includes fewer than 10 students

**Chancey Elementary was a new school as of 2002-2003 school year.

JEFFERSON COUNTY PUBLIC SCHOOLS

Elementary School Enrollment

2002-2003

		PROGRAM CAPACITY	STUDENT ENROLLMENT	%BLACK ENR. (8/23/2002)	STUDENTS IN RESIDES	%BLACK IN RESIDES	RESIDES-ENR. IN NON-PUBLIC	RESIDES-ENR. IN ANY PUBLIC	RESIDES-ENR. RESIDES SCHOOL	RESIDES-ENR. ANOTHER PUBLIC
185	Atkinson	755	633	50.3	1016	61.5%	7.6%	92.4%	49.1%	43.3%
127	Auburndale	640	549	35.8	783	12.1%	22.7%	77.3%	47.4%	29.9%
44	Audubon Traditional	608	579	33.0	N/A	N/A	N/A	N/A	N/A	N/A
55	Bates	490	474	19.7	938	5.9%	39.7%	60.3%	26.5%	33.8%
149	Blake	548	535	41.8	681	12.6%	18.5%	81.5%	47.0%	34.5%
225	Bloom	466	443	32.9	861	3.3%	52.0%	48.0%	21.7%	26.2%
91	Blue Lick	580	529	24.3	630	11.7%	12.5%	87.5%	60.2%	27.3%
94	Bowen	729	667	27.3	1217	7.6%	41.1%	58.9%	36.4%	22.5%
260	Brandeis	545	515	32.7	N/A	N/A	N/A	N/A	N/A	N/A
38	Breckinridge-Franklin	578	429	45.9	726	40.4%	16.9%	83.1%	44.8%	38.3%
265	Brown	270	261	37.3	N/A	N/A	N/A	N/A	N/A	N/A
243	Byck	583	512	47.2	1150	84.7%	5.2%	94.8%	28.2%	66.6%
4	Camp Taylor	568	511	30.3	1072	8.3%	39.8%	60.2%	32.2%	28.0%
5	Cane Run	574	525	49.4	582	83.0%	6.2%	93.8%	33.7%	60.1%
680	Carter Traditional Flem	650	579	36.0	N/A	N/A	N/A	N/A	N/A	N/A
102	Chancey	650	629	35.4	1343	25.2%	24.0%	76.0%	44.7%	31.3%
46	Chenoweth	664	570	42.8	1250	13.1%	54.7%	45.3%	27.3%	18.0%
323	Cochran	514	386	45.1	592	40.9%	18.8%	81.3%	38.3%	42.9%
83	Cochrane	495	419	40.1	523	12.6%	27.7%	72.3%	43.2%	29.1%
660	Coleridge-Taylor	728	672	48.1	426	96.7%	3.5%	96.5%	40.4%	56.1%
60	Coral Ridge	562	485	27.0	420	0.5%	10.5%	89.5%	58.6%	31.0%
92	Crums Lane	550	479	48.4	657	45.7%	13.2%	86.8%	31.7%	55.1%
82	Dixie	468	427	22.0	536	6.7%	16.0%	84.0%	57.3%	26.7%
156	Dunn	603	566	23.6	1241	5.4%	55.8%	44.2%	26.8%	17.4%
131	Eisenhower	551	442	36.2	421	3.8%	24.2%	75.8%	50.4%	25.4%
240	Engelhard	480	429	48.1	662	70.7%	5.9%	94.1%	32.6%	61.5%
10	Fairdale	669	542	29.1	596	2.2%	10.9%	89.1%	49.8%	39.3%

JEFFERSON COUNTY PUBLIC SCHOOLS

Elementary School Enrollment

2002-2003

		PROGRAM CAPACITY	STUDENT ENROLLMENT	%BLACK ENR. (8/23/2002)	STUDENTS IN RESIDES	%BLACK IN RESIDES	RESIDES-ENR. IN NON-PUBLIC	RESIDES-ENR. IN ANY PUBLIC	RESIDES-ENR. RESIDES SCHOOL	RESIDES-ENR. ANOTHER PUBLIC
11	Fern Creek	770	764	24.9	1278	30.1%	26.9%	73.1%	28.4%	44.7%
250	Field	426	366	46.9	572	7.3%	48.8%	51.2%	24.3%	26.9%
270	Foster	650	599	50.4	835	95.0%	5.7%	94.3%	23.1%	71.1%
290	Frayser	522	392	49.3	822	53.6%	8.4%	91.6%	39.5%	52.1%
58	Gilmore Lane	407	354	42.5	365	29.9%	17.8%	82.2%	52.6%	29.6%
61	Goldsmith	650	638	41.9	1011	29.5%	25.8%	74.2%	45.9%	28.3%
13	Greathouse/Shryock Trad	608	590	24.8	N/A	N/A	N/A	N/A	N/A	N/A
14	Greenwood	535	573	33.8	589	14.1%	18.8%	81.2%	46.7%	34.5%
115	Gutermuth	563	497	44.0	868	32.8%	19.4%	80.6%	30.0%	50.7%
121	Hartstern	592	579	32.6	862	40.4%	16.1%	83.9%	35.6%	48.3%
48	Hawthorne	505	375	44.4	945	5.7%	60.8%	39.2%	15.7%	23.5%
300	Hazelwood	696	465	44.8	812	43.3%	13.7%	86.3%	40.1%	46.2%
95	Hite	512	513	21.9	604	9.8%	25.5%	74.5%	43.0%	31.5%
76	Indian Trail	537	530	48.2	682	46.0%	8.9%	91.1%	50.3%	40.8%
325	Jacob	675	627	49.9	1085	56.7%	9.6%	90.4%	45.2%	45.3%
166	Jeffersontown	759	742	26.0	1177	8.7%	33.2%	66.8%	42.2%	24.6%
106	Johnsontown Road	471	392	39.2	426	5.2%	25.8%	74.2%	48.4%	25.8%
720	Kennedy	565	592	48.1	402	94.5%	5.0%	95.0%	21.6%	73.4%
59	Kenwood	669	583	36.4	711	12.2%	24.6%	75.4%	46.0%	29.4%
79	Kenwick	540	426	44.3	519	24.3%	22.5%	77.5%	42.6%	34.9%
432	King	484	421	48.6	585	94.7%	0.0%	100.0%	34.0%	66.0%
134	Klondike Lane	624	611	37.9	1541	19.7%	40.8%	59.2%	26.7%	32.4%
145	Laukhuf	620	535	22.1	708	5.6%	19.5%	80.5%	46.5%	34.0%
126	Layne	490	468	26.3	530	4.3%	20.9%	79.1%	46.2%	32.8%
520	Lincoln	406	372	50.0	603	79.4%	7.8%	92.2%	34.3%	57.9%
146	Lowe	566	553	28.4	1102	8.7%	42.9%	57.1%	29.8%	27.3%
107	Luhr	524	488	37.6	665	24.2%	33.1%	66.9%	28.7%	38.2%

JEFFERSON COUNTY PUBLIC SCHOOLS

Elementary School Enrollment

2002-2003

		PROGRAM CAPACITY	STUDENT ENROLLMENT	%BLACK ENR. (8/23/2002)	STUDENTS IN RESIDES	%BLACK IN RESIDES	RESIDES-ENR. IN NON-PUBLIC	RESIDES-ENR. IN ANY PUBLIC	RESIDES-ENR. RESIDES SCHOOL	RESIDES-ENR. ANOTHER PUBLIC
480	Maupin	650	625	46.8	613	95.8%	3.8%	96.2%	35.2%	61.0%
440	McFerran	1062	866	48.9	681	87.5%	6.8%	93.2%	42.7%	50.5%
22	Medora	420	390	24.4	422	2.1%	14.9%	85.1%	61.8%	23.2%
24	Middletown	632	528	29.2	1140	14.7%	40.4%	59.6%	29.3%	30.4%
147	Mill Creek	564	453	48.3	727	72.6%	7.6%	92.4%	39.6%	52.8%
99	Minors Lane	600	520	42.1	268	4.9%	7.1%	92.9%	82.5%	10.4%
96	Norton	774	734	25.1	1223	5.6%	48.1%	51.9%	32.0%	20.0%
27	Okolona	501	493	43.3	552	38.8%	13.8%	86.2%	33.5%	52.7%
500	Portland	472	380	49.4	565	55.8%	8.8%	91.2%	49.0%	42.1%
128	Price	569	547	47.7	592	73.8%	12.7%	87.3%	36.8%	50.5%
81	Ratterman	520	452	47.2	522	73.0%	6.1%	93.9%	34.1%	59.8%
530	Roosevelt/Perry	451	373	47.6	748	68.6%	6.6%	93.4%	43.9%	49.6%
560	Rutherford	600	520	31.1	1103	17.4%	17.3%	82.7%	39.9%	42.8%
86	Sanders	490	503	34.9	790	13.0%	19.5%	80.5%	38.4%	42.2%
63	Schaffner	600	577	32.4	N/A	N/A	N/A	N/A	N/A	N/A
580	Semple	629	613	36.0	916	14.7%	17.9%	82.1%	49.1%	33.0%
97	Shacklette	708	657	27.9	584	11.3%	22.9%	77.1%	47.9%	29.1%
610	Shelby	440	315	49.4	666	48.0%	10.8%	89.2%	37.2%	52.0%
103	Slaughter	454	453	47.7	575	47.8%	9.9%	90.1%	31.3%	58.8%
87	Smyrna	631	656	29.8	893	9.9%	30.1%	69.9%	46.9%	23.0%
64	St Matthews	519	515	23.5	1148	5.0%	54.4%	45.6%	25.6%	19.9%
71	Stonestreet	578	477	22.6	539	2.2%	20.4%	79.6%	48.1%	31.5%
104	Trunnell	661	640	33.7	837	13.4%	26.4%	73.6%	38.9%	34.6%
16	Tully	809	787	24.9	1270	7.0%	38.5%	61.5%	35.4%	26.1%
69	Watson Lane	661	613	26.1	788	5.6%	9.0%	91.0%	61.4%	29.6%
72	Watterson	606	611	42.2	1183	26.9%	33.9%	66.1%	28.5%	37.6%
116	Wellington	547	439	49.0	724	37.7%	16.7%	83.3%	29.3%	54.0%

JEFFERSON COUNTY PUBLIC SCHOOLS
Elementary School Enrollment
2002-2003

		PROGRAM CAPACITY	STUDENT ENROLLMENT	%BLACK ENR. (8/23/2002)	STUDENTS IN RESIDES	%BLACK IN RESIDES	RESIDES-ENR. IN NON-PUBLIC	RESIDES-ENR. IN ANY PUBLIC	RESIDES-ENR. RESIDES SCHOOL	RESIDES-ENR. ANOTHER PUBLIC
182	Wheatley	600	446	48.8	796	92.6%	5.2%	94.8%	29.3%	65.6%
109	Wheeler	665	654	23.2	1181	7.5%	29.7%	70.3%	32.0%	38.3%
67	Wilder	606	598	29.9	702	18.8%	31.2%	68.8%	44.3%	24.5%
66	Wilkerson	470	405	20.7	406	7.4%	18.7%	81.3%	51.5%	29.8%
117	Wilt	550	479	26.0	597	7.0%	19.8%	80.2%	45.6%	34.7%
374	Young	610	513	46.8	930	95.9%	5.7%	94.3%	27.8%	66.5%
78	Zachary Taylor	680	522	35.3	959	13.7%	33.7%	66.3%	32.6%	33.7%
	TOTAL	51,213	46,186	36.2	64,272	30.4%	24.2%	75.8%	37.7%	38.2%

2004-05 Application

Magnet Schools, Magnet Programs, Magnet Career Academies, Optional Programs, and High School Open Enrollment

Middle and High School: Grades Six Through Twelve

Please print.

Student's Full Name:

_____
First Middle Last

Date of Birth: _____ Current School: _____

Mark the level/grade student will be in **NEXT** year.

❑ Grade Six ❑ Grade Seven ❑ Grade Eight
❑ Grade Nine ❑ Grade Ten ❑ Grade Eleven ❑ Grade Twelve

Race ❑ Black ❑ All Others Sex ❑ Male ❑ Female

Student's Social Security Number: ___ ___ ___ – ___ ___ – ___ ___ ___ ___

Address: _____
Number Street

_____
City State Zip

Parent's/Guardian's Telephone Number

Work: (_____) _____ Home: (_____) _____

FIRST CHOICE: _____ _____ _____ / _____ _____ _____
School Code Program Code

* SECOND CHOICE: _____ _____ _____ / _____ _____ _____
School Code Program Code

* Only list choice programs with access on the second draw lists for the Traditional Program at Barret, Johnson, and JCTMS Traditional middle schools and Male and Butler Traditional high schools, as well as the Brown School, Meyzeek, Newburg, and Ramsey MST programs.

- Siblings are not given preference to attend Magnet Schools.

The Brown School and traditional schools consider multiple births (twins, etc.) as one application.
Does the applicant have a twin? ❑ Yes ❑ No
If yes, give the twin's name _____
Is the twin applying to the same school? ❑ Yes ❑ No

Optional, Magnet, and Advance Programs Office
485-3323

When your application is received, a confirmation postcard is mailed. If you have not received this card within three weeks of submitting your application, please call 485-3323.

Parent's/Guardian's Signature: _____ Date: _____

Parent's/Guardian's Name: (Please print.) _____

It is the parent's/guardian's responsibility to mail the application to Jefferson County Public Schools, Optional, Magnet, and Advance Programs Office P.O. Box 34020, Louisville, KY 40232-4020 or bring the the application in person to the JCPS Optional, Magnet, and Advance Programs Office at 3309 Bishop Lane (behind the Hawthorne Education Center).

www.jefferson.k12.ky.us

Jefferson County Public Schools
Shaping the Future

APRIL 2, 2001

TO: BOARD OF EDUCATION
JEFFERSON COUNTY
PUBLIC SCHOOL DISTRICT

FROM: STEPHEN W. DAESCHNER
SUPERINTENDENT

SUBJECT: STUDENT ASSIGNMENT

RECOMMENDATION: I recommend that the Board of Education approve the findings and recommendations regarding student assignment in the Jefferson County Public Schools.

FINDINGS

The Jefferson County school district is committed to providing a quality education and equal opportunities to all students. The District believes that all students can learn at high levels, regardless of their race, economic level or social status. The District's Student Assignment Plan is a very important element of the District's policies for attaining these goals.

The District's Student Assignment Plan has evolved over the years in response to external developments. The revisions to the Student Assignment Plan that are now presented to the Board of Education constitute another chapter in the history of student assignment in the District. A review of the past changes to the plan will demonstrate that the District's commitment to a quality education with equity for all students has been and will continue to be the underlying basis for the District's policies for the assignment of students to schools.

Since 1975, the District has assigned students at all grade levels to achieve racial desegregation. Initially, the District's student assignment plan was mandated by order of the federal

district court. During this period, all schools were desegregated within racial guidelines mandated by the court, except special schools. Desegregation was accomplished by mandatory busing of students based on factors ordered by the court.

In 1984, after extensive discussions with representatives of the community and the plaintiffs who had filed the original lawsuit, the District made significant modifications to the Student Assignment Plan. Attendance areas for middle and high schools were redrawn so that students could attend the same school throughout their middle and high school years. Adjustments were made in the original racial guidelines that had been ordered by the court in 1975.

In 1991, in response to the sweeping changes in Kentucky education law enacted by the Kentucky Education Reform Act of 1990 (KERA), the District again made significant modifications to the Student Assignment Plan. The 1991 plan eliminated the built-in change of schools within the elementary years to provide greater stability for students and parents during those years. Also, the 1991 plan was based on the concept of managed choice. Under this system, students may apply for schools or programs of their choice, and may be placed in those schools or programs subject to building/ program capacity, racial guidelines, and in some instances admission criteria.

Because the concept of managed choice was new, the District thought it wise to conduct a review of the Student Assignment Plan in 1995. The District implemented a process to receive public input and recommendations to identify areas for change, refinement or enhancement of the 1991 managed choice plan. Significant elements of the revised Student Assignment Plan adopted in 1996 included establishment of an administrative unit to implement the plan; accountability by consistent monitoring and reporting to the Board of Education; increased access for African-American students through racial guidelines of 15% minimum and 50% maxi-

mum African-American enrollment in all schools, together with a plan to encourage all schools to move toward an enrollment that reflects the District's actual average African-American enrollment of approximately 30%; and more effective management of desegregation at the elementary level.

In 1998, a lawsuit was filed against the District which challenged the Student Assignment Plan as it applied to the admission of African-American students to Central High School. The plaintiffs argued that the District's student assignment policies, which limited the number of African-American applicants who could be admitted to Central under the District's managed choice system, were an unconstitutional infringement of their rights. Although the plaintiffs were concerned only with the admissions process at Central, their lawsuit called into question whether the District could continue its commitment to education in a racially integrated environment. The District vigorously defended its student assignment policies, as applied at Central and all other schools. The court permitted intervention in the lawsuit by other interested groups and parents who argued that the District's policies of racial integration should be continued and even strengthened by the court.

In June 2000, the federal district court made several significant rulings in response to this lawsuit. First, the court held that the District is no longer subject to the 1975 federal court decree that mandated the desegregation of the Jefferson County Public Schools. The court commended the District for its good faith implementation of the 1975 decree for many years, but it concluded that the District had done all that was practicable to eliminate the vestiges of former state-sponsored segregation in the schools. Next, the court addressed the plaintiffs' specific arguments with regard to Central High School Magnet Career Academy. The court concluded that because the programs offered at Central are not available at other high schools in the District, the District cannot exclude

any student from admission to Central solely on the basis of race. This ruling was made effective for the 2000-2001 school year. The court further ordered the District to consider whether this ruling required a change in the admission process at other magnet schools. The court said that any such change would not be required until the 2002-2003 school year. Finally, the court ruled that the District may have compelling reasons to continue a fully integrated school system in all other schools, and that the District is free to adopt whatever student assignment plan it deems most beneficial to its students, consistent with the court's opinion and the Equal Protection Clause.

In September 2000, the court concluded that, having dissolved the decree and having ruled on the pending controversies, its continued oversight was unnecessary. The court ruled that its prior orders were deemed final and appealable. No appeals were taken, and the District was therefore free to take action to implement the June 2000 rulings with regard to magnet schools and other schools.

In the fall of 2000, the District began a process to receive public input regarding possible changes in the Student Assignment Plan, consistent with the court's orders. This process included public forums in locations throughout the county, a parent opinion survey conducted by the University of Kentucky, discussions with outside experts, and extensive review of all issues at a high level within the District's administration. The result of that process is the revised Student Assignment Plan that is presented for consideration by the Board of Education.

Significant elements of the proposed plan are as follows:

- The Board of Education will continue with Board Goals which provide that our students will be academically prepared in racially integrated learning environments and that they will be safe, supported,

respected and confident in racially integrated schools, classrooms, and student activities.

- With the exception of special schools and four magnet schools, all schools will continue to have a minimum African-American enrollment of 15% and a maximum African-American enrollment of 50%. The four magnet schools—Brandeis Math, Science and Technology Magnet Elementary School; Brown School; Central High School Magnet Career Academy; and duPont Manual High School/Youth Performing Arts School —will not be required to meet the 15% to 50% enrollment percentages, but shall be encouraged to provide racially integrated learning environments within the above percentages and shall annually submit a plan for that purpose.
- The superintendent shall continue to monitor and provide a report to the Board of Education regarding implementation of the Student Assignment Plan.
- The District will develop and implement appropriate orientation and training for all principal candidates, new principals, and current principals related to the successful implementation of the Student Assignment Plan.
- The District will also develop and implement appropriate training and orientation for all schools in the Student Assignment Plan and its goals.
- All other recommendations approved by the Board of Education in 1996 shall continue in effect

RECOMMENDATIONS

The current Student Assignment Plan approved and adopted by the Board of Education on August 26, 1996, shall be revised as set forth below effective July 1, 2002, with preparation and appropriate activities to begin immediately.

A. Integration and Educational Quality

1. The school district shall maintain educational and financial equity among all school children in the district by providing substantially uniform educational resources to all students in the district regardless of the location of their school, the racial composition of their school, or the type of educational program in which they are enrolled. The school district shall actively seek and obtain all types of additional intervention and compensatory resources for all eligible students and schools.

2. The Board of Education reaffirms its commitment to the current Board Goals 1 and 2 which state:

- All JCPS students will become critical thinkers and lifelong learners who are academically prepared in a racially integrated environment to be successful in the post-secondary education programs or careers of their choice.
- All JCPS students will be safe, supported, respected, and confident in racially integrated schools, classrooms, and student activities.

3. The school district shall make provisions for staff development which prepares all staff to work successfully with all students regardless of racial, ethnic, and cultural backgrounds; shall promote and encourage the use of effective and innovative instructional strategies in classrooms throughout the district; and shall create or expand strategically placed tutorial and enrichment services with the objective of raising the achievement levels of all students, especially those racial, socio-economic, and gender groupings which have lagged in achievement levels.

4. The school district shall maintain and update its current staff integration goals and practices and shall continue to actively seek more African-American teachers, counselors, and administrators.

B. Strategies for Achieving Integration

1. Any student who is in the minority in the school attendance area in which he or she resides shall be enrolled in that school unless he or she applies and is accepted into another school. Any student who is in the majority in the school attendance area in which he or she resides and who desires to transfer to a non-magnet school/program in an area in which he or she would be in the minority may have that transfer granted within the limits of building/program capacity.

2. All schools except special schools and those magnet schools listed in Attachment A shall have a minimum African-American enrollment of 15% and a maximum African-American enrollment of 50%. Those magnet schools listed in Attachment A will not be required to meet the 15% to 50% enrollment percentages, but shall be encouraged to provide racially integrated learning environments within the above-mentioned percentages and shall annually submit a plan for that purpose. The school district shall provide assistance to encourage all schools to achieve an African-American enrollment equivalent to the average district-wide African-American enrollment at the school's respective elementary, middle or high school level. The racial make-up of a school shall be determined based upon the enrollment in grades 1-12 with the exception of students in Exceptional Child Education self-contained classes and students who are enrolled in alternative schools and programs.

3. Schools shall work cooperatively with each other and with central office to ensure that enrollment at all schools except those on Attachment A is within the racial guidelines annually and to encourage that the enrollment at all schools progresses toward the midpoint of the guidelines.

4. Program capacity shall be established for each school taking into account factors such as: size of facility, size of

student population, program placement, class-size guidelines, work stations, and facility utilization.

5. The school district shall develop and implement a funding formula through which schools shall receive per-pupil funding for enrollment that is within the agreed-upon designated program capacity formula.

6. All elementary students (K-5) shall be assigned to the school which serves the area in which they reside. Kindergarten students shall be enrolled in that school unless the school has reached building/program capacity or (1) the student applies for and is granted placement into a magnet school/program or optional program, (2) the student applies for and is granted placement at another school in the cluster, or (3) the student applies for and receives a transfer to a school in another cluster. Students in grades 1-5 shall be enrolled in that school unless the school has reached building/program capacity and/or the extremes of the racial guidelines or (1) the student applies for and is granted placement into a magnet school/program or optional program, (2) the student applies for and is granted placement at another school in the cluster, or (3) the student applies for and receives a transfer to a school in a different cluster.

7. Elementary schools shall be grouped into clusters in order to facilitate integration. Advance Program feeder patterns shall be consistent with cluster alignment and cluster integration. Cluster alignment and Advance Program feeder patterns are displayed in Attachments B and C.

8. Each cluster shall annually submit a plan to implement programs which facilitate and enhance integration within the guidelines. Upon approval of its plan, the cluster shall receive funding to support implementation of its plan.

9. All 6th through 8th grade students shall be assigned to the middle school which serves the area in which they reside. They shall be enrolled in that school unless the school has

reached building/program capacity and/or the extremes of the racial guidelines; or (1) the student applies to and is granted placement into a magnet/optional school/program or (2) the student applies for and receives a transfer.

10. All 9th through 12th grade students shall be assigned to the high school which serves the area in which they reside. They shall be enrolled in that school unless the school has reached building/program capacity and/or the extremes of the racial guidelines; or (1) the student applies to and is granted placement into a magnet/optional school/program, (2) the student applies to and is granted placement into another high school under the open enrollment program, or (3) the student applies for and receives a transfer.

11. School attendance boundaries and placement of programs shall be adjusted as necessary in order to facilitate implementation of the student assignment plan and to address issues of building/program capacity. (See Attachment D)

C. Administration, Monitoring and Accountability for Integration

1. All actions for the implementation of these recommendations shall be coordinated and assisted by the Department of Student Assignment, Health, and Safety formed for the purpose and empowered to ensure that schools appropriately implement the Student Assignment Plan.

2. The superintendent shall establish a monitoring system to provide data and report to the Board of Education regarding implementation of the Student Assignment Plan.

3. The school district shall continue to use one application form and process for elementary schools/programs, and one for middle schools/programs and high schools/programs.

4. The school district shall continue to implement a centralized process to identify, select, and place students who are interested in magnet/optional schools/programs and high

school open enrollment. (See Attachment E). The school district shall also continue to implement an exit process with opportunity for appeal for students enrolled in magnet/ optional schools/programs. (See Attachment F).

5. The school district shall continue to administer a consistent process for enrolling students into elementary, middle, and high schools/programs.

6. All students enrolled in the eighth grade in the district's Traditional Program and Brown School shall reaffirm their commitment to those programs as a condition of enrollment in those programs at the high school level.

7. The school district shall continue to implement a consistent process for informing parents and students about the Student Assignment Plan and available choices. This process shall continue to include the role of schools which shall have the major responsibility and Parent Assistance Centers which have been established in various geographical areas to provide support for parents and students participating in the school selection/assignment process.

8. The school district shall continue to implement a process for identifying possible new or expanded magnet/ optional schools/programs. This process shall consider requests by schools and magnet/optional school/program placements to enhance implementation of the Student Assignment Plan.

9. The Department of Student Assignment, Health and Safety shall develop and implement appropriate training and orientation on the Student Assignment Plan and its goals for all schools.

10. The Department of Student Assignment, Health and Safety shall develop and implement appropriate orientation and training for principal candidates, new principals, and current principals on the Student Assignment Plan and its goals.

11. The school district shall include in the job description of the principal and appropriate central office staff a requirement that each be responsible for implementation of the Student Assignment Plan.

12. Any school that is having difficulty in achieving compliance with the Student Assignment Plan shall enter a process which includes planning and preparation with central office support to achieve compliance the following year.

13. The Superintendent is authorized to take all actions that are necessary to implement these recommendations.

Attachment A

Brandeis Math, Science and Technology Magnet Elementary School

Brown (Elementary, Middle and High) School

Central High School Magnet Career Academy

DuPont Manual High School/Youth Performing Arts School

Attachment B

Jefferson County Public Schools
~~1997-98~~ 2002-03 Student Assignment
Elementary School Clusters

• **BYCK/ LINCOLN**	• **CANE RUN**	• **COLERIDGE-TAYLOR**	• **FOSTER**
• Bloom	Crums Lane	• Dunn	Atkinson
~~Breckinridge~~	Jacob	Englehard	Greenwood
Cochrane	Shacklette	• Lowe	Kenwood
• Field	Watson Lane	• Murphy Lane	Portland
Hawthorne	Wellington	• St. Matthews	Sanders
• Hite		Shelby	Semple
Middletown		• Tully	
• Norton		• Wilder	
• Zachary Taylor			
• **KENNEDY**	• **KING**	• **MAUPIN**	• **MCFERRAN**
Camp Taylor	Gutermuth	Coral Ridge	Blake
• Cochrane	Hazelwood	Fairdale	Blue Lick
Layne	Johnsontown	Medora	Dixie
Stonestreet	~~Mill Creek~~	Mill Creek	• Frayser
Wilkerson	Trunnell	Rutherford	Gilmore Lane
• **PRICE**	• **RANGELAND**	• **WHEATLEY**	• **YOUNG**
Bates	Hartstern	Bowen	• Auburndale
• Fern Creek	Indian Trail	• Goldsmith	Breckinridge-Franklin
Klondike	Laukhuf	Jeffersontown	Chenoweth
Luhr	Okolona	Minors Lane	• Eisenhower
• Watterson	Slaughter	Roosevelt-Perry	Franklin
Wheeler	Wilt	Smyrna	• Kerrick

Audubon, Carter, Greathouse/Shryock, Schaffner, Brandeis and Brown are not placed in clusters because these schools enroll all of their students through the district's magnet school process.

• *Denotes Advance Program Centers. Students who are eligible for Advance Program will be assigned to an Advance Program Center in the Cluster in which they reside.*

Jefferson County Public Schools
1997-98 2002-03 Advance Program Student Assignment
Elementary School Clusters in Grades 4-5

	A Line	C Line
• Byck	Byck	Bloom
• Lincoln	Lincoln	Hite
~~Breckinridge~~	~~Byck~~	~~Byck~~
• Bloom	Bloom	Byck
Cochrane	Hite	Lincoln
• Field	Field	Lincoln
Hawthorne	Bloom	Byck
• Hite	Hite	Lincoln
Middletown	Hite	Lincoln
• Norton	Norton	Lincoln
• Z. Taylor	Z. Taylor	Lincoln

	A Line	C Line
• Foster	Foster	Foster
Atkinson	Foster	Foster
Greenwood	Foster	Foster
Kenwood	Foster	Foster
Portland	Foster	Foster
Sanders	Foster	Foster
Semple	Foster	Foster

	A Line	C Line
Maupin	Medora	Medora
Coral Ridge	Medora	Medora
Fairdale	Medora	Medora
• Medora	Medora	Medora
Mill Creek	Medora	Medora
Rutherford	Medora	Medora

	A Line	C Line
• Cane Run	Cane Run	Cane Run
Crums Lane	Cane Run	Cane Run
Jacob	Cane Run	Cane Run
Shacklette	Cane Run	Cane Run
Watson Lane	Cane Run	Cane Run
Wellington	Cane Run	Cane Run

	A Line	C Line
• Kennedy	Kennedy	Kennedy
Camp Taylor	Cochran	Cochran
• Cochran	Cochran	Cochran
Layne	Kennedy	Kennedy
Stonestreet	Kennedy	Kennedy
Wilkerson	Kennedy	Kennedy

	A Line	C Line
• McFerran	McFerran	McFerran
Blake	McFerran	McFerran
Blue Lick	McFerran	McFerran
Dixie	McFerran	McFerran
• Frayser	McFerran	McFerran
Gilmore Lane	McFerran	McFerran

	A Line	C Line
• Coleridge-Taylor	Coleridge-Taylor	Coleridge-Taylor
• Dunn	Dunn	Coleridge-Taylor
Engelhard	Coleridge-Taylor	Coleridge-Taylor
• Lowe	Lowe	Coleridge-Taylor
• Murphy Lane	Murphy Lane	Coleridge-Taylor
• St. Matthews	St. Matthews	Coleridge-Taylor
Shelby	Coleridge-Taylor	Coleridge-Taylor
• Tully	Tully	Coleridge-Taylor
• Wilder	Wilder	Coleridge-Taylor

	A Line	C Line
• King	King	King
Gutermuth	King	King
Hazelwood	King	King
Johnsontown	King	King
~~Mill Creek~~	~~King~~	~~King~~
Trunnell	King	King

	A Line	C Line
• Price	Price	Fern Creek
Bates	Price	Fern Creek
• Fern Creek	Fern Creek	Price
Klondike	Price	Watterson
Luhr	Price	Fern Creek
• Watterson	Watterson	Price
Wheeler	Price	Fern Creek

A Line = Resides School if it is an Advance Program School; If not Advance Program School, the A line = Feeder Advance Program School
C Line = Head of cluster with exceptions

• Denotes Advance Program Centers. Students who are eligible for Advance Program will be assigned to an Advance Program Center in the cluster in which they reside.

Jefferson County Public Schools
~~1997-98~~ 2002-03 Advance Program Student Assignment
Elementary School Clusters in Grades 4-5

	A Line	C Line
• Rangeland	Rangeland	Price
Hartstern	Rangeland	Price
Indian Trail	Rangeland	Price
Laukhuf	Rangeland	Price
Okolona	Rangeland	Price
Slaughter	Rangeland	Price
Wilt	Rangeland	Price

	A Line	C Line
• Wheatley	Wheatley	Bowen
• Bowen	Bowen	Wheatley
• Goldsmith	Goldsmith	Wheatley
Jeffersontown	Wheatley	Wheatley
Minors Lane	Wheatley	Wheatley
Roosevelt-Perry	Wheatley	Wheatley
Smyrna		

	A Line	C Line
• Young	Young	Young
• Auburndale	Auburndale	Young
Breckinridge-Franklin	Young	Young
Chenoweth	Young	Young
• Eisenhower	Eisenhower	Young
• Kerrick	Kerrick	Young

A Line = Resides School if it is an Advance Program School; If not Advance Program School, the A line = Feeder Advance Program School
C Line = Head of cluster with exceptions

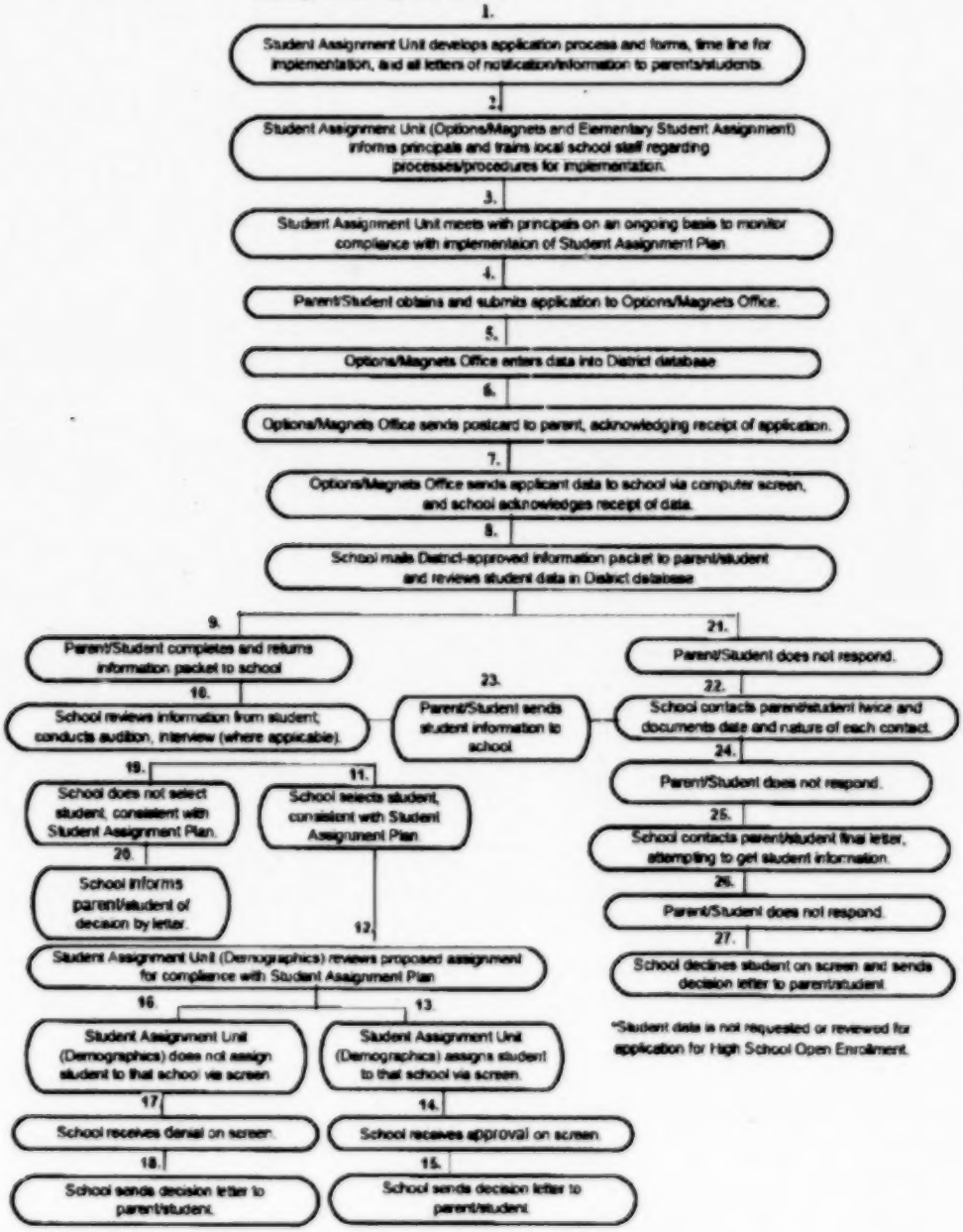
• Denotes Advance Program Centers. Students who are eligible for Advance Program will be assigned to an Advance Program Center in the cluster in which they reside.

Attachment D

Meyzeek Middle School will become an Advance Program Center for resides students as well as for Math, Science and Technology Magnet Program students.

Recommendation C4 Attachment E (1)

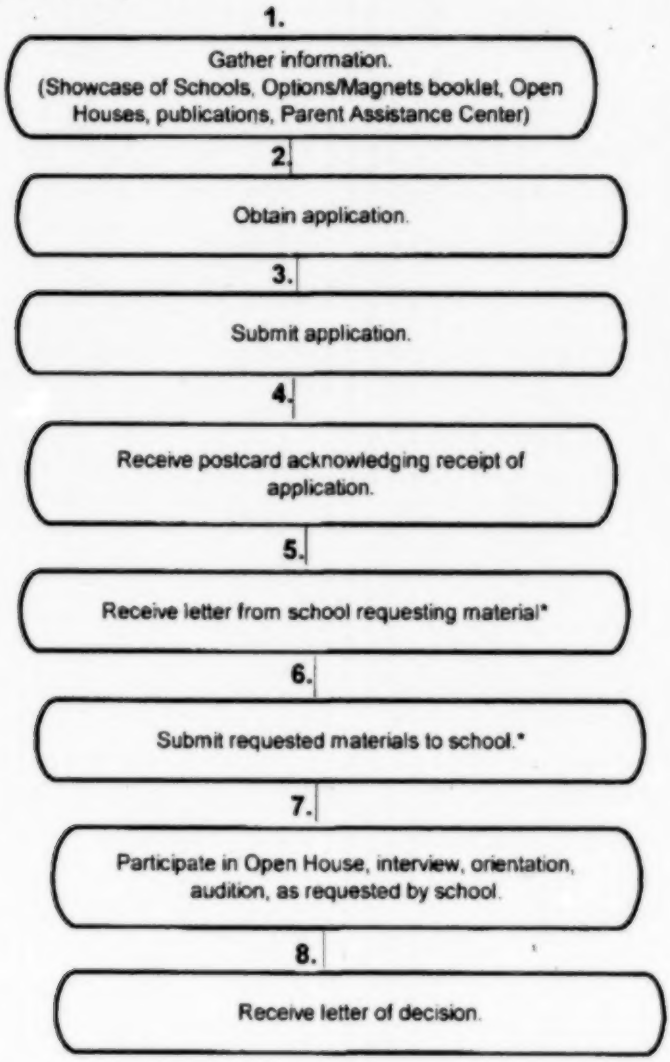
Centralized Process to Identify, Select, and Place Students in Optional/Magnet Programs and High School Open Enrollment*



*Student data is not requested or reviewed for application for High School Open Enrollment.

Optional/Magnet and High School Open-Enrollment Application Process for Parents

Attachment E(2)



*Student data is not requested or reviewed for application for High School Open Enrollment.

Selection Criteria For Optional/Magnet Schools Programs **Attachment E(3)**

I. Elementary Schools

A. Those schools listed on Attachment A of the Student Assignment Plan will use the criteria listed below. Other schools are not required to use selection criteria except to comply with de-segregation goals and building/program capacity.

B. If school uses selection criteria, it must develop a packet containing/requesting the following items and must have that packet approved by the Student Assignment Unit. A sample packet will be kept on file in the Student Assignment Unit, and a description of components of the packet will be published in District materials. Schools may use up to four of the following items only.

1. Student Information Form to include:
   a. Basic demographic information
   b. Program preference
   c. Checklist for materials to be submitted
2. Checklist about child for adult to complete —could be completed by teacher, child-care provider, or other adult significant in child's life
3. Copy of report card/progress report for students applying for P2 or above
4. Other items such as test scores, work samples and/or interview

II. Middle and High Schools

A. Those schools listed on Attachment A of the Student Assignment Plan will use the criteria

listed below. Other schools are not required to use selection criteria except to comply with desegregation goals and building/program capacity.

B. If school uses selection criteria, it must develop a packet containing/requesting the following items and must have that packet approved by the Student Assignment Unit. A sample packet will be kept on file in the Student Assignment Unit, and a description of components of the packet will be published in District materials. Schools may use up to five of the following items only.

1. Student Information Form to include:
    a. Basic demographic information
    b. Program preference
    c. Checklist for materials to be submitted
2. Survey and/or essay. If school uses a survey and an essay, the two must be combined on one form.
3. Two recommendations—one must be from a current school teacher, counselor, assistant principal, or principal, the other may be from any adult.
4. Copy of report card/progress report
5. Work sample and/or performance audition (where applicable)

C. School reviews student data from District sources. Schools may use up to three of the following items only:

1. Attendance
2. Course grades
3. CATS and standardized test scores

Optional/Magnet School/Program Exit Process

Attachment F(1)

1. Student Assignment Unit develops time line for implementation and all letters of notification/ information to parents/students.

2. Student Assignment Unit (Options/Magnets) collects data on number of exits and reasons for exits and works with principals to ensure that the exit process is reasonable and equitable.

3. Student Assignment Unit (Options/Magnets) meets with principals on an ongoing basis to monitor implementation of the exit process.

4. School develops and informs parents of criteria for exiting students, which are consistent with the program and are approved by the Student Assignment Unit.

Should student performance or behavior not conform to school expectations, the following steps will be implemented:

5. School notifies parent in writing about problematic student behavior or performance.

6. School may place student on probation following a conference with parent and student.

7. School sends parent a letter stating that student's status will be reviewed by school Exit Committee.

8. School's Exit Committee - consisting of school staff, excluding principal - reviews student's status.

9. School sends parent a registered letter stating that student is going to be exited from school.

10. Student Assignment Unit facilitates placement of student in another school.

If parent wishes to appeal the school's exit decision, the following process will be implemented:

11. Parent may appeal to principal.

12. Parent may appeal to director of Options/Magnets.

13. Parent may appeal to executive director of Student Assignment.

Jefferson County Public Schools
Optional and Magnet Programs
Documentation for Exiting Process
School Accountability

Attachment F (2)

Telephone No: 485-3323
Fax: 485-3936

Student's Name: _____ I.D. No: _____
Last First Middle

Race: _____ Gender: ☐ Male ☐ Female Grade: _____ Date of Birth: _____

Student's Address: _____
Street City State Zip Code

Parent's/Guardian's Name: _____ _____
Mother Father

Parent's/Guardian's Telephone No.: (1)_____ (2)_____ (3)_____
Home Work Emergency

Reassignment From: _____ _____ Telephone:_____
School Program Code

Person Submitting Reassignment Request: _____

Reassignment To: _____ Telephone:_____
School

Person Contacted at Receiving School: _____ Date:_____

Reason for Student Movement (Check as Appropriate.)

___ Address Change ___ Discipline ___ Academic Grades ___ Parent/Student Request

___ Transportation ___ Other: _____

Strategies the School Has Taken to Support Successful Participation:

- ☐ Conference with parent, students, and teachers
- ☐ Progress reports or report cards every three weeks
- ☐ Letter each six weeks for failing grade, with warning of possible loss of placement
- ☐ ESS (Extended School Services)
- ☐ Study Hall
- ☐ Tutoring Sessions (L.I.N.K., etc.)
- ☐ Saturday School
- ☐ Weekly Progress Report
- ☐ Academic Support Groups (Stars Club, etc.)
- ☐ Classroom Behavior Contract
- ☐ Assignment Log and/or Contract
- ☐ Progressive Disciplinary Actions as Appropriate
- ☐ ISAP (In-School Adjustment Program) and STOP (Suspension Truancy Off-Site Program)
- ☐ Other: _____

School Comments: _____

Parent Comments: _____

Appeal Process: _____

Parent's/Guardian's Signature: _____ Date: _____

Principal's Signature: _____

JA-96

Office of Student Services
Lam Building
4309 Bishop Lane
Louisville, Kentucky 40218
(502) 485-3340
Fax: (502) 485-3893

August 16, 2002

Dear Ms. Meredith:

After careful consideration, the Office of Student Services has disapproved your transfer request. The decision was based on the following:

1. The transfer would have an adverse effect on desegregation compliance of the School **(JCPS Board Policy: states that each school must be within 15-50% Range for its African/American enrollment for the 2002-2003 school year)**.

According to due process, you do have the right to appeal this decision. You may submit your appeal in writing, or you may present your appeal to the appropriate district personnel. The bottom portion of this letter is provided for your convenience in making an appeal.

Sincerely,

/s/ John Huggins
John Huggins, Ed.D
Assistant Director of Student Services

APPEAL FORM

Appeal should be filed within five (5) days receipt of the denial letter.

[ ]	Written Appeal	The decision will be based on information submitted in writing by the parent/guardian.
[ ]	Appeal with Hearing	The decision will be based on information presented in person by parent/guardian.

Mail to:
Student Transfer Appeals
Jefferson County Public Schools
P.O. Box 34020
Louisville, KY 40232-4020
Call (502) 485-3335 if you wish to
Schedule a hearing

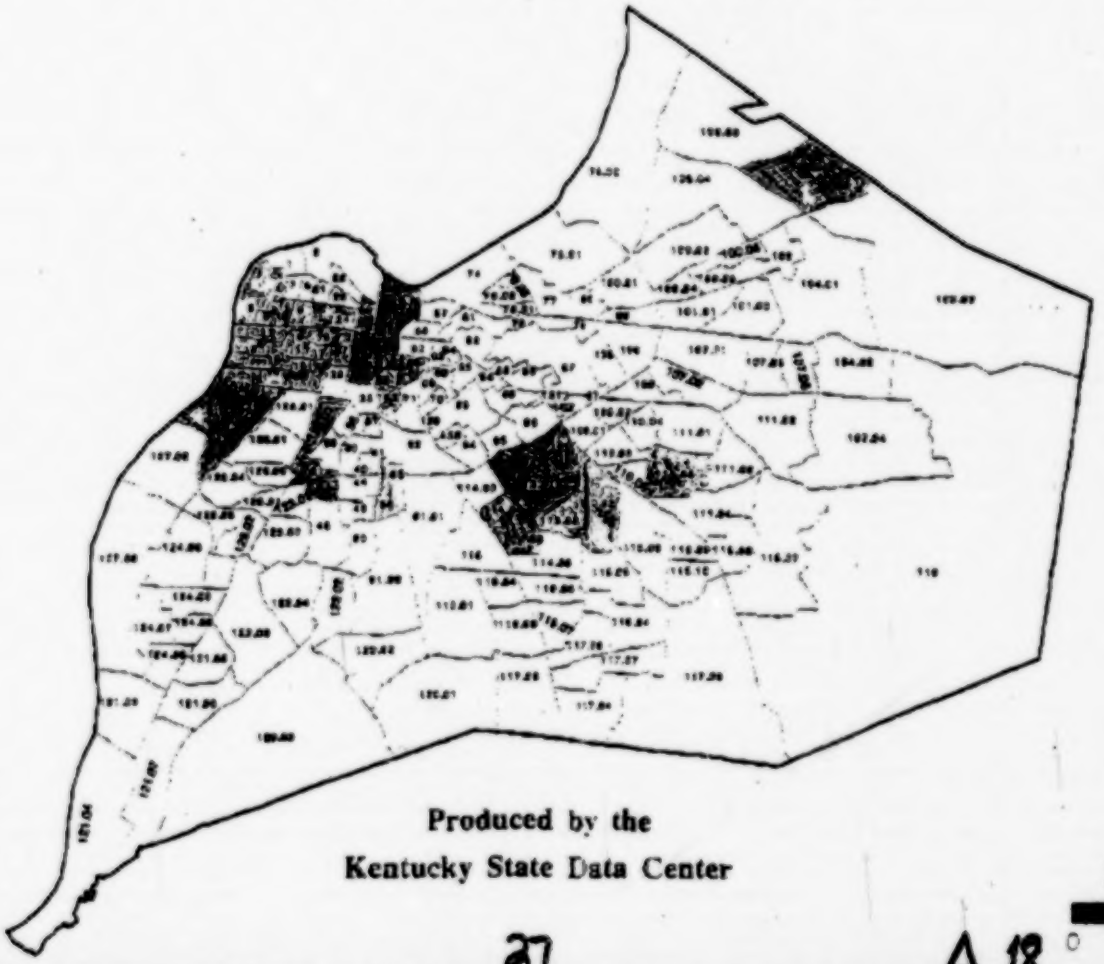
Ms. Meredith
1025 E. Caldwell
Louisville, KY 40204

Re: Joshua McDonald (WM)
Grade: Kindergarten (4-5-97)

Jefferson County

1990 Census Tracts

1990 Census Data: Total Population



≥ 20% B

60-79% B

40-59% B

20-39% B

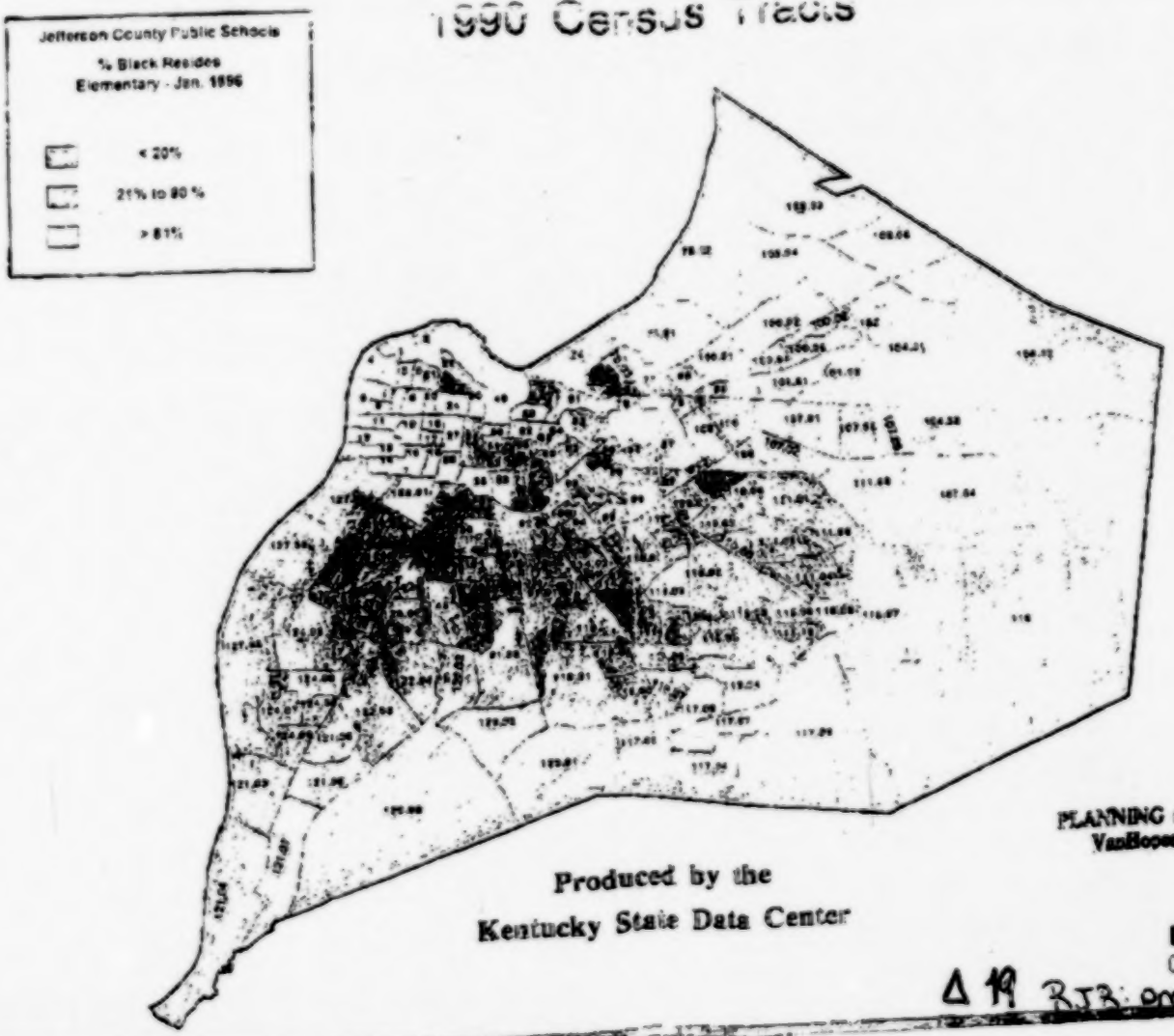
Produced by the
Kentucky State Data Center

Miles
0 2 4

27

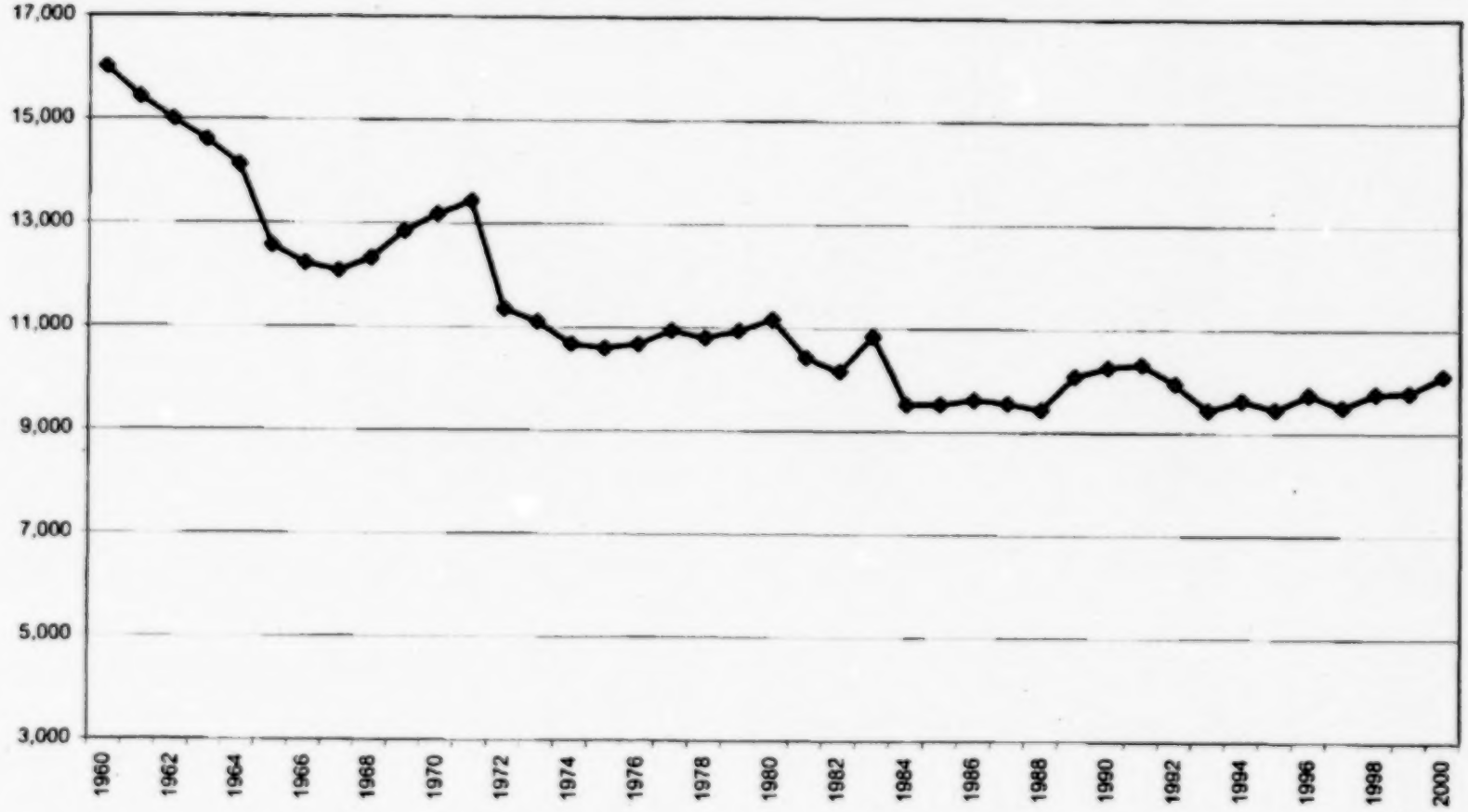
Δ 18

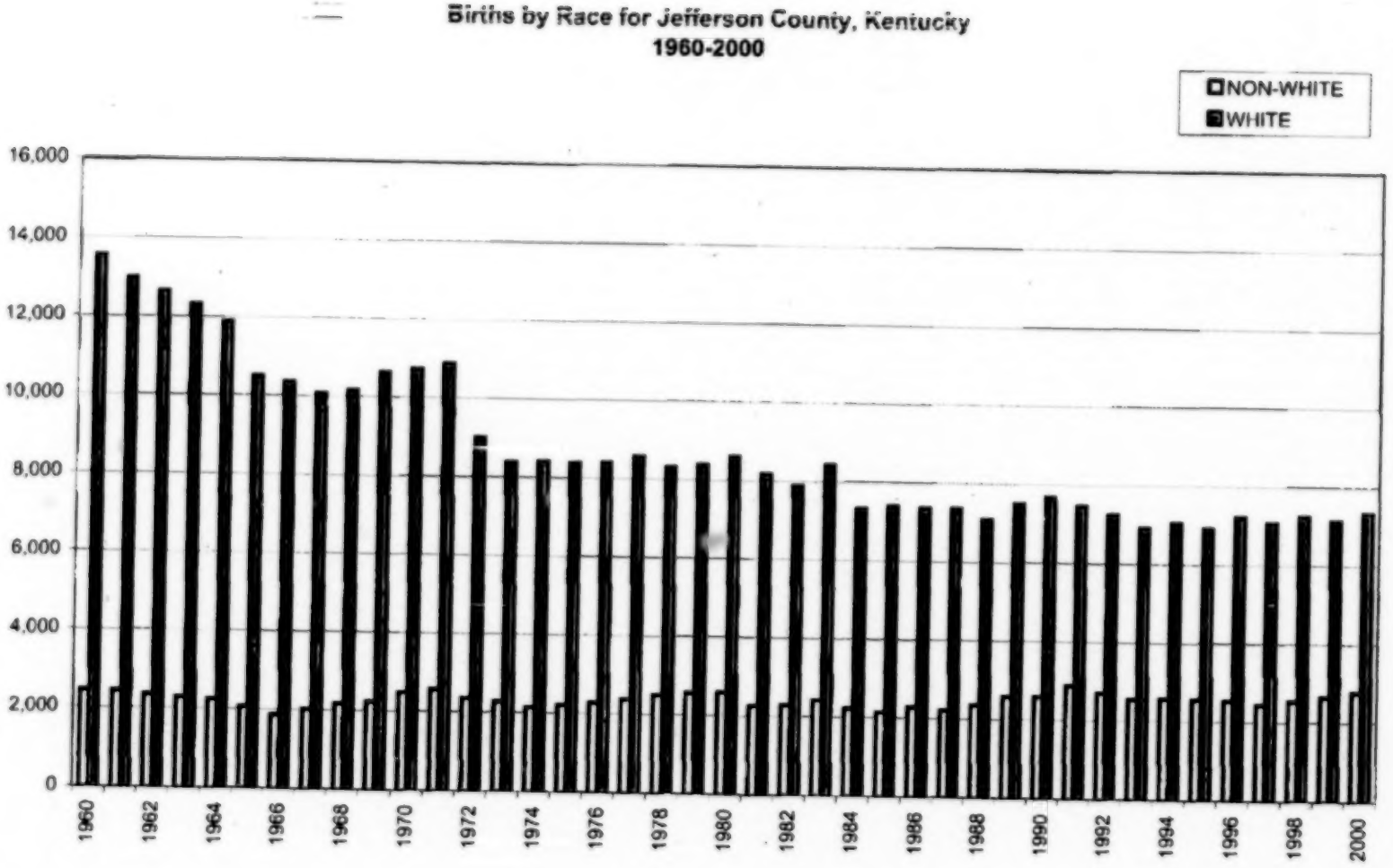
Jefferson County
1990 Census Tracts



Δ 19 RJB: oms 2/26/99

Total Births for Jefferson County, Kentucky




Births by Race for Jefferson County, Kentucky
1960-2000
NON-WHITE
WHITE
16,000
14,000
12,000
10,000
8,000
6,000
4,000
2,000
0
1960
1962
1964
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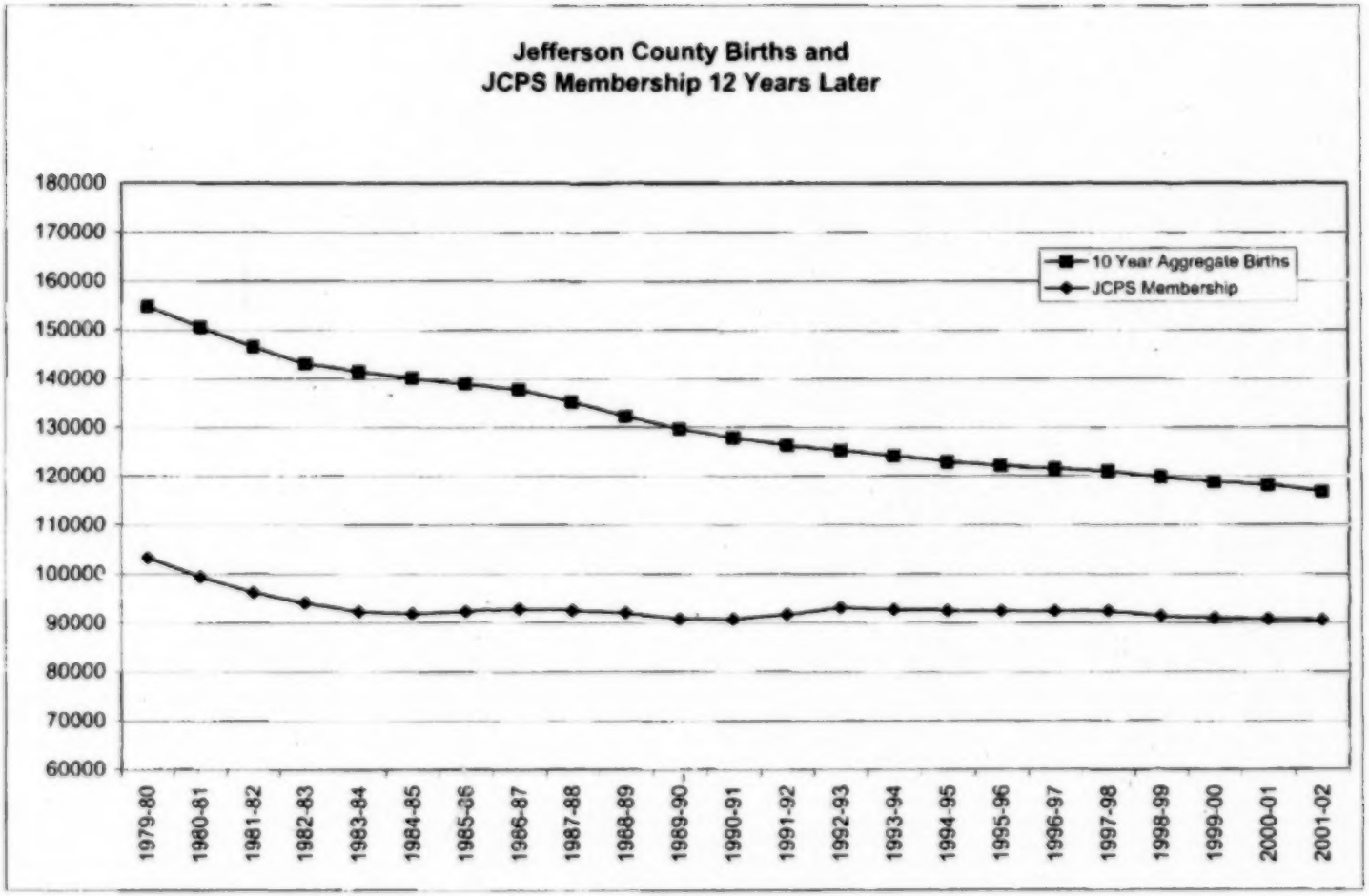
1990
1992
1994
1996
1998
2000


Jefferson County Births and
JCPS Membership 12 Years Later
180000
170000
160000
150000
140000
130000
120000
110000
100000
90000
80000
70000
60000
10 Year Aggregate Births
JCPS Membership
1979-80
1980-81
1981-82
1982-83
1983-84
1984-85
1985-86
1986-87
1987-88
1988-89
1989-90
1990-91
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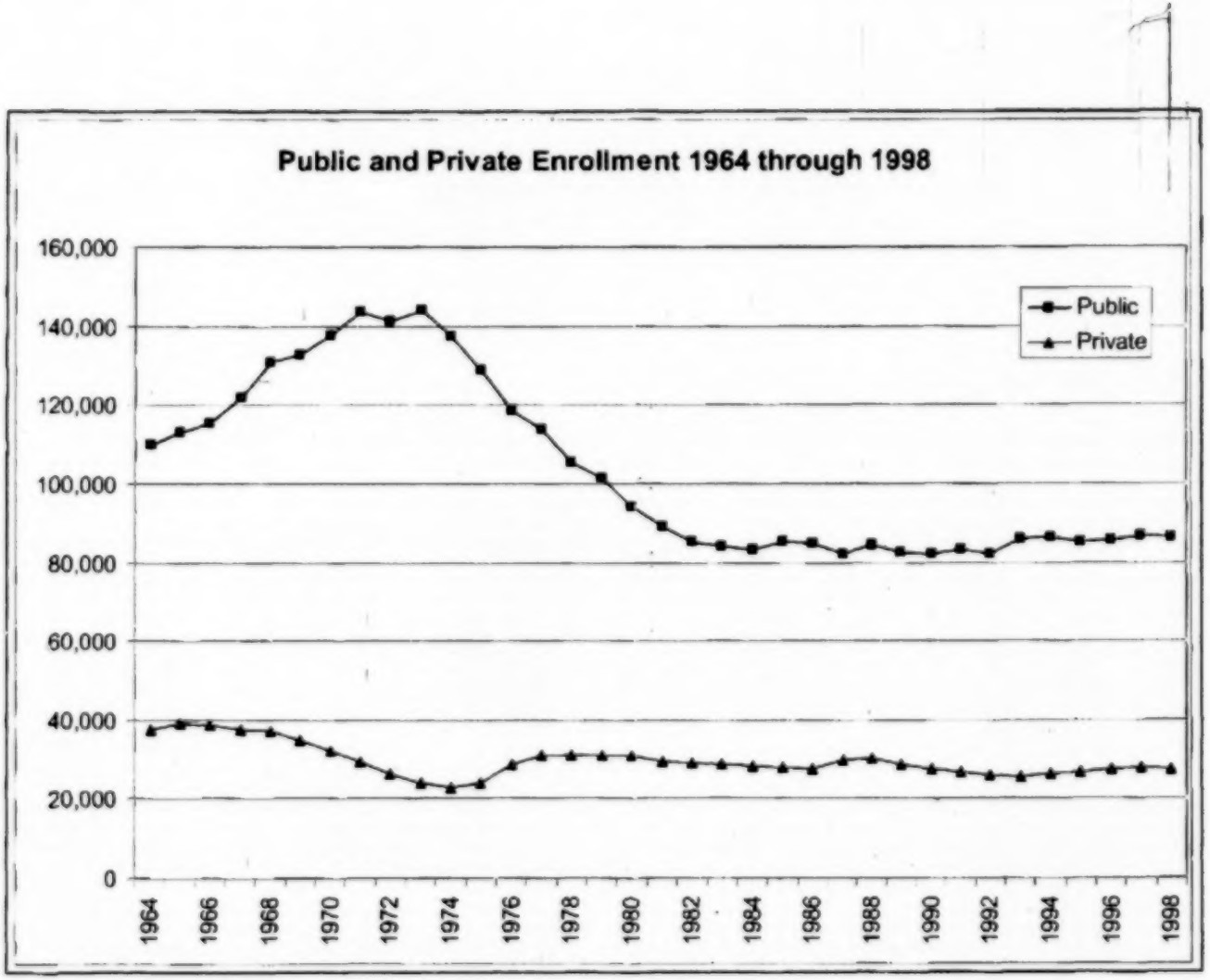
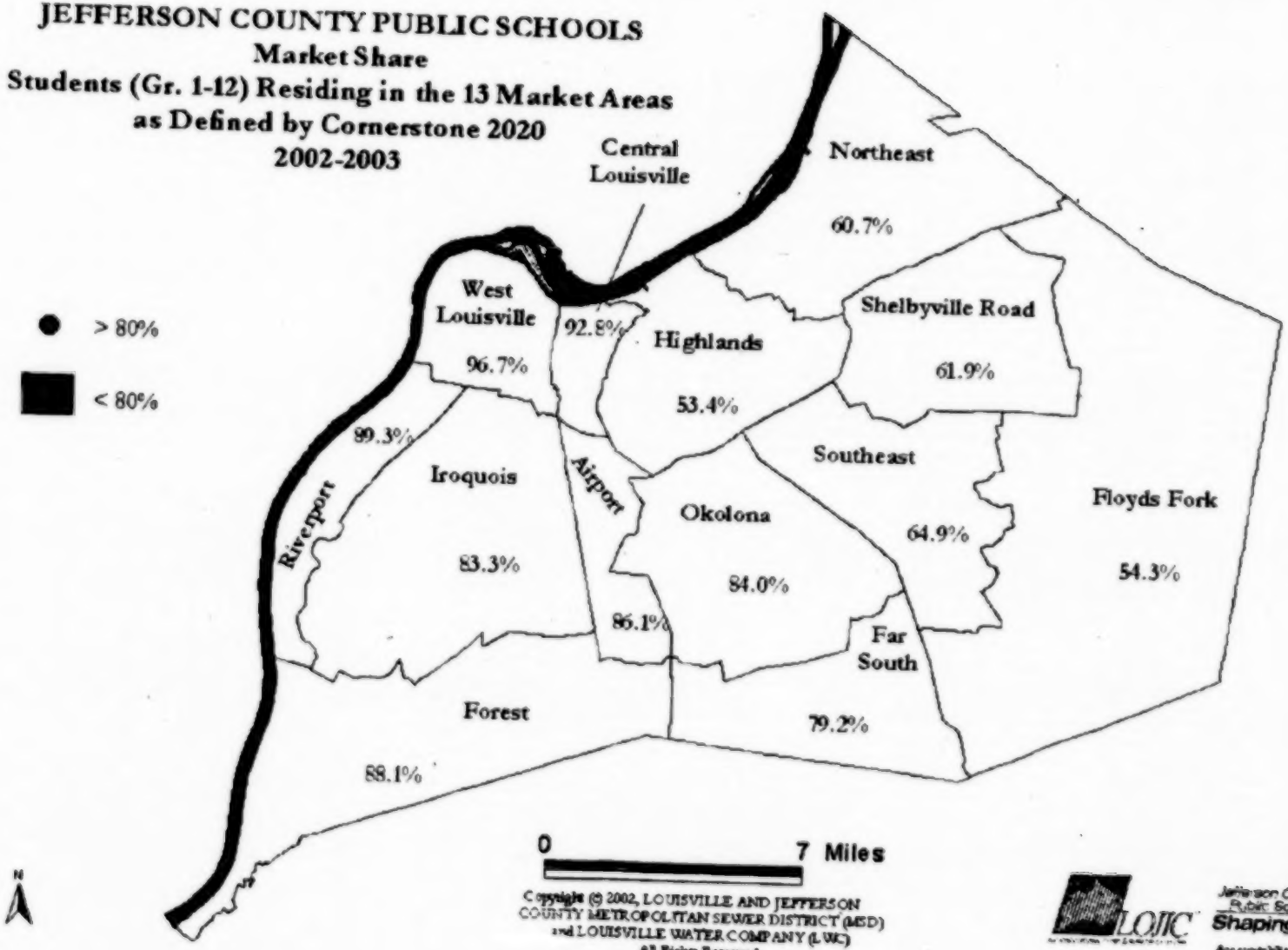
1996-97
1997-98
1998-99
1999-00
2000-01
2001-02


Public and Private Enrollment 1964 through 1998
160,000
140,000
120,000
100,000
80,000
60,000
40,000
20,000
0
Public
Private
1964
1966
1968
1970
1972
1974
1976
1978
1980
1982
1984
1986
1988
1990
1992
1994
1996
1998

JEFFERSON COUNTY PUBLIC SCHOOLS
Market Share
Students (Gr. 1-12) Residing in the 13 Market Areas as Defined by Cornerstone 2020
2002-2003



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Jefferson County Public Schools
Shaping the Future
Accountability, Research & Planning
RJR: RSpm 6/6/2003

NOVEMBER 27, 2000

TO: BOARD OF EDUCATION
JEFFERSON COUNTY
PUBLIC SCHOOL DISTRICT

FROM: STEPHEN W. DAESCHNER
SUPERINTENDENT

SUBJECT: REPORT OF THE RESULTS OF THE STUDENT ASSIGNMENT PLAN PUBLIC INPUT PROCESS

RECOMMENDATION: I recommend that the Board of Education accept a report of the results of the Student Assignment Plan public input process.

RATIONALE: On July 17, 2000, the Board of Education approved a process for review of the current Student Assignment Plan. That process included:

- A formal parent opinion survey. This random sample survey was conducted by the University of Kentucky Survey Research Center.
- Five public forums conducted from September 26 through October 4, 2000, at which participants responded to the survey and were offered the opportunity to make comments.
- An opportunity for the public to respond to the survey on the Internet from September 25 to October 15 and via a telephone voice poll from September 26 through October 1, 2000.

The survey conducted among Jefferson County Public School parents by the University of Kentucky Survey Research Center shows the following:

- 97% of parents believe a student's education is enhanced when there is a variety of educational programs or schools from which to choose.
- 96% said they would send their child to a school outside of their neighborhood if the school offered a specialized program, not available at their neighborhood school, that meets their child's individual interest.
- 82% believe that students benefit in a racially integrated school environment.
- 77% of parents (89% African American) believe schools should have enrollment guidelines to ensure that children attend school with students from different races and backgrounds.
- 83% said a magnet school's enrollment should be made up of students from across the entire county.
- More than 75% of parents prefer that the assignment to magnet schools be based upon criteria that correspond to achievement rather than to a student's background characteristics.
- 73% said any changes in the District's Student Assignment Plan should cause little disruption for families.

The results from all survey methods were consistent.

Beginning November 28, 2000, staff will consider the results and prepare recommenddations. The approved timeline calls for staff to present the recommendations to the Board in March, 2001, to go into effect the 2002-2003 school year.

Elementary School Gaps
Difference in Percent Proficient and Distinguished Performance in Reading Between:

	2002	2003
• Disability vs. No Disability	-29%	-24%
• F/R Lunch vs. Paid	-32%	-27%
• Afr-Am. vs. White	-26%	-23%
• Male vs. Female	-11%	-10%

Middle School Gaps
Difference in Percent Proficient and Distinguished Performance in Reading Between:

	2002	2003
• Disability vs. No Disability	-43%	-39%
• F/R Lunch vs. Paid	-34%	-30%
• Afr-Am. vs. White	-29%	-25%
• Male vs. Female	-16%	-16%

High School Gaps
Difference in Percent Proficient and Distinguished Performance in Reading Between:

	2002	2003
• Disability vs. No Disability	-29%	-25%
• F/R Lunch vs. Paid	-25%	-25%
• Afr-Am. vs. White	-24%	-23%
• Male vs. Female	-13%	-13%

Elementary School Gaps
Difference in Percent Proficient and Distinguished Performance in Math Between:

	2002	2003
• Disability vs. No Disability	-24%	-22%
• F/R Lunch vs. Paid	-31%	-28%
• Afr-Am. vs. White	-26%	-26%
• Male vs. Female	-1%	-2%

Middle School Gaps
Difference in Percent Proficient and Distinguished Performance in Math Between:

	2002	2003
• Disability vs. No Disability	-22%	-23%
• F/R Lunch vs. Paid	-25%	-28%
• Afr-Am. vs. White	-22%	-26%
• Male vs. Female	-1%	-1%

High School Gaps
Difference in Percent Proficient and Distinguished Performance in Math Between:

	2002	2003
• Disability vs. No Disability	-31%	-29%
• F/R Lunch vs. Paid	-31%	-28%
• Afr-Am. vs. White	-31%	-31%
• Male vs. Female	0%	+3%

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Case No. 3:02-CV-620-H
December 8, 2003
Louisville, Kentucky

DAVID MCFARLAND, Parent and Next Friend of Stephen and Daniel McFarland, *et al.*,
Plaintiffs,

vs.

JEFFERSON COUNTY PUBLIC SCHOOLS;
JEFFERSON COUNTY BOARD OF EDUCATION;
STEPHEN W. DAESCHNER, SUPERINTENDENT.
Defendants.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JOHN G. HEYBURN II
UNITED STATES CHIEF DISTRICT JUDGE

APPEARANCES:

For Plaintiffs:	Teddy B. Gordon 807 West Market Street Louisville, KY 40202
For Defendants:	Byron E. Leet Francis J. Mellen, Jr. Wyatt, Tarrant & Combs, LLP 500 West Jefferson Street, Suite 2800 Louisville, Kentucky 40202-2898
For NAACP Legal Defense & Educational Fund Inc:	Chinh Quanq Le 99 Hudson Street Suite 1600 New York, NY 10013

* * *

[1-77] (CAROL HADDAD, called by defendants, sworn)

* * *

[1-78] Q. Miss Haddad, tell the Court a little bit about yourself.

A. Well, I am married to Attorney Robert Haddad. I have two children and four grandchildren. My two children attended public schools in the seventies with merger and desegregation. I now have four grandchildren in public schools, one at Wheeler, one at Newburg, and two at St. Matthews Elementary.

Q. How long have you lived here in Jefferson County?

A. All my life.

Q. Tell us about your experience with the Jefferson County Public School System. When did you first have some involvement with the school district?

A. I got on the Board in '75—in '76 as a result of merger and desegregation of the public schools, and then I went—I was on four years, went off 10 years, and came back in 1990 and have been on ever since.

Q. Describe the district that you represent on the School Board.

A. I think I have the most diverse district. It starts at Audubon Elementary, it goes out Preston Highway past Male to Southern, and comes back in and goes by Newburg, Indian Trail, downtown to Shelby and Breckinridge Metro School.

* * *

[1-81] Q. Do you personally believe in the importance of desegregation, Miss Haddad?

A. I really do.

Q. Why?

A. Well, I believe for the children today—when my children—they were in segregated schools, and then when the merger and desegregation came and they were put into

desegregated schools, they thrived, and now my grandchildren, who are now in the public schools, we are starting to see some of the things we wanted to accomplish back in 1975 because they could not understand why you would ever have a school that didn't have diversity. So many of their friends are—they bring them home with them, African American, Spanish. So they don't understand what all the problem would be. They couldn't understand having a school system that didn't have all kids in it.

Q. Based on your, what is the total now, about 18 years in public service on the School Board?

A. 18 years, or abuse.

Q. However you term it, do you have an opinion about what the public opinions are toward desegregation in this community today?

A. Well, definitely. I think that—we had our Showcase down at the Convention Center in November. We had between eight and 10,000 people who came down to make choices for their children. I remember when we did Renaissance in 1991, people were upset because they had to make a choice for their children. Now, years ahead of time people are going down there and looking at schools so that they feel like they have a say in what's going on with their children's education. So it brings the community together to make decisions for the children's education.

Q. Ms. Haddad, were you present for the previous trial in the Hampton case involving primarily Central High School?

A. Yes.

Q. Did you get calls from constituents in your district while that case was going on or in the wake of that decision?

A. No. It really surprised me. I thought that I would—with all the hoopla we had in '75 that I would get a lot of phone calls saying let's all go back to our neighborhood schools. I did not get one call. I was very present out there that people would have called me had—they call me for a lot

of other things. But I didn't get any calls. So people said that was fine with them.

Q. They don't have—people don't have any trouble calling you if they have got something they want to complain about?

A. No. They never call to thank you. Once in a while, but not often.

* * *

[1-84] Q. Now, in your judgment, Ms. Haddad, are Audubon and Male better schools than the other schools in your district?

A. I disagree with that. I don't agree with that. I'll tell you why. I have a grandson who applied to the Traditional School, Audubon, because it was in his neighborhood, and he didn't get in. So as a result they made other choices, and they chose St. Matthews Elementary School, which is a 20-minute drive, and they love it. They are excelling. They are in the advanced and gifted and talented. They have language, and they have a lot of advantages Traditional Programs don't have.

Q. Let me ask you something. You said your grandson applied to go to Audubon. Did that happen while you were on the School Board?

A. Yes, sure did.

Q. Did it happen while you were the chair of the School Board?

A. Yes, it did.

Q. And yet your grandson didn't get in Audubon?

A. No. He followed the process.

Q. You couldn't get him in Audubon?

A. No. He had to do what everybody else had to do.

* * *

[1-88] Q. Ms. Haddad, based upon your some 18 years of service on the School Board, do you have an opinion about

what will happen to student assignment in this district if the School Board is prohibited from considering race at all in student assignment?

A. I think we will go back to a segregated system, back to the pre-'75 days. I think you will have pockets of poverty, and I think that will be a disaster. I think the kids today in this world, they are so global and our population has changed, and I think if you take the diversity out, you do an injustice to the kids because today more than ever they need to be in a diversified population.

Q. Ms. Haddad, during the plaintiffs' case, we heard some testimony about two schools and a suggestion that two schools were not good schools in the district. The two specifically were Wheeler and Newburg. You don't happen to have any family members that attend—

A. Yes. I have two grandchildren. My granddaughter went to Wheeler. She is now in Newburg. When she took the 4th grade test, she was distinguished, as were others at Wheeler, and at Newburg she is doing excellent. She is 4.0. I think the reason they probably couldn't get in Newburg was because it's overcrowded. They have over a thousand kids, people wanting to get into the school. It's excellent. There's not any safety problems in that community at all. I go out there all the time.

Q. And you have family members both—or a family member in both Wheeler and in Newburg?

A. Exactly. I have a grandson in the 4th grade at Wheeler who is doing excellent, has excellent teachers. I think it's what goes on in the building. I think that we have so many teachers that are so dedicated to kids. I think to put a label that some of these schools aren't good because they don't have a certain number is wrong because we are dealing with a lot of different kids and we are trying to get all kids to be where they need to be.

* * *

[1-104] THE COURT: Well, I suppose it's not the objective, is it, of the School Board to have the test scores of all the schools be equal, certainly not precisely?

THE WITNESS: No. It's to meet the needs of every individual child. We are working to make all kids successful. It's at different levels. We are working to make sure they all get to where they need to be.

* * *

[1-111] (DR. STEPHEN DAESCHNER, called by defendants, sworn)

* * *

[1-113] Q. How many years have you been with the Jefferson County Public School System?

A. This is my eleventh year.

Q. I don't know that we said this. What's your title?

A. I'm Superintendent of Schools.

Q. Did you have any knowledge of this school district's efforts in the way of desegregation prior to coming to Jefferson County?

A. Yes, I did. I've been connected with desegregated schools for a long, long time, even to the fact that before I came here, was very familiar back in 1975 with what generally this district went through. We were doing the same thing when I was in St. Louis. We had a huge desegregation court order that was very similar to Louisville. In fact, I even traveled, that's when the office was over in the Brown Building, and met with staff here to discuss issues of desegregation.

Q. Does desegregation matter to you personally based upon your years as an educator and currently as a superintendent of the school system?

A. Very much so, yes.

Q. Why?

A. I think you always, and what I have heard today, you always have to start with your own kids. I choose to start there. I have four wonderful children. They are quite split in age group. I have a 35 and a 33-year-old that were basically educated in Alaska, currently employed. They e-mail me once a month. That's about right. I currently also have two children, and that's a 7th and 8th grader. They go to Kammerer Middle School, which is in our district. It is very important for my wife and I and for those kids to be educated in a very diverse school system. I think it adds to their education. It adds to their experience. I think I take that forward and believe in that very much as a personal basis that diversity is very important for our students today. They will graduate into a diverse pluralistic society that we all live in. We are going to have to deal with that as adults I believe very much so.

* * *

[1-120] THE COURT: Can I ask a question? We have all looked at the statistics, and some of the statistics show that the scores, irrespective of what tests you happen to be looking at, if you look at the median score on some of these schools, and some of them are Traditional, that those scores are somewhat higher than other schools you could select out. Some people would say, well, that means it's a better school. How do you reflect on that?

THE WITNESS: Thank you, Your Honor. First of all, I'm going to talk about scores are a sum of the accumulation of individual scores. Those individual scores can reflect lots. If I broke out, for example, the Traditional Schools let me say by SES, socioeconomic, and I take another school's scores, let's just pick my kids' Kammerer, by SES, you'll see no difference. So if you equalize by some parameters, you'll get same scores or better scores.

The second thing I would like to say is it's the individual student that's of the advantage and the individual. Within that we are trying to gain scores -- you talked to this earlier. In my opinion, I can't do a terrible lot about history, although I've been here a long time now. What is very much of a concern to me is tomorrow, and I'm after gain. I call it value-added, which is sort of the question you asked, how is this student doing next year, year after, year after, year after, year after. That's called value-added education. We have some data that the value-added education is probably superior in schools other than Traditional.

I need to kind of bring this home. We don't have the option of the children that we receive. Our largest distribution is at Kindergarten. That's before we ever see them. It's due to the way the parents give their children to us. The honest fact is based on the 2000 Census data as an example, if this student comes to us with two parents that have read to them, done a wonderful job for them in the preschool, nourished them and are carrying say a 4,000 to 5,000-word vocabulary when we got them at Kindergarten, the question is how much do we advance those next year, next year.

I'm going to give you another set of kids—both of these are actual—that may not even have been with parents, maybe raised by grandmother or grandfather, single-parent families. Some are great, but they generally could come to us—and by the way, 82 percent of our African-American population comes to us from single-parent families based on the 2000 d[illegible]—come to with us with a vocabulary of about 500. That's at Kindergarten. That's before we see them. Our job in public education is try to drive those two sets to get that lower set, if you will, to gain and yet keep that other set.

What we see as we move kids along, our data will show you that that child that has that 500 will outgain, will never overcome in many cases, but will outgain the other child that comes to us with the 4,000. So you see trying to paint a

picture of that individual child. As it goes along, we begin to reduce the gaps between our African-American children and our other. We begin to reduce the gaps between our SES and other, which means that the gap data, we have it, don't deny that, yet it's how parents give their children to us, and then we drive forward to reduce that a little bit at a time. I think it would be wonderful if the community would give us all the children with the same vocabulary or the same learning. They are bright kids, every single one of them. That's what the data shows in our district.

* * *

[2-64] (PATRICIA TODD, called by defendants, sworn)

* * *

[2-131] Q. There have been some—there's been some discussion about the races under the Student Assignment Plan and under the race guidelines in the Board Student Assignment Plan. As I understand it, the school district looks at African-American and then it looks at all other. Those are the only two races that are considered, is that correct?

A. That is correct.

Q. Why does the district look at it that way? Why doesn't it include other races in the break-out of racial composition?

A. There are a couple of reasons for that. One of them is a historical perspective. The plan is still reflective of the '75 Plan in which the issue was about discrimination for African-American or black children. And so our plan continues to reflect the evolution of the original plan from '75. The second reason and I think is a very important reason in terms of student enrollment in the general public schools, only 5 to 6 percent of that population is due to other races or ethnic backgrounds. So while they are still an important part of considering diversity and the social benefits and the academic benefits, they are definitely a very small part of our student

population. So in this community, for this school district, it is still largely a question of black and white.

Q. What is the average African-American enrollment in the Jefferson County Public School System?

A. At the elementary level it is about 36 percent. At the middle school it's about 36 percent. At the high school level it's about 31 percent. The average is about 34.

* * *

[2-133] Q. Tell the Court about how the 15/50 guidelines evolved and how we arrived at those numbers.

A. All the previous plans to the 1996 Plan, the guidelines were based on the percentage of African-American enrollment at each—at the respective level, elementary, middle or high school, and that meant for the school district and for parents in the community there were three sets of racial guidelines. One of the things that we recommended as a result of community input in the 1996 Plan was to have all three levels be within the range of 15—no less than 15, no more than 50 percent African-American. We had been hopeful that this would permit more African-American children to be able to choose to stay home as their first choice and be able to do so. But I will tell you that all—from '75 on there have been critics who have complained that either the racial guidelines are too tight or the racial guidelines were too loose. I think one of the challenges for district staff and the Board of Education has been to find a range of guidelines that seems to make sense to the community and to work well for the vast majority of parents.

Q. Ms. Todd, do you believe that a majority black school must be an inferior school?

A. Absolutely not.

Q. Then why does the school district have race guidelines that prohibit a majority black school in this district?

A. Well, first of all, we believe in the benefits of a desegregated learning environment, and that that translates to

academic opportunities for all children. Two, we believe that in order to prepare our kids for work in our community or any other community, they are largely going to be encountering diverse work places, and so we feel like there is a social benefit as well as an academic benefit. Thirdly, if you are going to believe in those two things and have a Student Assignment Plan and a Board goal that specifically identifies the importance of desegregation and integrated learning environments, then you need a yardstick by which to measure whether or not you are achieving that. Without that yardstick, I really would not have any moral authority to be able to make the Student Assignment Plan be successful.

* * *

[2-143] Q. Based upon your work in student assignment in the school system, do you have an opinion about what would happen to the racial composition of the schools in the JCPS system if the district was prohibited from considering race in assigning students to schools?

A. Yes. Based upon my experiences, I believe that essentially we would resegregate as a school district and that that would be detrimental to the educational program and social benefits that the plan provides.

Q. Do you have an opinion about what would happen to the racial composition of the schools if you could consider race but you couldn't use the guidelines of 15 to 50 percent?

A. Yes. That gives me an amount of authority in which to facilitate, negotiate and work collaboratively with principals and district staff in order to ensure that the plan is implemented.

* * *

[2-166] Q. Ms. Todd, how substantial is the impact of the race guidelines in the district's Student Assignment Plan and in the assignment of students who are subject to those race guidelines throughout the system?

A. In my opinion there is a minimal impact.

Q. What's the basis for your saying it's a minimal impact?

A. Well, when you look at the data, I think that you will find that essentially most elementary school students choose to stay at their resides school, and that at the middle school and high school level about half are at their resides school. That does not mean some folks do not get impacted, but I believe it to be a minimal impact.

Q. The primary tool that you use at the elementary school level is what?

A. The cluster system.

Q. The primary tool at the middle and high school levels is what?

A. The contiguous and noncontiguous boundaries.

Q. If you are a middle or high school student, you have a right to apply to how many other schools other than your resides school?

A. We are at middle and high?

Q. Yes.

A. All right. You have two choices to a Magnet or Optional Program. So there would be two. As a 9th grader, you would have open enrollment, which would be the third. And you also have the opportunity to transfer, and there are no limitations to how many transfer requests that you can make.

Q. Of those middle and high school students who do apply to exercise a choice, what happens to most of them?

A. Most of them would get their choice.

Q. Looking at the plan as a whole—let me back up a second. We have talked about 97,000 students throughout the system. What's the number of students who are in the system and subject to the race guidelines in the plan, approximately?

A. I think it's about 87.

Q. All right. 87,000 students.

A. 87,000, correct.

Q. Looking at the plan as a whole, are substantial numbers of students denied acceptance to their choice school because of their race at the middle and high school level?

A. No.

Q. If any middle or high school student is denied acceptance to a school of his or her choice because of race, what harm does that student suffer?

A. As I stated earlier, because of the comparability of the curriculum, instruction and the funding system, I do not believe that there is any harm to any student.

Q. Do you have any information about whether the majority of elementary school students end up attending their resides school in the system?

A. I think Dr. Rodosky is going to show us some data that says the majority of them do.

Q. All right. Now, again, the choice options that elementary students have are what?

A. Essentially they have four choices in terms of two cluster choices, two Magnet Option choices, and then, again, they also have the option to use transfers and there's no limits on that.

Q. And if there is an elementary school student out there who didn't get his or her choice because of race guidelines in the plan, what harm does he or she suffer?

A. Again, I do not believe that there is any harm based upon curriculum, instruction, funding issues, comparabilities.

* * *

[2-194] Q. Joshua McDonald was not accepted into Breckinridge Elementary School for 2002-2003, is that correct?

A. That's correct.

Q. As I understand it, he applied for a transfer to Bloom?

A. Correct.

Q. Why was his application for transfer denied?

A. The letter indicated that it was for race.

Q. So you don't dispute that?

A. No.

Q. Race was the factor in that—

A. The denial of that transfer.

Q. Did he have a right to appeal that decision?

A. Absolutely. And the letter denying the transfer indicated that.

Q. Did he appeal?

A. No.

Q. Did he apply to get out of Young?

A. No. Between the Kindergarten and 1st grade year there was, again, an opportunity to fill out a cluster application and to ask for a different school, and that did not occur.

Q. Now, there was some suggestion that there might have been transportation issues with getting to Young Elementary School. Would this child, Joshua McDonald, have been entitled to transportation to Young Elementary School?

A. Absolutely.

Q. The primary talent pool at Bloom, there was an indication that that's what the family wanted at Bloom. Is Bloom the only school that has a primary talent pool?

A. No. As I indicated earlier, that is an opportunity at elementary schools as a result of KERA.

Q. Is it your judgment that Joshua McDonald is receiving an inferior education at Young Elementary compared to what he would have received at Bloom?

A. No.

* * *

[3-23] (LOUDENA PEABODY, called by defendants, sworn)

* * *

[3-24] Q. What's your job?

A. Currently I am Director of Instructional Support, and my main responsibility is that I coordinate the training for 64 district resource teachers who go into the schools and provide

either school-based professional development or in-the-classroom coaching.

Q. How many years have you been employed by the Jefferson County Public School System?

A. 25 years.

Q. All right. Tell us generally what different jobs you have held in the JCPS system over those 25 years.

A. I've been a teacher at all three levels. I have also taught in special education and regular education, a guidance counselor and an elementary principal for eight years. I've been in my current position, this is my third year.

Q. Teacher at all three levels. Where did you teach at the elementary school level?

A. Taught at Crums Lane Elementary, and I taught at the Binet School, and then I taught at Crosby Middle School when I taught middle school and then also at Seneca for high school.

Q. Okay. You said you were a principal for eight years. Where were you principal?

A. At Minors Lane Elementary.

Q. If you would, describe your experience as principal of Minors Lane Elementary over those eight years. What was that school like when you arrived there?

A. I was—I became principal there in 1993, and at that time our test scores, our CATS scores were at a 24. So we were identified as a school in decline. That's what it was called then.

Q. 24 out of what's the total?

A. On a scale of like 100.

Q. Out of a 100, Minors Lane Elementary was a 24 when you arrived?

A. Correct.

Q. Describe, if you would, something about the school. First of all, where is it located?

A. It's located between Okolona and Fairdale, which is in the southern part of Jefferson County. It has two trailer parks

in the area and then a very small, like neighborhood, which during that time the first year—the first year there at Minors Lane the airport expansion began, and so the people who owned homes in the neighborhood began to either move or their property was bought by the airport. So that continued also over that eight-year period.

Q. What was the percentage of free and reduced lunch at Minors Lane Elementary?

A. It ranged from 76 percent to 80 percent.

Q. All right. What was the percentage of African-American enrollment at Minors Lane Elementary?

A. When I began at Minors Lane, there was 17 percent. We only had two African-American families in the neighborhood. And when I left, the African-American representation was 26 percent.

Q. So it actually increased while you were there?

A. Yes.

Q. I don't know that we identified the eight years that you were at Minors Lane Elementary. When did you start?

A. 1993 to 2001.

Q. When you left in 2001, what was the school index then?

A. 81.

Q. So it went from 24 to 81 in your tenure?

A. Correct.

THE COURT: Is that the academic index?

THE WITNESS: Yes.

BY MR. LEET:

Q. How did it come about that the African-American enrollment changed from 17 percent to 26 percent during your tenure there?

A. Well, we are in clusters. Wheatley is the head of the cluster. I had been counselor at Wheatley Elementary. So I was familiar with the neighborhood and the students there.

So what I did is I went down in August of every year and did an orientation with the incoming families. At that time they had not chosen what school they wanted to attend, and what I did is I told them about Minors Lane and talked a little bit about the bus ride and parent involvement and the activities that we had for students. So when it did come up for them to choose, hopefully they chose us. And then what happened is over the years because our scores went up and activities, then families in the neighborhood would tell other families that moved in, and so that's why our increase in African-American population.

* * *

[3-30] Q. Based on your 25 years of experience as an educator, a person who has taught at all three levels within the school system, has been a counselor, now Director of School Support, do you believe that low SES students, let's just say it, poor students in this school district can learn and can achieve?

A. Yes. Absolutely.

Q. If that's true, then in your judgment why do you need race guidelines as part of the Student Assignment Plan?

A. Well, I'm real supportive of integrating our schools because I think that's the way our society is. It becomes more and more integrated. So I think our schools need to reflect what society looks like. I think it gives students greater exposure to diversity. It helps students become more socially and emotionally educated. I think if we had segregation, you would miss out on those three components in education.

* * *

[3-56] (SAM CORBETT, called by defendants, sworn)

* * *

[3-58] Q. From your perspective, Mr. Corbett, as a former member of the School Board and as a businessman and community leader today, do you have an opinion, a view, about the importance of diversity in the school system and in the schools?

A. I do, and I would say that my perspective is not as much from being a previous Board member or even a business person in Louisville, but more as what I would define as a consumer of the product and one who has approximately 200 employees, many of whom consume the product either with their children or their grandchildren. I sell for a living so I tend to look at everything from that perspective and from my perspective as consumers. In my case with my youngest son a senior in high school in a Jefferson County school and my employees who have, as I mentioned, children and grandchildren, I tend to look at what's the benefit of having diversity within the buildings to the people that work for me to my own children, to my friends and their children.

And I guess I can only point to the situation I have in my own business where today a third of our work force is white, a third of our work force is African-American, a third of our work force is Hispanic. Five years ago we had a significant Vietnamese population. I know we all talk this and it sounds good, but from a practical standpoint if we want our children to live and work in a world where they are going to be dealing with people who don't necessarily look and/or sound like they do, then what better way to prepare them for that than to be in that setting in the school building because they are going to get it in the workplace, and my company is a perfect example of how that's going to happen.

* * *

[3-60] Q. Mr. Corbett, have you participated in any urban workshops in connection with Greater Louisville, Inc., GLI?

A. I have three or four times in the last 10 years.

Q. Has your participation in those workshops exposed you to other cities, other metropolitan areas around the country and how they may compare or contrast with Louisville?

A. It has. That's one of GLI's goals is to visit cities that are similar in nature to Louisville.

Q. When you have been involved in those workshops in those GLI matters, people come to Louisville. Are you proud of the school system that we have here and do you advertise that to the people that come into town?

A. Obviously I am, but I think GLI and the leadership of the community is, too, because many of us have been involved in presentations when groups are visiting where we are asked to participate and talk about what's going on in JCPS. It starts with Mayor Abramson because he is a fan, is a former PTA president at his child's school when he was not in office. So there's a lot of community support for what's going on with JCPS.

Q. Based on your experience, is that true at all other cities?

A. Well, no. I mean clearly a perfect example, one year GLI went to Cleveland, and Cleveland did everything they could, the people that were presenting to GLI, which I assume represented the leadership or part of the leadership of that community, they did everything they could to talk—to not talk about what was going on with their school system. They had—to define their system as a school system in crisis would be somewhat of an understatement, and this is their city system. They have many other systems through their suburbs. Their Cleveland School System was in such disrepair that those people almost—not almost, they apologized for what was going on and acted as if, well, we are going to do better. We don't want to talk about it.

* * *

[3-71] (DR. ROBERT RODOSKY, called by defendants, sworn)

[3-92] Q. First of all, I would like to show you what I will mark as Defendant's Exhibit 27, which was I believe previously an exhibit in the Hampton case. Could you identify that and tell us what it says?

A. That is the number of births by year that is used for our projections in Jefferson County from, looks like 1960 through 2000.

MR. LEET: Move to admit Defendant's Exhibit 27, Your Honor.

THE COURT: It's admitted.

(Defendant's Exhibit 27 admitted in evidence.)

BY MR. LEET:

Q. I ask you if you can identify what I have marked as Defendant's Exhibit 28.

A. That's the number of births by race for Jefferson County, 1960 to 2000. It is by white and nonwhite births. You can see what the relationship of the two births are by the bar graphs.

Q. What's it tell us? Interpret it for us.

A. Well, it basically tells us that we are fairly stable in terms of births right now, over the last several years.

Q. Okay. How does the nonwhite birth rate compare with the white birth rate?

A. Nonwhite birth rate is going up.

Q. And the white birth rate?

A. And the white birth rate was declining for a while in the early nineties. It made a little comeback and it's stabilized.

MR. LEET: Move to admit Defendant's Exhibit 28.

THE COURT: It's admitted.

(Defendant's Exhibit 28 admitted in evidence.)

BY MR. LEET:

Q. Next I'll show you what—let me first ask you, Defendant's Exhibits 27 and 28, were those used as exhibits in the Hampton case?

A. Yes, they were.

Q. Defendant's Exhibit 29, can you identify that?

A. Yes. This is where we take births in a 12-year cohort and take aggregate births, and then we look at our total population over the 12-year cohort. These would be students that would be in our district as a total district. So the top line are the 12-year aggregate births, and then the bottom line, the bottom years are basically the school year and what our enrollment was during that particular school year. Basically it shows that as aggregate births declined, our enrollment has stabilized. So we aren't on a parallel downward course. Actually, if this was considered a gap, we are closing the gap between aggregate births and our enrollment.

Q. Was Exhibit 29 also an exhibit in the Hampton case?

A. Yes, it was.

MR. LEET: If I haven't done so, I would move to admit it.

THE COURT: It's admitted.

(Defendant's Exhibit 29 admitted in evidence.)

BY MR. LEET:

Q. Defendant's Exhibit 30, Dr. Rodosky, what does that show us?

A. This is the public and private school enrollment 1964 through 1998. The public school enrollment is the top line. The private school enrollment is the bottom line. You will see that in the early seventies we experienced a great decline in our enrollment. It finally stabilized around 1983. And we have gained back some of it beginning in the early 1990's in

terms of an enrollment gain. The bottom line is the private school enrollment, and you will see that there was a little dip in the private school enrollment around '74. It came back and in '76—and it's sort of been the low 20,000—between 22 and 25,000.

Q. Dr. Rodosky, is it a goal of this public school system to maintain good market share in the community?

A. It is. Yes.

Q. Let me show you next what I have marked as Defendant's Exhibit 31. Can you identify that?

A. Yes.

THE COURT: Excuse me. Does the private include parochial?

THE WITNESS: Yes. We as a district have to maintain a census of all schools in the Jefferson County area, including home schools. So on our file we have the fact that student A is a private school and we have that school coded, and so that's how we get this data.

BY MR. LEET:

Q. Dr. Rodosky, can you identify Exhibit 31?

A. Yes. Exhibit 31 is what we call the market share comparison. It has three years on the screen. What we did was our district participated in the Cornerstone 2020 project that was sort of an early 1990's initiative by I believe city and county government at the time in which they divided the county up into areas that they would look at various land use issues of those areas. So we thought it would be a good idea to take the Cornerstone 2020 framework and basically put our public and nonpublic school data within that framework to see how we were doing within each of these land use areas. So what you have is Northeast, West Louisville, Floyds Fork, and I believe that there are some maps that correspond to this that might be coming up, and then there's the public school enrollment and the nonpublic school enrollment. So you can

see where there is growth occurring on some of these areas from I believe 1992-93 to this past year. And you can also see that our market share is basically holding its own.

* * *

[3-123] Q. Now, has the school district ever made any attempt to poll or question graduates on their views about the advantages or disadvantages of desegregation?

A. Yes, we have.

Q. And in what context did the school district do that?

A. Okay. My office, by School Board, I don't know if it's policy or direction to the superintendent, we have to every five years do a follow-up of graduates that graduated five years previous. So in the 2002 year I contracted with the Survey Research Group at the University of Kentucky to survey our 1997 graduates.

Q. And let me ask you if the following questions were asked of those graduates. First of all, question, "I think it is important for my long-term success in life that schools have students from different races and backgrounds in the same school."

A. That question was asked.

Q. Graduates were asked whether they strongly agreed, agreed, disagreed or strongly agreed with that?

A. Right. Yes.

Q. What were the results on that question?

A. 97 percent of the students that were surveyed felt strongly—strongly agreed or agreed to that statement.

Q. And 3 percent of the graduates who were polled disagreed with that proposition?

A. That's correct, yes.

Q. Was this question also asked: "Going to classes with people from different cultural backgrounds, how well did JCPS prepare you"? The options were very well, somewhat well, somewhat poorly or very poorly. What were the results of that question?

A. The results of that question were 89 percent of the students that were in college that had to attend classes, they answered that JCPS prepared them well or strongly prepared them.

Q. Can you identify what has previously been marked and introduced as Exhibit 37 in the stipulations, Dr. Rodosky, which I'll put on the screen?

A. Can I interrupt you? There was a third question on that graduate follow-up survey.

Q. Yes. Wasn't it very similar to the second question?

A. It was very similar, but it was different. It had to do with working, with preparing yourself to work in the workplace with different people instead of attending classes. It had to do with work.

Q. How were the results of that third question that directed graduates to indicate whether they thought the school system prepared them well to work in the workplace as opposed to attending classes?

A. Like 88 percent of the graduates felt prepared or well-prepared.

* * *

[3-160] Q. Dr. Rodosky, keep that handy. What does Defendant's Exhibit 63 tell us about differences in the achievement gap between 2002 and 2003?

A. Well, it shows that we do have a gap and that the gaps vary depending upon what groups we are looking at and that the biggest gaps that we have is in the area of students with disabilities versus students with no disabilities. Basically the third I guess level of the gap—if we were going to sort of rate the gap from most gap to least gap, it would go disability versus no disability, free and reduced lunch versus paid lunch, African-American versus white, and male versus female. And that's the case in almost all these except for I believe something in middle school math.

Q. Let's just talk about African-American versus white achievement gap. Let's focus just on that one.

A. Okay.

Q. You've heard the plaintiffs' counsel talk about what he referred to as a 20-point achievement gap between white and black in the school district. What does Defendant's Exhibit 63 tell us about whether this school district is having success or not having success in reducing the gap between academic achievement among African-American students and white students?

A. Well, I think it is showing that we are reducing the gap. We have one year of data. One of the things that I would like to point out is since I've been associated with the school district, we have always had test data by groups, especially African-American versus other or African-American versus white. One of the frustrating things that I have found out is that starting in 1977-78, we have had differences. We start to close the differences, and then they change the test or they change the scaling or they change something. So, if you look at our data by groups starting in about 1977-78, you will see a trend of closing the gap, and then all of a sudden the test or the measure changes. We had—back in the late eighties, early nineties before KERA, there was a test called the Kentucky Essential Skills Test, and I could only describe it as a very, very basic test, and we were about maybe five to eight points difference in the gap, and you could see it being reduced from year to year.

Then KERA was introduced. Then we went to KIRIS, which was to be piloted. Then we started to look at that data, started to close the gap. Then they changed to CATS. We are really only in—when we think about it, there was a baseline year—a baseline biennium. The baseline biennium was a conversion from KIRIS to CATS. During the second year of the biennium, they then did new performance kinds of things and basically redefining what novice, apprentice, proficient meant, and the schools really got that information

in the—probably the end of the 2000 school year, maybe the beginning of 2000-2001 school year. So we are really in about the third year or the second year of starting to understand the assessment tool, the expectations and the measurement. We are doing a pattern that we have done with other tests, and that is, we are starting to close the gap.

Q. Dr. Rodosky, did the Broad Foundation's recognition of this school district relate in any way to issues involving reducing the achievement gap between African-American and white?

A. It did, yes.

* * *

[3-172] (DR. EDWARD KIFER, called by defendants, sworn)

* * *

[3-179] Q. What does it mean to you when we talk about reducing the achievement gap?

A. Can I say that I have written a paper on that?

Q. Please.

A. It's not what you see in the media. I think the media doesn't do a very good job of telling us what these kinds of issues really are. For me, I wanted to look at it because I was afraid that the kinds of reporting that we get lead to very stereotypic kinds of notions about what those are. So I spent some time on both Kentucky data, the KIRIS data, and Fayette County data to look closely at it. Let me give you a couple of examples that I hope people—I hope people don't draw these kinds of inferences. But the way that this gap is reported, someone could really believe that all white students have higher scores than all black students. They really could believe that.

What happens is when you look at these means, you forget that there are distributions of scores. So what I did in my

paper was try to take a serious look at those scores, and what you find out is that of course there are differences between white and black achievement, but the distribution of scores, the overlaps are substantial. That's one thing. I think that's really important. I'll come back to that.

The second thing that you find is that the relationship between black and white scores, at least in Fayette County, and my guess is true as well in Jefferson County, differs depending upon what school you look at. There were more than a third of the elementary schools in Fayette County where the average black score indeed was higher than the average white score. People would, of course, miss that kind of thing, and it should be pointed out if you close those gaps that you are going to widen the gap at the district level, so that No Child Left Behind sort of puts you in a bind. The other thing, because of the percentage of minorities in Fayette County, that if you go to the black mean, there are I think two or three times as many white students below the black mean as there are black students below the black mean. So that if you viewed this as strictly a remedial kind of thing, you would have far more white students that should be remediated than black students.

I guess, to make a long story short, we are late in the day, this issue is certainly desirable to guarantee each child an equal opportunity in a public school system, and it's desirable to look closely at what those opportunities provide in terms of outcomes, but the issue of the gap I think is much more complex than has been portrayed.

* * *

[3-181] Q. You've already testified about and others have testified about at some length the surveys that you participated in regarding Jefferson County Public School graduates or students and their families. I don't want to belabor that. I only have a couple of questions. In connection with those

surveys, Dr. Kifer, did you find any similarities between how black families and white families viewed what was important in the school system?

A. I think that one, you are referring to the assignment survey.

Q. Yes.

A. Okay. I think—I thought there would be far more disagreement within the community about some of these issues than the survey turned out. There was remarkable agreement among every group in Jefferson County Public Schools about how desirable having diversity in the schools was. It's unambiguously true that Jefferson County citizens believe that that's a desirable characteristic of school systems.

* * *

[3-207] Q. Dr. Kifer, you've talked about how you want to see in a school diversity?

A. Right.

Q. Is improved educational achievement the only reason you want to see diversity in a school if you look in a school?

A. No.

Q. What are the other reasons?

A. Well, I think that -- well, I am a public school freak. I believe so strongly in the schools as being places where opportunities and talents can be developed. I think that it's extraordinarily -- it's the American promise. You get those kinds of opportunities regardless of your background. It's a part of the American ethos that says we ought to learn to live together. What you are talking about is democracy. A piece of the kinds of stuff that the public schools do best is this -- ought to do best is initiating people into what is a very pluralistic Democratic society. That's their goal.

* * *

[5-3] (DR. GARY ORFIELD, called by defendants, sworn)

* * *

[5-13] Q. Based upon the work you have done, Dr. Orfield, the studies that you have reviewed and that you are familiar with, have you formed any opinions regarding the impact on students of racial segregation in the schools, or conversely, the impact on students of racial desegregation in schools at the K to 12 level?

A. Yes.

Q. Summarize the opinions that you have reached on those issues.

A. Well, basically I believe there are quite strong, powerful effects on both minority and white students from desegregation and very negative consequences from segregation or resegregation of schools. To really simplify and summarize that vast body of research, I would say by and large the research shows that black students gain in terms of educational achievement measured by test scores from desegregated experiences. By and large it shows that there is not a significant effect on white students one way or another in terms of test score outcomes.

More importantly than test score outcomes, which test scores of course are very, very strongly linked to parent educational level, income and a variety of other forces outside of schools, but the things that schools appear to affect more dramatically where desegregation has a much easier effect, much larger effect, easier to discern, is in terms of racial—learning how to cooperate and understand across racial lines in terms of what kind of life you have after school, whether you go to college, whether you finish college, what kind of employment you have, how you live and work in communities, and these effects are not just on minority students. They are strongly positive for all groups of students, each of the minority groups that we studied and white students.

Our research shows, by the way, that normally in the United States whites are the most segregated population. Of course, we are going through a racial transition in the United

States where 40 percent of our students are now nonwhite and we are going to have half nonwhite students in another generation. So we believe that the consequences for white students of not being able to understand and operate in a multiracial setting are tremendously negative.

Q. Is it your testimony, Dr. Orfield, that the benefits to black students that come from racial desegregation or racial integration are not limited to matters of academic performance that you can see in test scores but are broader than that?

A. Much broader, yes.

Q. You've testified about your opinion of some of the harmful effects that follow from students' experience in segregated schools. I want to ask you whether it's your belief that the harmful effects are the same if the segregation is de jure segregation, and on the other hand if the segregation is de facto segregation.

A. I believe that the basic effects are the same. Possibly when we used to have officially mandated segregation under state constitutions and where there was all the pressure of the state and the society overtly against any student who wanted to make a transfer into a white school, for example, I think probably if we could compare that experience with what exists now, we would see even more dramatic negative effects. But it seems to me right now if you look at places that are found to be guilty of a history of discrimination and places where that has never been determined, the results are quite similar in terms of the effects.

Q. Let me talk about the benefits for a moment. Are the benefits to black students from attending a desegregated school system the same whether that desegregation is a result of a court-ordered plan, and on the other hand if it results from voluntary desegregation?

A. Well, I think that where you can actually achieve desegregation through largely voluntary means and you get a buy-in by families and by school folks and everyone, that's a

pretty positive way to do it. I think that the benefits are large even if it's fairly mandatory. But I think that when you can have parental and student choices involved as well as ending up with a desegregated setting, that's probably better.

* * *

[5-23] Q. Dr. Orfield, are you familiar with a case that was styled Grutter v. Bollinger involving the University of Michigan Law School that eventually went up to the United States Supreme Court?

A. Yes, very familiar.

Q. Are you familiar with the benefits of racial integration that were identified by the Supreme Court in that opinion?

A. Yes. We did a study of the University of Michigan Law School students which was entered in evidence in that case. I was a witness in the case. The study is included in the book that the Supreme Court cited in the case. So I'm very familiar with that, with the litigation and with the outcome.

Q. Do you believe that a socioeconomic status Student Assignment Plan for Jefferson County, Kentucky that considered just SES data and not race would be successful in fostering the benefits of racial integration that were identified by the Supreme Court in the *Grutter* opinion?

A. I believe that it would be very, very difficult to do, and you would lose a lot in the transition process, and the outcome would be highly uncertain and that it would probably fail in some important respects.

Q. Is it your view that a majority black school is an inferior school?

A. No.

Q. Then why are you concerned about avoiding—

A. My children have all been to majority black schools for part of their education.

Q. I'm sorry?

A. My children have all been to schools like that for parts of their education.

Q. If you don't believe those schools are necessarily inferior, why are you concerned with avoiding a return to majority black schools?

A. I am concerned because I think maintaining integration is very valuable for the entire community, for the black children, the white children and for the future of the community as a society, the kind of democratic outcomes that Justice O'Connor discussed in her decision in the *Grutter* case. I believe those are very, very important and fundamental interests. The problem with a majority black school, especially a small majority black school, is that it tends to resegregate. It's not that that school is inherently inferior. It's that there is a process that will tend to make it not majority, but all black. As those schools go through resegregation, they also become very high in concentrated poverty, and that destabilizes the whole system. That isolates those children. As that process takes hold, it tends to produce polarization of a serious sort.

Q. Isn't it true that prior to the Supreme Court decision in *Brown v. Board of Education*, there were all black high schools that had very high academic standards around the country?

A. There were a few. They basically existed because of very special conditions that existed before *Brown*. Basically there were a lot of very talented African-Americans who had even Ph.D.'s who could not get jobs any place except in those schools. They were able to get remarkable staffs in schools like Dunbar in Washington, a few other schools. At that time only one-quarter of black students were finishing high school, at the time of *Brown*. So you had a much more limited group of students, much more selective in important respects. You had a captive group of highly-trained professionals who were not allowed to live outside of or to work outside the system of segregation. You had the entire black middle class putting its aspirations on those particular schools. None of those conditions exist now. When you go to neighborhood schools or

even if you look at what happened to those schools, if you look at Washington Dunbar High School today, you don't get that result because the black middle class is not confined either educationally or residentially in the same way. So you get extreme concentrated poverty in schools that are extremely separated from the rest of the society, even from the black middle class society, and the black middle class tends to leave them. Those who are there leave them very rapidly.

Q. Do you happen to know whether that's also true of Central High School in Louisville, the last point that you just made that the black middle class tends to leave the school?

A. Well, I understand that Central High School has gone from a little less than half black at the time of the Court decision to 80 percent and that it's gone from 60 percent to 66 percent free and reduced lunch, which is probably an underestimate of the true level of poverty in that school.

* * *

[5-26] Q We have talked a lot this morning about the benefits for black students. Do you have an opinion about whether there's a benefit for white students from attending racially-integrated schools?

A. Yes. I believe there's a very strong benefit.

Q. What is that benefit?

A. The benefit, as the students told us when we studied this in Indiana, was that their communities are not the real world. Whites are segregated. They are segregated primarily in suburban communities, and they are segregated by both race and class. They get little—very little understanding of what the actual society is like in their home communities. White students know that. When they experience diversity, they find it intellectually exciting. They find it positive. It gives them new points of view. It helps them understand other groups. It makes them very confident about their ability to live and work and participate in a society that's multiracial.

Young people know that we are actually going to have that society, that it's actually here. A lot of older people don't understand that. We find kind of remarkably consistent results, very positive results, from students who have been in diverse schools, and they are mostly along those lines, their preparation for entering into a diverse society.

Q. The studies that you have conducted in this area, were they relied upon by the Supreme Court in the *Grutter* decision?

A. Yes.

Q. All right. Do you believe that all of the benefits that flow from racial integration, from diversity, can be proven by reference to a test score?

A. No.

Q. You mentioned a few moments ago that you have done work polling or interviewing students and families here in Jefferson County, Kentucky—

A. Yes.

Q. —and their views of desegregation. Tell the Court about that, if you would, your work in that area.

A. Yes. Well, we did a study of the high school juniors here in 2000, which was published in our book in 2001, and we had an excellent sample of high school juniors, and we got a very good response rate, 90 percent plus response rate, which is excellent for reliability of a survey. We basically found kind of stunningly strong and parallel views of black and white students about the benefits of their school system. We found, for example, that when we asked students whether they were comfortable working with students from different racial and ethnic groups, 61 percent of the white students and 61 percent of the black students said they were very comfortable. Another 31 percent of the white students and 35 percent of the black students said they were comfortable. That's a total 92 percent of the whites and 96 percent of the black students, really stunningly high results in terms of—you couldn't even—if we presented some of those numbers

without actually asking the students, no one would have believed them, I'm sure. These surveys were confidential, by the way, and they did not go to anybody in the schools. Nobody had any way to identify the students. So they could have said whatever they wanted.

We found that students, both black and white students, had very educational aspirations here and that they were similar, and they reported similar levels of encouragement from their teachers. We also found that more than 80 percent of both groups said their school experience had helped them learn how to work and relate to students from other groups. 90 percent of both groups, more than 90 percent, said they were—they would be comfortable working under a supervisor of a different race as adults.

That's one of the reasons the businesses intervened so strongly in the University of Michigan case. They believe that as well, that if you—that what you learn to do is—working across racial lines is not a natural thing in society. It's not something you automatically know how to do. I recently wrote an article for a newspaper in Connecticut where I reported that in more than 30 years of teaching, teaching issues that relate to race relations, I found students who have had interracial experiences in their elementary and secondary school are just vastly more sophisticated in understanding things than students who come from elite suburban schools. They are also much more effective at working together in groups of other students.

One of the things that—one of the important reasons why there's a benefit of diversity in education for all groups of students is that all of our great colleges and universities are diverse. So students have—white students have to make that transition as well as minority students when they get to elite colleges, and our colleges are going to remain diverse thanks to the Supreme Court decision. So if you think about it, you are disadvantaging your child if you don't prepare them to

function effectively in those kinds of settings, certainly even more so for the military and other institutions.

Q. Does a school in your opinion, Dr. Orfield, need to have a particular percentage, a particular racial balance, in order to be a racially-integrated school and to foster these purposes that you believe are laudable purposes?

A. I do not believe there's a particular magic number. I think the important thing is that as much as possible we kind of realize the goals of the Supreme Court in the *Green* decision and have all our schools look like they are part of the overall community, that they all reflect what the overall community looks like within a reasonable range so that the schools are not identifiably white or minority. They are much more stable and much more successful if there's a substantial group of students from each race and if it's lasting, if the desegregation isn't just transitional, as happens in many neighborhoods, but is lasting throughout the students' career.

Q. If a school does not have a critical mass of a minority group represented in that school, then what happens to the school and to the students who are members of that minority who happen to be in the school?

A. Basically students who are in small isolated minority groups in a school are not likely to have a strong effect on the overall school and are likely to feel isolated and are not likely to produce the benefits of an integrated education for all the students in the school. The classes are not as likely to have strong representation of different points of view in class discussions and so forth. When I taught at the University of Chicago, I had very few minority students. I had more than most people. We had only 3 percent black students in our school at that time. When I went to Harvard, all my classes are very strongly integrated. I have lots of black students, lots of Latino students. The diversity within each community as well as between the various groups comes out in much more interesting and rich discussions, and you simply can't exclude those issues.

The last chapter in this book that the Supreme Court cited is by an emeritus professor at the University of Virginia, who tells what it was like to try to teach southern history to an all white seminar before the university was really integrated. He said issues that came up automatically that you had to talk about as soon as you had black students in significant numbers in the class were never talked about before. They were talked about in a completely different way. We are a racialized society. When you have significant presence of two or more of our major racial and ethnic groups, you have a different educational experience.

Q. Dr. Orfield, the studies that you did, the polling, if you will, that was done of students, white and black, in Jefferson County after the Hampton decision, is that information, that data contained within your book—

A. It is.

Q. —Diversity Challenged?

A. Chapter 5.

Q. Chapter 5 of your book is devoted to that?

A. Yes.

* * *

[5-34] Q. On this question of narrow tailoring, Dr. Orfield, I guess what I want to know is why are the race guidelines so important in ensuring racially-integrated diverse schools and academic settings? Aren't there other ways to get to the same result?

A. Well, I think that the most important reality you have in urban school systems is that you have very segregated neighborhoods, and if you just rely on neighborhoods plus a choice that has no desegregation standards in it, there's very likely to be serious resegregation. That's what we see almost every place where this happens. It happens quite fast. The stunning thing is to see in school districts that have never had for a generation a classic ghetto school, for example, to get some of those within two or three years and have them be on

the list of the state's least successful schools, you know, you just get this pattern happening very, very rapidly, especially in the inner-city low income minority communities. Then you get a lot of pressure on your most selective Magnets, which tends to make them whiter and whiter over time. As these forces develop, the community comes apart educationally. People lose a sense of a common school system, which I think is extremely destructive.

I think what's different about—between public schools and colleges when you are thinking about these issues, where colleges only consider race as one factor in the admissions process but public schools have actual standards for maintaining desegregation, is that colleges aren't residentially defined. Colleges are much more varied than schools are. Schools have much more commonality among them, so that the effect of which school you go to is not nearly as powerful as which college you go to.

A pure choice system without any kind of desegregation requirements tends to spin into a resegregation process. We have got lots of evidence on that. We had a faculty seminar at Harvard for a couple of years on the effect of choice programs, and there's been a big study—international study of New Zealand which has gone to this in a massive way that shows a lot of stratification takes place in a pure choice model. We have seen that quite consistently.

I think colleges are also different in the sense that they have small minorities. By and large the elite colleges are in the Affirmative Action businesses. Colleges also never resegregate to any significant pattern. They are overwhelmingly white in their composition. I think schools need a lot more powerful strategies to maintain integration in many settings than colleges do. So if you are looking at what is absolutely necessary to get the job done, colleges can do it with relatively small influence of race as a balancing factor.

Public school systems can't do it without a much more powerful strategy, I believe, and that's why it's so important.

* * *

[5-49] Q. Before we leave these high school gaps, what is your position on an African-American in a desegregated school plan, like the quota plan of the defendants here, versus being four grade levels behind when he graduates in high school here for reading and math? Where do you draw the line? You still want the desegregation?

A. Yes, absolutely.

Q. So you'll trade off desegregation versus a four-year grade level if you have your choice?

MR. LEET: Your Honor, I'm going to object to that. That's not what he said. It mischaracterizes his testimony.

MR. GORDON: He's the expert.

THE COURT: But he didn't say what you just said he said. You can ask the question again. Well, you can ask that question. He can answer the question. I think the premise is a little bit inaccurate. Go ahead.

* * *

[5-50] Q. Let me ask the question again. If I misstate it, I'm sure everyone will correct me. The intent of the question is it is my understanding that if you have a choice between a desegregated school system and African-Americans graduating —desegregated school system with African-Americans and African-Americans graduating four grade levels behind in reading, then you are going to take the desegregated school system instead of the four grade levels behind? Is that a fair way to say that?

A. That's preposterous and a misstatement of my opinion.

Q. Okay. Correct me.

A. I didn't say that. I said nothing like that. I don't believe that. What you are implying in your question is that by segregating the students, they would have a lower educational gap. What I am saying is the research would be—suggests very strongly they would have a larger educational gap in terms of achievement scores. Of course, you are eliminating from consideration all the other nonachievement test score effects of desegregation.

Q. No, I'm not suggesting that at all. What I am suggesting in the Jefferson County Public Schools or what I am looking at here is a pretty strong high school gap. It tells me that African-Americans when they graduate high school are below their white counterparts both in reading and mathematics. Would you agree with that?

A. Yes.

Q. Okay. So the question on the table is if you had your druthers, would you rather have a—would you continue this school system with the desegregated Student Assignment Plan and the gaps that you are seeing?

A. What I believe is that if you went to a resegregated school system, the gaps would get bigger, and I also believe that there are a lot of things that can be done to lower these gaps, but they are very hard and they cost a lot of resources. That's what we really should be working on rather than thinking about resegregating it. Segregated schools have always failed. There's never been an equal and separate school system in the United States as far as I can tell. If you have ever discovered one, I would like to know. I've been asking Abigail Thernstrom and everyone else to tell me where one ever existed. We had thousands of them. So posing this as an alternative is absurd. There's no example of a resegregated place that does better for black students.

* * *

[5-60] Q. This morning did you testify to the educational and social competencies that students develop in schools which cannot be measured in test scores or grades?

A. I did.

Q. And in your opinion as a professor in the School of Education at Harvard University, are school boards responsible for educating students in ways not measurable by test scores and grades?

A. Yes, absolutely.

Q. Indeed, would you say that school districts would be remiss if they focused only on the measurable outcomes?

A. Well, I would say two things about that. A lot of things besides test scores and grades are measurable and are very, very important. Some of them are not. But certainly the whole tradition of American public education has been about creating a society of people who can understand how to function in a democracy and creating a single society out of many diverse people, and that's always been recognized as a central goal of education in the United States, at least as important as any other goal of education, and I think sometimes we forget about that. That's why we created public schools in the United States, and it's a fundamental part of our entire educational heritage. You can see it from the very first days of the discussion of public education. I think we have narrowed our vision seriously to exclude things about our history, about our public life, our democracy, about our culture, and when we do that, it's diminishing what our schools do.

* * *

[5-61] Q. Also, this morning you spoke a bit about the benefits of diversity and the kind of testimony that was placed into evidence in the Michigan cases. You spoke with Mr. Leet as to the relevance of that to K through 12 education. I want to focus on that a little bit more. Are you

familiar with the research in the areas of developmental psychology and school integration that talk about the ages at which children begin to observe racial cues and develop racial stereotypes and prejudices?

A. Yes.

Q. And what does that research tell us?

A. Well, it tells us basically that students come to school initially in Kindergarten, 1st grade without really well-developed racial stereotypes, and they develop somewhere after the 3rd or 4th grade in a fairly serious way, and that it's much better in terms of the development of those stereotypes and ideals about race that children are together from early as possible level.

Q. Do children at these ages learn these lessons only from family or their parents?

A. No. They learn from their social interaction as well. Of course, they learn from their peer groups, and what their peer groups are matters a lot.

Q. Does it also matter then if children are growing up in residentially-segregated neighborhoods? How does that affect the importance of integration in schools?

A. Well, in residentially-segregated neighborhoods they don't have these experiences with diversity in their neighborhood play, in their neighborhood social activity. So the school experience becomes all the more important.

Q. How would you characterize this body of literature you are talking about? Is it dismissed, outdated, dwindling, or is it a growing body of research that's fairly well accepted?

A. I would say there's a very substantial body of research. It goes back into the period even before *Brown*, and it was very vigorous in the sixties and seventies, and it's still going on now. I think we are seeing a revival of some of that work, particularly about multiracial schools.

Q. When we spoke a minute ago about the other educational goals beyond testing and grades, is this the kind of educational goal that you think school districts are responsible for?

A. Yes. I think school districts are responsible for all of these outcomes of education and for having a vision about a child not just as someone who gets a particular score in math and reading, but someone who has—is going to have a life and be a part of a community.

* * *

[5-73] THE COURT: And so based on your work, how would you describe what you believe to be the—assuming you believe there to be an interest, an interest of a public school system in keeping diverse schools?

THE WITNESS: Well, I think there's a lot of interests. One of them is enhancing academic achievement. One of them is increasing the probability that students will complete their public education. Another one is increasing the probability that they will go to college. Another one is increasing the probability that they will function together as workers and citizens in the community in the long run. Another one is improving the racial climate of the community as a whole. Another one is keeping all the citizens of the community seeing all the schools as worthwhile and none of them as different and across a racial barrier that should be seen and treated in different ways in the broader society. I think that—

THE COURT: Is that an interest that is different—so you are saying that in your mind anyway a school system like Jefferson County has an interest in having diverse schools partly because it affects the education of the people at the schools?

THE WITNESS: Yes.

THE COURT: And partly because of the positive benefits of the fact of diversity?

THE WITNESS: Yes.

THE COURT: Not internally what happens, but the existence of it?

THE WITNESS: Yes. I think it has—it affects things way beyond the schools. It also has a lot of effects of other things in the school.

THE COURT: That would be something—in the *Grutter* case, for instance, there was a lot of criticism of the University of Michigan for what was said to be its focus on diversity and its benefits outside the classroom. In other words, the fact—part of what they asserted, they asserted that our compelling goal is all the benefits that flow from a diverse law school.

THE WITNESS: Yes.

THE COURT: Which was said to be—partly those benefits were those that flowed internally, that is, between the students.

THE WITNESS: Yes.

THE COURT: And then it was also asserted that there were external benefits.

THE WITNESS: Yes.

THE COURT: Which was highly criticized and not terribly rebutted in the majority. But it would seem that the Jefferson County Schools have certainly a different interest in that regard and perhaps more of an intense interest in the externalities.

THE WITNESS: I think so.

THE COURT: Assuming they are benefits, that's to be argued, I suppose, but the Jefferson County Schools exist in

much more of a community than the University of Michigan Law School, which sends its—well, the interest that was—sorry to ramble on, but it's important to identify what the interests are.

THE WITNESS: Right.

THE COURT: It was asserted that the University of Michigan or the State of Michigan had some interest in the fact that they had a diverse law school.

THE WITNESS: Yes.

THE COURT: Which was criticized, and perhaps rightly so, because I mean, the University of Michigan Law School graduates go all over—

THE WITNESS: They're a national law school.

THE COURT: What possible interest could the State of Michigan have in that?

THE WITNESS: My daughter is a graduate of that law school and so is my son-in-law, and they are both in Washington, D.C.

THE COURT: I'm sure the State of Michigan is greatly benefitted by that. Of course, they had to pay the out-of-state tuition.

THE WITNESS: Exactly. Believe me.

THE COURT: But that's sort of—the Jefferson County schools might view that a little differently.

THE WITNESS: Yes. I think if you think about public schools, they are the most important function of local government, and the reason that they are and the reason they are supported to the extent they are and taxpayers are willing to pay so much for them is they are absolutely central to the future of the community. They are the most visible and most central formative public service at the local level, and the

reason for that is because they really constitute the future of the community. 90 percent almost of our students go to the public school systems.

THE COURT: One thing that different people have referred to throughout the case and also in the past case was the supposed educational benefits of a diverse classroom.

THE WITNESS: Yes.

THE COURT: And I have never really been able to get a handle—number one, I'm not exactly sure how one would figure that out. I've never really been able to get a handle on what the research actually shows. There were a number—in the Grutter case, there were a number of research studies, for instance, cited in the minority done by your own school, which supposedly showed that—of course, this was dealing with college—that minority students going to all black colleges did better than if they were in an integrated setting. So I'm a little bit confused about what the research actually shows.

THE WITNESS: Well, research is never totally simple and straightforward in the way we would like it to be. So there's always complexities in it. If you look at the study that was done by Derek Bok and William Bowen, former presidents of Harvard and Princeton, that actually followed the life experiences of the students who were admitted under Affirmative Action to all the leading colleges and universities in the country, which the Supreme Court majority opinion cited, they are very powerful transformative experiences in their lives. They actually had—

THE COURT: These were the minority students?

THE WITNESS: Yes. They had tremendous success in completing these very demanding colleges, and their actual service in their professions and in their community were even in excess of the white students who were enrolled. They had

a profound effect not just on the students' individual lives, but on the professions and on their communities as well. They followed—they had this incredible data set that followed students from all the elite colleges in the East and some other places as well from the book called *The Shape of the River.*

I think that the strong weight of evidence, and that's the fair way to say it, is that there are strong lifelong effects of diverse educational experiences and that those can be enhanced and made stronger if you do certain things to create the right conditions for the interactions to take place. And the effects are—relatively the smallest effect is on test scores, but it's significant. It eliminates part of the gap, maybe a fourth. But the larger effects are on life chances, on the chances of finishing high school, going to college, what you do as an adult, what kind of employment you get. All of those kinds of effects are quite powerful.

THE COURT: And who is—in your opinion, who benefits the most and who is least affected?

THE WITNESS: Well, I think that the students that benefit the most in terms of changing their academic success and their life chances easily measurable are the minority students that would otherwise be attending high-poverty racially-segregated schools. But in terms of understanding the society and functioning in the society as it goes through the kinds of changes we are going through and so forth, I think all groups of students benefit. I don't think it's a system a zero sum gain where one group of students loses and another gains. I think it really is one of the few positive sum gains in public policy. If you do it reasonably well and you create schools that everybody is willing to go to, everyone gains substantially. There are ways that you can increase the gains that are well-known.

THE COURT: Following up on that, then how does the critical mass—what is the research that shows that critical mass is important?

THE WITNESS: Well, the research that shows that critical mass is important isn't very large. It's something that virtually everybody who works in desegregation work believes to be true. There was a reasonable body of research about school desegregation that's summarized in a book that Willis Holley edited that says that in his judgment and the judgment of the experts that he consulted, having at least 20 percent of the second group of students present in an interracial classroom is really important for them to be visible enough to make a difference and to create the conditions under which you can have integration take place rather than just a small outside group that's marginalized.

In my own teaching, what I found is if you have a class where you have one or two black students, for example, they are considered the official voice of the black community. They are expected to speak for the entire community, and they are always on the spot. If a third or fourth of your class is African-American students, then everybody sees the differences within that community as well as the commonalities, and there's a much different kind of interaction, and they are just—they are not treated as an afterthought in the discussion where somebody tries to pipe up and say, well, there's a black perspective. It's integrated into the whole discussion that goes on in the class.

One of the theories of school integration is that for schools to be really successful at creating optimal conditions, they have to change from just being like a white school that welcomes a handful of minority students to a school that's genuinely interracial, in other words, that actually respects and reflects both cultures. That doesn't happen when you just have a small group of students from another group.

My own kids on occasion have been—actually started school in an overwhelmingly black school in Washington, D.C. It was very hard to get the teachers to think about the fact that maybe white students needed to hear about white heroes and things of that sort. The same thing happens in white schools that have two or three black students. Basically once you get a substantial number, then those students become a force for changing the school, and their families begin to make demands, which are good demands because they bring about a transformation.

When we started having a significant number of Hispanic students in Harvard Education School, a group of them came to me and said, we have to have curriculum, we have to have professors. Things are excluded in our curriculum that are important to our community. Students here who come from the East need to know about what's going on in the West. I looked at them, and I said, well, I guess we admitted the right people. We have enough here now that we are going to have to begin to do this. That's what we need to do. That's what happens with a critical mass of students as an institution begins to become really diverse. The conditions for optimal learning are equal status interaction and substantial presence of two or more groups in the—at the classroom level and in the school level.

THE COURT: Which is really more important, the critical mass or the fact that they—that a minority group not be segregated to themselves as a majority?

THE WITNESS: I think both of them are important. I think complete segregation is obviously the worst alternative. Token integration is better than that, but—or token desegregation. Substantial desegregation that leads to integration is what really produces the strongest learning conditions.

THE COURT: If you accept this premise, then it would seem that, yeah, there could be valid reasons for reaching this

critical mass, but no one really knows what that is. It can't be defined as an absolute number, right?

THE WITNESS: Well, I don't think at the current state of knowledge I certainly would want to try to do that. When I testified in the Michigan case, I said I think this is the kind of thing that is probably going to differ from community to community and from one part of the country to another because we have different societies, and it should relate to the structure of the overall society in which the child is growing up. So my recommendation to the Court there was that we give some discretion to our educators to make reasonable judgment about that.

* * * *

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Nº. 05-915

In The
Supreme Court of the United States

CRYSTAL D. MEREDITH,
CUSTODIAL PARENT AND NEXT FRIEND
OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Should *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Regents of University of California v. Bakke*, 438 U.S. 268 (1978) be overturned and/or misapplied to allow the Jefferson County Board of Education to use race as the sole factor to assign students to the regular (non-traditional) schools in the Jefferson County Public Schools?

II. Whether the race-conscious Student Assignment Plan with mechanical and inflexible quota systems of not less than 15% nor greater than 50% of African American students without individually or holistic review of any student, meets the Fourteenth Amendment requirement of the use of race which is a compelling interest narrowly tailored with strict scrutiny.

III. Did the District Court abuse and/or exceed its remedial judicial authority in maintaining desegregative attractiveness in the Public Schools of Jefferson County, Kentucky?

PARTIES TO PROCEEDING

Crystal Meredith as Custodial Parent and Next Friend of Joshua Ryan McDonald, a student in the regular (non-traditional) schools of the Jefferson County Public Schools.

Jefferson County Board of Education is the legal entity encompassing the Jefferson County Public Schools.

Stephen W. Daeschner is the Superintendent of the Jefferson County Board of Education.

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OPINIONS BELOW

The Opinion of the Court of Appeals is reported as *McFarland v. Jefferson County Public Schools*, 416 F. 3d 513 (6th Cir., 2005). (Petition Appendix (P.A.) B1 through B3.) The order denying rehearing was filed of record October 21, 2005 and is found in (Petition Appendix (P.A.) A1 through A2.) The Opinion of the United States District Court for the Western District of Kentucky which was adopted by the Per Curiam Opinion of the Sixth Circuit Court of Appeals, was rendered on June 29, 2004, *McFarland v. Jefferson County Public Schools*, 330 F.Supp 2nd 834 (W.D.KY. 2004), and is found the (Petition Appendix (P.A.) C1 through C79.)

BASIS OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on the 21 day of July, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions at issue: Fourteenth Amendment, Section 1, "All persons born or naturalized in the United States and subject to the jurisdiction thereof are

citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor to deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On or about May 2, 2003, the trial court granted leave, allowing a Third Amended Complaint to be filed of record by Crystal Meredith, as Custodial Parent and Next Friend of Joshua Ryan McDonald. (Petition Appendix (P.A.) D1, D2.) Any additional Amended Complaints, were deemed unnecessary and inclusive by the Court's order of May 2, 2003.

This amended complaint of Crystal Meredith in behalf of her son, Joshua, became the Plaintiff to represent the rest of the students in the Jefferson County Public Schools hereinafter referred to as JCPS. The other plaintiffs were parents representing their children who had been denied admission into the Traditional Schools of JCPS. The trial Court ruled in favor of that class of plaintiffs in finding that the race-conscious student assignment plan of JCPS was not narrowly tailored, and therefore held that JCPS' use of race was unconstitutional. Crystal Meredith was denied her

request to transfer her son, Joshua, into Bloom Elementary because he was White, thus running afoul of said student assignment plan. (J.A., p.79.) All students, inclusive of Joshua Ryan McDonald, are assigned to schools based upon quotas of not less than 15% nor greater than 50% African American. (J.A., p.97.) Any other ethnic group, such as Hispanic, Asian American or even Native American are considered as Other and are categorized as White. Therefore, the race-designated, hard-core quotas are strictly compiled as Black and White. The trial Court ruled in favor of JCPS in regard to the class of students represented by Joshua McDonald in holding that the use of race in the regular program of JCPS was narrowed tailored.

The facts were not in dispute that with Joshua's admittance into Bloom, the school's racial make-up would still have been less that 49% African American; and the school was not at capacity. (J.A., p. 79.) From the trial Court's Memorandum Opinion and Order, only Crystal Meredith in behalf of her son, Joshua was left to appeal to the 6th Circuit Court of Appeals. The initial plaintiffs had prevailed on their 14th Amendment cause of action. The 6th Circuit Court of Appeals affirmed the Trial Court's Opinion *Per Curium* and Motion for Rehearing and Rehearing En Banc was denied. Crystal Meredith filed her Petition for Writ of Certiorari to the Supreme Court of the United States. Petition for Writ of Certiorari was granted on June 5, 2006.

SUMMARY OF ARGUMENT

Petitioner submits the following is a concise statement of her summary of argument:

1. Race was the sole factor to assign students in the non-traditional schools in the Jefferson County Public School system, (J.A., p. 79; J.A., p.97; J.A., p.122), and;
2. There was no plus factor in determining which students, Black or White, should be assigned to certain schools; said plan was not narrowly tailored, and;
3. There was no individual holistic review of any student's application for acceptance within the non-traditional school program, (J.A., p.79), and;
4. There was no distinguishing factor in the public school setting from the university setting of the Michigan undergraduate program (*Gratz*, *supra*) that would allow quotas, or allow expansion of compelling interest to apply to a K-12 educational setting, and;
5. There was no finding of critical mass, and;
6. There were no facts to support any type of finding that said unknown critical mass would improve educational outcome as found in *Grutter v. Bollinger*, *supra*, and;
7. If compelling interest is defined as "educational benefit", then there is no compelling interest: See:

Scalia's Dissent, *Grutter v Bollinger*, *supra*, (J.A., pp. 109-111), and;

8. The defining feature of a student's application to the non-traditional schools was race; every student has to check the box, (J.A., p.74), and the 15% to 50% quota as used by the Jefferson County Public Schools is a race-designated, hard-core mechanized quota. Race is the make or break test of admission into the regular and/or non-traditional program of JCPS, *see McFarland v. Jefferson County Public School*, *supra*, and;

9. Any factual reference by the Respondent to de facto neighborhood schools with an African American majority would not apply. The Jefferson County Schools having won in the lower court, that the trial court had to find that all public schools in the non-traditional program were basically fungible (equal) , As admitted, JCPS already includes high concentrations of poverty; therefore what difference would a high concentration of poverty school with greater than 50% African Americans make, if all non-traditional schools are equal, *see McFarland v. Jefferson County Public School*, *supra*, and;

10. This hard-core mechanized race-designated quota system with no improvement of educational outcome is simply an action for the sake of reflecting racial distribution. There is nothing written in the

> Fourteenth Amendment to define this use of race as a compelling constitutional interest. It is nothing more than affirmative discrimination. Present and future societal discrimination alone is insufficient to justify a racial classification. *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986).

ARGUMENT

The law is well settled that race must solely be a plus factor not the dominant factor in any type of race-conscious plan utilized by the JCPS. The trial court has simply misapplied *Regents of University of California v. Bakke, supra*; *Grutter, supra* and *Gratz, supra* to allow the race-conscious plan used by the JCPS to be a compelling constitutional interest on the basis of diversity and that the plan used is not narrowly tailored and fails to withstand strict scrutiny for all the reasons cited above.

In order to satisfy the legal requirements pronounced by this Honorable Court in *Gratz v. Bollinger, supra, Grutter v. Bollinger, supra* and *Regents of University of California v. Bakke, supra,* there must be three (3) legal standards achieved. Those three (3) legal parameters simply are:

(1) Compelling interest;
(2) Narrowly tailored plan; and
(3) Strictness of scrutiny.

All race-conscious policies failing to conform to these three (3) legal standards must fail. Plurality opinions adopted by this Honorable Court in *Grutter v. Bollinger*, *supra* mandates the operational definition in those three (3) standards. The trial court's opinion fails to meet those three (3) standards and thus, is a failed attempt to comply with *Bakke*, *supra*, *Grutter*, *supra* and *Gratz*, *supra*.

More specifically, as to the third legal parameter established by the above cited cases, the standard for review is the strictness of judicial scrutiny. The race-conscious plan of the JCPS is not narrowly tailored. The Student Assignment Plan of the JCPS is nothing more than a hard-core, mechanized quota. If a race-conscious plan is a hard-core, mechanized quota, then it violates the Supreme Court's finding in *Gratz v. Bollinger*, *supra* and violates the Equal Protection Clause of the Constitution of the United States of America. "Racial classifications are too pernicious to permit any but the most exact connection between justification and classification." *Gratz*, *supra*, p. 259.

The race-conscious, hard-core, mechanical quota Student Assignment Plan of the JCPS seeks to fix a number of desirable minority students to insulate one group of applicants from another. For the Student Assignment Plan of the JCPS to be defined as anything other than a hard-core, mechanized quota, there must have been a finding by the trial court that Joshua Ryan McDonald was denied entrance into his neighborhood school for a reason other than he was

White. That simply is not the case. Race was the make or break test!

The JCPS is the only state actor who denigrates a 5-year-old's self-worth and self-esteem by comporting him to be color coded throughout his educational career. JCPS is the only state actor allowed to use race to dissipate the family unit by time and distance from home. JCPS should no longer be allowed to use race as the determining factor of educational outcome. If educational benefit is the true test of compelling interest, than JCPS fails their own test. Race, as the make or break test, culminates in the justification of perceived stereotypes as to all of our African American students in the public school systems of the United States. To embrace and accept the pivotal argument of the School Systems in support of their race-conscious student assignment plan, this Honorable Court must concede and/or agree that African American students in their own environment are worse off, worse off socially, worse off educationally and will be unable to integrate into a menial job in an increasingly diverse workforce. JCPS and the other public schools in our great nation promote the status quo and repudiate change. They should embrace it, for only then will each family/parent/student be able to control their own destiny.

". . . The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of

social scientists. . . ." *Missouri, et al v. Kalima Jenkins, et al*, 515 U.S. 70 (1995), p. 23.

CONCLUSION

Crystal Meredith in behalf of her son, Joshua, and all students similarly situated who attend the regular program within the Jefferson County Public Schools, seeks to have the Student Assignment Plan of the Jefferson County Public Schools declared unconstitutional and in violation of their equal protection rights pursuant to the Fourteenth Amendment of the Constitution of the United States of America.

Respectfully submitted,

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(14)

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Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Respondents believe that this case presents one question, which they state as follows: Whether the court of appeals correctly affirmed, *per curiam,* the thorough and well-reasoned district court decison that the student assignment plan of the Jefferson County, Kentucky public schools -- which provides that the schools shall be racially integrated -- complies with the Equal Protection Clause of the Fourteenth Amendment.

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STATEMENT

A. The Jefferson County Public Schools

The Jefferson County, Kentucky public school district (the "School District") encompasses almost all of the area of Kentucky's largest unit of local government, the Louisville/Jefferson County Metro Government.[1] The schools within the School District (the "Jefferson County Public Schools" or "JCPS") include 87 elementary, 23 middle, and 20 high schools, and alternative and special education schools and centers. Stipulation of Facts ("Stip.") pars. 10-16, Joint Appendix ("JA") 22-24. About 97,000 students were enrolled in JCPS in 2003-2004. They included about 5,000 preschool, 42,500 elementary, 21,650 middle, and 24,750 high school students, and 3,100 students in the other schools and centers. Stip. par. 34, JA 29.

The Jefferson County Board of Education (the "Board") has general control and supervision of JCPS under state law. The Board has seven members who are elected for four-year terms from separate voting divisions in non-partisan elections in even-numbered years. The Board meets at least monthly in meetings that are open to the public, and decides questions presented to it by majority vote. The members of the Board receive a minimal per diem for their service. Stip. pars. 6-7, JA 21; Kentucky Revised Statutes ("KRS") 61.810, 160.160, 160.200 to 160.280.

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[1] The Metro Government is the consolidated countywide government for an area of about 400 square miles with about 700,000 residents. The Metro area includes several smaller cities with limited government functions. One such city operates a 400-student K-8 public school system. *See Hampton v. Jefferson County Board of Education*, 72 F. Supp. 2d 753, 759, n. 13 (W.D. Ky. 1999) ("*Hampton I*"). All other Metro area public school students are within the School District.

JCPS is governed by the Kentucky Education Reform Act, 1990 Ky. Acts. c. 476 ("KERA"), a statute enacted in response to a state court decision which held unconstitutional the previous statewide system of elementary and secondary schools. KERA set statewide learning goals, designed an assessment program to measure schools' progress in reaching the goals, and created a process to hold schools accountable for their performance. To implement KERA, the Kentucky Department of Education ("KDE") designed a statewide model program of studies, set academic expectations and student performance standards, and created a core academic content for the assessment program. Stip. pars. 41-43, JA 31-32. The assessment program does not compare one school's average scores to another school's averages; it measures each school's progress in reaching its own goal. Transcript ("Tr.") 3-45 (Peabody). The Board also is subject to the No Child Left Behind Act, 20 U.S.C. § 6301 *et seq.* ("NCLB Act"), which employs a similar assessment and accountability program.

All JCPS schools are basically equal. The Board's funding allocation formula, approved by KDE, provides financial resources to all schools in the same manner. Stip. par. 27, JA 25; Stipulation Exhibits ("Stip. Exh.") 16-17; Tr. 4-80 to 82 (Hardin). All schools are basically equal in their instructional staff. All principals and teachers are hired and assigned in the same manner. Stip. pars. 29-30, JA 27-28. Some schools offer programs not available at other schools, but all schools are basically equal in the curriculum that they use in compliance with state law, and in the quality of the instruction that they provide. Tr. 2-152 to 161 (Todd), 4-92 (Castillo), 4-103 to 106 (Rose), 4-139 to 142 (Burks); Stip. Exhs. 29-31. All schools are subject to the same criteria with regard to student progression, promotion, and grading. Tr. 2-157 (Todd); Stip. Exh. 32. All schools are basically equal

in matters such as discipline, dress codes, homework policies, and extracurricular activities. Stip. par. 56, JA 36.

The Board prepares a biennial plan as a condition to the receipt of funds from KDE. The plan contains a statement of the Board's overarching educational goals for JCPS. The Board's current statement includes four goals, two of which expressly require racial integration:

> Goal One (Student Achievement): All JCPS students will become critical thinkers and lifelong learners who are academically prepared in a racially integrated environment to be successful in the post-secondary education programs or careers of their choice.
>
> Goal Two (Student Atmosphere): All JCPS students will be safe, supported, respected, and confident in racially integrated schools, classrooms, and student activities.

Stip. par. 8, JA 21; Stip. Exh. 5.

Jefferson County housing is substantially segregated along racial lines. Tr. 3-77 to 81 (Rodosky); Defendants' Exhibits ("Dft. Exh.") 17, 18 (JA 99), 19 (JA 100), 20-22.[2] The assignment of all JCPS students to "neighborhood schools" would result in a substantial number of racially segregated schools. Tr. 3-127 to 128 (Rodosky).[3] *See also*, *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358,

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[2] There has been some increase in racially integrated housing since the 1970s; the Board believes that the continuous maintenance of racially integrated schools throughout the period may have assisted in that. Tr. 3-83 to 84 (Rodosky).

[3] That method of assignment also would create capacity issues in up to 40% of JCPS school buildings, because of the mismatch between school locations and population movement since desegregation began in the School District. Tr. 3-128 to 129 (Rodosky).

371, n. 29 (W.D. Ky. 1999) (*"Hampton II")* (Board's evidence of probable resegregation absent the use of race in student assignment). The School District, however, exists in a mid-sized metropolitan area with many mostly white suburbs within its boundaries, and has a majority of white students. Tr. 2-72 to 74 (Todd). Racial integration is a realistic goal for JCPS. The Board's success in meeting the goal has given it a national reputation. *See, e.g.*, Dft. Exh. 72, p.117; *Hampton II*, *supra*, at 369-70. The Board's current process of assigning students among its schools to meet the goal is stated in a student assignment plan adopted in 2001 (the "Plan"). Stip. Exh. 74, JA 75-96.

B. The Student Assignment Plan

The sole petitioner in this case is a parent whose complaint in district court arose from the denial of her request to transfer her son from one elementary school to another. This Court will better understand the issues presented by the denial of the request if it has some knowledge of the overall student assignment process. Respondents will, therefore, describe the operation of the Plan as it affects all students.

The Plan is a complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools through a system of "managed choice." The strategies include automatic approval of majority-to-minority transfer requests; the grouping of elementary schools into clusters to facilitate integration; the adjustment of school attendance areas and programs as necessary to facilitate implementation of the Plan; programs and systems for orientation, training, administration, monitoring, and accountability; and broad racial guidelines. Stip. Exh. 74, pp. 5-8, JA 81-83; Tr. 2-129 to 131 (Todd). The Plan provides that each school (except preschools, kindergartens, alternative and special education schools, and self-contained special education units) shall have

not less than 15% and not more than 50% black students. Stip. Exh. 74, p. 5, JA 81. Of the students subject to the Plan, 34% are black and 66% are "other." Stip. par. 36, JA 30.[4]

The student assignment process begins with school boundaries. Each elementary, middle, and high school, except for magnet schools,[5] has a designated geographic attendance area. Each such school is the "resides school" for all students who reside in its geographic attendance area. There are no selection criteria for admission to a resides school, except attainment of the appropriate age and completion of the previous grade. Stip. pars. 61, 63, JA 37-38.

The elementary schools, except for magnet schools, are grouped into 12 clusters of from five to 10 schools each. All of the schools in the cluster that includes a student's resides school are "cluster resides schools" for the student. For example, a student whose resides elementary school is one of the nine schools in the Coleridge-Taylor cluster has one resides school and nine cluster resides schools. Stip. par. 62, JA 37; Stip. Exh. 43.

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[4] The terms "black" and "other" were first used in a desegregation decree issued by the district court in 1975. Stip. Exh. 66. There has been some increase in other ethnic minorities in Jefferson County since then, but those terms still reflect the community's overall racial reality. Tr. 2-131 to 132, JA 120 (Todd). For that reason, the district court thought it more accurate to use those terms in its opinion. *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 840, n. 6 (W. D. Ky. 2004), Appendix to Petition for Certiorari ("Pet. App.") C-11.

[5] There are five magnet elementary, three magnet middle, and four magnet high schools. The Brown School, which includes grades kindergarten through 12 in one building, is also a magnet school. Stip. par. 69, JA 40; Stip. Exh. 46.

The resides schools are supplemented by magnet schools, magnet programs, and optional programs. Magnet schools do not have attendance areas, and admit students only by application. Magnet and optional programs are special programs offered at 10 of the 82 resides elementary, 12 of the 20 resides middle, and 15 of the 16 resides high schools. Even students who reside in the attendance area of a resides school which offers a magnet or optional program must apply for admission to the program. Stip. pars. 67, 70-72, JA 39-41; Stip. Exhs. 45, 46.

From February through March each year, elementary students can submit applications to attend a school other than their resides school. They can make up to four choices: a first and second choice among their cluster resides schools, and a first and second choice among magnet schools and schools that offer magnet or optional programs. All elementary students are asked to submit such an application, but not all do. A student who does not submit an application is assigned to his or her resides school or to another school within its cluster. Stip. pars. 64-66, JA 38-39; Dft. Exh. 3.

From November through January each year, middle and high school students likewise can make a first and second choice among magnet schools and schools that offer magnet or optional programs. Students entering the ninth grade can apply to attend any high school. A student who does not submit an application is assigned to his or her resides school. Stip. pars. 66, 73-75, JA 39-41; Dft. Exhs. 4, 5.

Applications to magnet schools, and magnet and optional programs, are evaluated on the basis of available space in the school, the racial guidelines, and the applicable criteria for the school or program.[6] Elementary cluster applications are

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[6] The applicable criteria vary by school and program but may include (1) objective criteria established by the school or program, such as an essay,

evaluated on the basis of space and the guidelines. Typically, parents are notified of their child's assignment by May. Students may then apply to transfer to a school other than their assigned school (except a magnet school, or entry into a magnet or optional program) for any valid reason. Transfer applications are typically based on day care arrangements, medical criteria, family hardship, student adjustment problems, and program offerings.

In 2003-2004, about 10% of JCPS students submitted applications to attend a magnet school, or a magnet or optional program; about half of the applications were granted.[7] In 2002-2003, about 7% of the students (including some who had previously submitted choice applications) applied for a transfer; the majority of the requests were granted.[8] The Board provides transportation to students who attend a school other than their resides school through a choice or transfer application.[9]

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recommendations, attendance data, course grades, or test scores; (2) for a magnet or optional program, available space in the program; (3) for a middle school math-science-technology magnet program, one of the magnet traditional program schools, or the Brown School, position on a computer-generated random draw list; and (4) for the Brown School, a residential ZIP code that will make the student body representative of the entire county. Stip. par. 77, JA 42.

[7] Stip. pars. 79, 82-84, JA 43-44. The Board does not have records which show how many unsuccessful applicants later submitted a successful transfer application.

[8] Including transfer requests granted in previous years, about 7% of students attended a school other than their resides school on a transfer in 2002-2003. Stip. pars. 34, 81, 86-88, JA 29, 43-45.

[9] Stip. pars. 111-119, JA 53-55. The Board must transport students for reasons of distance from school, safety or disabilities. KRS 158.110. Most students would receive transportation even in the absence of the "managed choice" system. Tr. 4-127 to 134 (Caple).

An elementary student has three levels of choice, for up to five schools. Middle and high school students have two levels of choice, for up to three schools. Nevertheless, most middle and high school students do not submit a choice application and are assigned by default to their resides school.[10] Nearly all elementary students attend either their resides school or their first choice cluster resides school.[11]

Because the failure to submit an application is itself a choice, all students participate in "managed choice" at least by default. Although less than half of students submit applications, most applications are granted, with percentages of success varying among schools and programs in ways that are not unexpected. This aspect of the Plan provides a "safety valve" for those who wish to make a choice, and is an important tool for the Board's goal of offering a racially integrated education to students from every part of the Metro area.

Racial integration in resides middle schools and high schools, which enroll the great majority of middle and high school students, is accomplished primarily through the drawing of attendance areas, some of which have non-contiguous boundaries. Tr. 2-84 to 85, 2-90, 2-166, JA 123 (Todd), 4-96 (Castillo). In elementary schools, it is accomplished by the cluster plan, in which students choose from among five to up to 10 basically equal schools, and are almost always assigned either to their first or second choice

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[10] Stip. pars. 79-81, JA 43. In 2003-2004, about 50% of high school students and 67% of middle school students attended their resides school. Stip. pars. 34, 89, JA 29, 45.

[11] In 2003-2004, about 95 or 96 percent of elementary students attended either their resides school or their first choice cluster resides school; the rest were assigned to a cluster resides school by the Board. Tr. 2-98 to 99, 5-109 to 112 (Todd).

school. At application schools and programs, decisions are influenced by space and program limitations much more often than by the racial guidelines. Many parents have long understood, and the district court agreed, that the racial guidelines have minimal impact in this process, because they "mostly influence student assignment in subtle and indirect ways." Tr. 2-166 to 168, JA 122-24, 5-109 to 114 (Todd); Pet. App. C-18.

The number and percentage of Jefferson County students enrolled in JCPS declined dramatically after the implementation of the desegregation decree. Tr. 3-94, JA 132 (Rodosky); Dft. Exh. 30, JA 104. The student assignment plan adopted by the Board in 1984 substantially modified the court-ordered student assignment process and began a series of periodic revisions that have enhanced stability and predictability, expanded parent and student choice, and relaxed the racial guidelines. *Infra,* n. 13. The percentage of Jefferson County students attending public schools has stabilized since 1984, and the percentage of *white* students in JCPS has likewise remained stable, despite a relative decline in white births. Tr. 3-93 to 96, JA 131-32, 3-100 to 102 (Rodosky); Dft. Exhs. 27-30, JA 101-04.

The Board periodically polls students, graduates, parents, and the community to determine their attitudes about JCPS. The results show very strong student, parent and community support for a student assignment plan that provides for choice by parents and students and maintains racially integrated schools. *See* Stip. Exhs. 23, 65, 75; Dft. Exhs. 37, 38 (JA 106), 72, p. 118 and p. 138, nn. 21-24; Tr. 3-123 to 125, JA 134-35 (Rodosky), 5-28 to 29, JA 145 (Orfield). "It's unambiguously true that Jefferson County citizens believe that [racial diversity is] a desirable characteristic of school systems." Tr. 3-182, JA 139 (Kifer).

C. The Petitioner

Crystal Meredith ("Meredith" or "Petitioner") is the mother of Joshua McDonald. In 2002, Joshua's resides school was Breckinridge - Franklin Elementary ("BFE"). BFE is in the Young cluster. Meredith did not submit an application in early 2002 to indicate a choice for Joshua's enrollment in kindergarten for 2002 - 2003. In August 2002, Meredith asked that Joshua be enrolled at BFE in kindergarten. BFE is a "year-round" school which had started classes in July; by August, it had no space for late enrollees. Joshua was assigned to Young and was enrolled in kindergarten there. Meredith then applied to transfer Joshua to Bloom Elementary, which is not in the Young cluster. Because the application was denied under the guidelines, and Meredith neither appealed the denial nor applied for a transfer to another school, and did not in early 2003 indicate a choice other than Young for Joshua's enrollment for 2003 - 2004, Joshua attended Young for the first grade at the time of the hearing. Stip. par. 5, JA 20-21; Plaintiffs' Exhibit ("Plt. Exh.") 15, JA 97.

Meredith testified that she wanted her son to attend Bloom instead of Young because Bloom offered an ungraded primary school program. Tr. 1-49 (Meredith). In fact, KERA requires every elementary school to have an ungraded primary program; KDE regulations dictate the content of the program. KRS 158.031; 704 KAR 3:440; Tr. 2-69 to 70, 2-195 (Todd). Meredith also testified that it took Joshua 20 minutes to get to Young from home, and that she had to drive him. Tr. 1-50 (Meredith). In fact, the Board made bus transportation available to Joshua. Tr. 2-195 (Todd).

D. Procedural History

Although Meredith and other plaintiffs filed this case in 2002, the district court's decision is better understood with

knowledge of another case filed in district court by different plaintiffs in 1998. The earlier case finally resolved the status of a desegregation decree issued by the district court nearly three decades earlier. In that sense, the history of this case began in the 1970s.

In 1972, several plaintiffs filed lawsuits which challenged the *de jure* segregation that existed in the public schools of the former Louisville Independent school district and the then Jefferson County school district. In 1973, the Sixth Circuit held in the consolidated litigation that "all vestiges of state-imposed segregation must be eliminated" in both school districts. *Newburg Area Council, Inc. v. Board of Education of Jefferson County*, 489 F. 2d 925, 932 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918 (1974), *reinstated*, 510 F. 2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). In April 1975, the two school districts were merged by KDE into one, the School District. *See Cunningham v. Grayson*, 541 F. 2d 538, 539 (6th Cir. 1975). In July 1975, the Sixth Circuit issued a writ of mandamus that required the district court to enter a desegregation decree. *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578 (6th Cir. 1975). The district court complied within the month. Stip. Exh. 66.

The district court's decree established racial guidelines for all schools in the School District and required countywide busing by a method known as the "alphabet plan," because the students transported from their "home" school to an "away" school were selected by the first letter of their last name and their grade level.[12] The decree was implemented in

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[12] The decree required all elementary schools to have black enrollment in the range of 12% to 40%, and all middle and high schools to have black enrollment in the range of 12½% to 35%. Stip. Exh. 66, p. 3. Because assignments were randomly made by last name and grade level, most students did not attend the same school at each school level (elementary,

September 1975. The School District unsuccessfully appealed to the court of appeals, *Cunningham v. Grayson*, *supra*, and filed a petition for a writ of certiorari which was denied. *Board of Education of Jefferson County v. Newburg Area Council, Inc.*, 429 U.S. 1074 (1977).

The court-ordered student assignment plan remained in effect, with some modifications by the district court, for nearly a decade. Stip. Exhs. 67-69. In 1984, and again in 1991 and 1996, the Board modified the student assignment provisions of the decree. The Board gradually replaced the "alphabet plan" with methods of student assignment that provided students with greater continuity and stability, offered additional choices to parents and students, and relaxed the original racial guidelines but maintained racially integrated schools.[13] The Board took those actions without court approval, because it believed that it was no longer subject to the decree.[14] In 1999, however, the district court held when

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middle, and high) through all grades of that level.

[13] The 1984 plan provided for students to attend one middle school and one high school without change in assignment, enhanced the programs offered at an historically black high school, established a countywide magnet school at another high school, and established racial guidelines for all schools of 10% above and 10% below the countywide average. Stip. Exh. 71. The 1991 plan, which was largely prompted by the passage of KERA, provided for students to attend one elementary school without change in assignment, and established racial guidelines of 15% to 50% for elementary schools, and 15% above and 15% below the countywide average for middle and high schools. Stip. Exh. 72. The 1996 plan established racial guidelines of 15% to 50% for all schools, created a staff unit to ensure implementation of the plan, and provided for monitoring and reporting to ensure accountability. Stip. Exh. 73. *See also*, Tr. 2-77 to 83 (Todd).

[14] In a 1978 order, Judge Gordon said that as a result of the decree as amended, "the Jefferson County Schools are unitary." Stip. Exh. 67, p. 24. In a 1985 order, Judge Ballantine denied the motion of the original

the question was presented to it that the Board remained under court supervision. *Hampton I*, *supra*, at 783.[15]

The district court dissolved the decree the following year, at the request of the *Hampton* plaintiffs, when it resolved their complaint. The district court held in *Hampton II* that Central High School, which before the decree was an all-black school and became a magnet school in 1993, could not be subject to the racial guidelines in the 1996 plan.[16] The Board adopted the Plan in response to *Hampton II*. The Plan provides that three other magnet schools are not subject to the guidelines because they, like Central, offer unique programs. Stip. Exh. 74, p. 3, JA 79.

This case was filed by Meredith and three other parents (together with Meredith, "Plaintiffs"). The Plaintiffs other than Meredith claimed that their children were unlawfully

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plaintiffs to reopen the litigation. He noted that the applicable decisions of this Court provide that "once the constitutional violation has been remedied, ... the federal courts must not interfere with the traditional functions of the school board." Stip. Exh. 70, p. 8.

[15] The district court noted that '[t]his conclusion may seem surprising." *Id.* at 754. The *Hampton I* opinion contains a detailed history of desegregation in Jefferson County from the 1950s through the filing of the *Hampton* complaint. *Id.* at 755-67.

[16] Central offers a "magnet career academy" program that prepares students for careers in business, law, medicine, and computer technology. Stip. Exh. 45, p. 18. No other high school offers a similar program. The district court held that denial of admission to Central to the *Hampton* plaintiffs involved an unconstitutional use of race to allocate a limited government benefit among competing applicants. 102 F. Supp. 2d at 381 ("When it decides who may attend Central, JCPS uses a racial classification that denies a benefit, causes a harm, and imposes a burden on unsuccessful African-American applicants.").

denied entry into magnet traditional program schools.[17] Meredith claimed that her son was denied entry into his "neighborhood school." All Plaintiffs requested injunctive relief and damages. Pet. App. E-1; Record ("R.") 8, 15, 16.

The district court held that the Plan satisfied the "compelling interest" requirement of this Court's equal protection decisions. The district court also held that the Board's use of race in student assignments satisfied the "narrow tailoring" requirement of those decisions, except for the use of race-separate lists in the application process at magnet traditional program schools.[18] The district court ordered the Board to change that process, but it did not grant any other relief to any Plaintiff. Pet. App. C-78.

Only Meredith appealed. The court of appeals affirmed in a *per curiam* opinion which held, "Because the reasoning which supports judgment for defendants has been articulated in the well-reasoned opinion of the district court, the issuance of a detailed written opinion by this court would serve no useful purpose." *McFarland v. Jefferson County Public Schools*, 416 F. 3d 513, 514 (6th Cir. 2005) *cert. granted*, 126

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[17] Those schools are countywide magnet schools which provide instruction in a "traditional" environment. They are provided by the Board with the same financial, instructional, curricular, disciplinary and extracurricular resources, materials, services and policies as every other school. Moreover, eight resides schools provide a traditional or structured learning environment. Stip. pars. 98-100, JA 48-49; Pet. App. C-29. The Board did not exempt the magnet traditional program schools from the racial guidelines in response to *Hampton II*, because they are not unique.

[18] The use of separate lists at those schools was not required by or even described in the Plan; it was simply the method chosen by staff to implement the Board's goal of racial integration. The Board changed the magnet traditional program school application process for 2005-2006 to comply with the district court's order, without changing the text of the Plan. Thus, that part of the district court's decision is not at issue here.

S. Ct. 2351 (2006); Pet. App. B-1. The court of appeals denied Meredith's subsequent petition for rehearing. Pet. App. A-1.

SUMMARY OF ARGUMENT

The district court correctly held that the Plan satisfies the requirements of the Equal Protection Clause. Under well-established principles, the Plan must further a compelling governmental interest and must be narrowly tailored to meet that interest. This Court most recently applied those principles to higher education admissions policies in *Grutter v. Bollinger*, 539 U.S. 306 (2003); when applied in the much different context of the student assignment plan of a public elementary and secondary school district, those requirements are easily satisfied by the Plan.

The Board presented overwhelming evidence that the Plan achieves the Board's compelling interest in providing a competitive and attractive public school system, maintaining community support for JCPS, and preparing students for life in a democratic and racially diverse society. Petitioner and the other Plaintiffs presented no meaningful evidence to the contrary.

The use of race in the Plan is narrowly tailored because the student assignment process is flexible and uses race in a limited and permissible manner; the racial guidelines lack the attributes of a quota; the student assignment process does not cause undue harm; the Board has considered, and in large part uses, race-neutral alternatives to achieve its compelling goals; and the Plan is subject to periodic review by democratic processes.[19]

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[19] Some readers of this summary and the argument below may imagine that they "hear the thud of square pegs being pounded into round holes." *Parents Involved in Community Schools v. Seattle School District No. 1*,

ARGUMENT

I. The Board Has A Compelling Interest In Maintaining Racially Integrated Schools.

A. The Board's Interest Must Be Considered In Light Of The Unique Importance Of Elementary And Secondary Schools In Our Society

Every state of the United States requires its children to receive an elementary, and at least a partial secondary, education.[20] In most states, the provision of such an education by the legislature is a constitutional requirement.[21] Nearly 90 percent of the nation's school children attend public

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426 F. 3d 1162, 1193 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006) (Kozinski, J., concurring). Respondents agree that here, as in that case, "there is something unreal about ... efforts to apply the teachings of prior Supreme Court cases, all decided in very different contexts, to the plan at issue here." *Id.* Respondents argued below that the Plan is subject to, at most, intermediate scrutiny. *See* Post-Hearing Brief of Defendants, R. 54. Judge Kozinski proposed "robust and realistic rational basis review" as an alternative to strict scrutiny. 426 F. 3d at 1194. Nevertheless, the Plan satisfies the test of strict scrutiny. Indeed, it could be said -- recognizing that several dissenting Justices in *Grutter* questioned whether the facts in that case justified the result -- that the Plan satisfies the test better than the law school's admissions program did. *See* pp. 21, 25, 30, n. 28, 37, n. 30, 42-43, 45, *infra*.

[20] Education Commission of the States, Compulsory School Age Requirements (August 2006), *available at* http://www.ecs.org/clearinghouse/64/07/6407.htm (last visited October 4, 2006). Kentucky has such a requirement. KRS 159.010.

[21] Education Commission of the States, Constitutional Language: State Obligations for Public School Funding (August 2002), *available at* http://www.ecs.org/clearinghouse/38/62/3862.htm (last visited October 4, 2006). Kentucky has such a requirement. Ky. Const. § 183.

elementary and secondary schools.[22] In almost every state, the expenditure of funds for those schools is the largest single item in the state general fund budget.[23] All of this is true because public elementary and secondary schools play a unique role in our democracy.

The core mission of public elementary and secondary schools is to educate children in the civic values and skills that they need to become active and capable citizens. This Court has recognized that public school teachers "play a critical part in developing students' attitudes toward the government and understanding of the role of citizens in our society" because they "inculcat[e] fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979). In addition to this important political role, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). "[T]he significance of education to our society is not limited to its political and cultural fruits. The public schools

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[22] U.S. Department of Education, National Center for Education Statistics, Characteristics of Private Schools in the United States: Results from the 2003-2004 Private School Universe Survey (March 2006) p. 2, *available at* http://nces.ed.gov/pubs2006/2006319.pdf (last visited October 4, 2006). In Kentucky, about 90 percent of students attend public schools. *Id.* Table 23 and KDE, Kentucky Education Facts Page (November 2005), *available at* http://www.education.ky.gov/KDE (last visited October 4, 2006).

[23] National Association of State Budget Officers, The Fiscal Survey of States (June 2006), *available at* http://www.nasbo.org/Publications/PDFs/FiscalSurveyJune06.pdf (last visited October 4, 2006). In Kentucky in recent years, from 41 to 48 percent of the general fund budget has been so spent. KDE, Kentucky Board of Education Meeting Notes (June 4-5, 2003), *available at* http://www.education.ky.gov/KDE (last visited October 4, 2006).

are an important socializing institution, imparting those shared values through which social order and stability are maintained." *Plyler*, *supra*, at 222, n. 20. Public school teachers perform "a task that goes to the heart of representative government," because public schools are an "assimilative force by which diverse and conflicting elements in our society are brought together on a broad but common ground." *Ambach*, *supra*, at 77. Thus, "education has a pivotal role in maintaining the fabric of our society." *Plyler*, *supra*, at 203.

The most significant notice by this Court of the importance of public elementary and secondary schools to the nation was *Brown v. Board of Education*, 347 U. S. 483 (1954). This Court aptly summarized the central role of those schools in an often quoted passage:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 493. In holding that state-sponsored school segregation is unconstitutional, this Court in *Brown* considered "public education in the light of its full development and its present

place in American life throughout the Nation," not merely its status in 1868. *Id.* at 492-93.[24]

KERA provides that students in Kentucky's elementary and secondary schools shall acquire, among others, the capacities of "[k]nowledge to make ... political choices" and "[u]nderstanding of governmental processes as they affect the community, the state, and the nation." KRS 158.645. KERA further provides that the schools shall develop their students' ability to "exhibit[] the qualities of altruism, citizenship, courtesy, honesty, human worth, justice, knowledge, respect, responsibility and self-discipline" and "[b]ecome responsible members of a family, work group or community, including demonstrating effectiveness in community service." KRS 158.6451. These capacities and abilities surely are among the "fundamental values necessary to the maintenance of a democratic political system." *Ambach*, *supra*, at 77.

The district court correctly noted that when a government decision is influenced by race, the Equal Protection Clause requires that "[t]he interest asserted must be examined and approved in each case in light of the particular context in which it is asserted." Pet. App. C-38, citing *Grutter*, 539 U.S. at 327. The district court suggested that *Brown* may not be directly relevant to its decision in a legal sense, but it concluded that "*Brown*'s original moral and constitutional

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[24] This Court noted in *Brown* that public elementary and secondary schools had become more important in American life since the adoption of the Fourteenth Amendment, with increased emphasis on a longer school year, more years of schooling, and compulsory attendance. *Id.* at 489-90. Since 1954, the importance of those schools to our nation's place in the global economy has been emphasized many times by the executive and legislative branches, *e.g.*, the President's education summit with the nation's governors in 1989; the passage of Goals 2000: Educate America Act (P.L. 103-227) in 1994; and the passage of the NCLB Act in 2002.

declaration has survived to become a mainstream value of American education." Pet. App. C-45. The district court properly defined the context within which it examined the Board's interests by reference to *Brown, Plyler* and other relevant decisions of this Court.[25]

B. The Plan Creates More Competitive And Attractive Public Schools And Causes Broader Community Support For JCPS

The district court noted that one who proposes to use race should first "define with precision the interest being asserted," and it correctly described the precise interest of the Board as follows:

> To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of *Brown*'s promise. The benefits the JCPS hopes to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools;

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[25] The district court also noted recent and relevant legislative action: that Congress affirmed the value of racial integration by enacting the NCLB Act; and that in offering financial assistance for magnet schools, Congress noted that "[i]t is in the best interests of the United States ... to continue the Federal Government's support of ... local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds ... to ensure that all students have equitable access to a high quality education that will prepare all students to function well in ... a highly competitive economy comprised of people from many different racial and ethnic backgrounds." 20 U.S.C. § 7231(a)(4). Pet. App. C-44, n. 34.

and (4) broader community support for all JCPS schools.

Because this Court recently considered the strength of educational interests in *Grutter*, the district court appropriately looked to that decision for guidance. The district court noted at the hearing, however, that while a public law school has a valid interest in the internal benefits of racial diversity, a public elementary and secondary school system may have a greater and perhaps more valid interest in its external benefits. Tr. at 5-74 to 76, JA 155 to 157. The district court found in the record certain important benefits of the Plan "that were not relevant in the law school context but are relevant to public elementary and secondary schools." Pet. App. C-4. The district court concluded that racial integration in JCPS provides an important and valid external benefit to the Board and the community: "Integrated schools strengthen and make the entire school system more attractive." Pet. App. C-50, n. 40.

Elementary and secondary education is mandatory under state law, but parents and students can choose not to attend public schools. KRS 159.010, 159.030. Many families, though, are not able to pay nonpublic tuition. The Board's goals for JCPS are thus shaped in several ways by the existence of strong competition from private and parochial schools. Pet. App. C-49; Tr. 3-95, JA 133 (Rodosky), 4-91 (Castillo). The Board wishes to provide a public school system in which each school is succesful and all schools can give a quality education to every child the Board receives from the community. Tr. 1-121, JA 119 (Daeschner).

The desegregation decree was legally necessary, but it had painful short-term consequences for the community and the Board. The district court noted when it issued the decree that "certain individuals in our community have publicly declared

their intended resistance, by the use of force if necessary, to prevent the implementation of our Judgment and Plan of desegregation." Stip. Exh. 66, p. 22. Indeed, "[c]ommunity resistance was extremely intense, and this transition was one of the most difficult experienced by any city at the height of the desegregation era." Dft. Exh. 72, p. 116. *See also Hampton I*, *supra*, at 755 ("A full telling of that story ... would necessarily describe the confusion and outrage at Judge Gordon's busing order which seemed to tear this community apart as it sent children from their own neighborhoods to places that many of both races had never seen."). Dft. Exh. 30, JA 104, charts the substantial decline in JCPS enrollment that followed the entry of the decree.

The decree was effective, but it had educational disadvantages; notably, it did not provide for continuity in assignment through all grades at each school level. Moreover, the decree by its very nature did not provide for any student choice. The educational flaws of the decree were magnified by the passage of KERA; its emphasis on stability, parental participation, assessment and accountability were not served by the lack of continuity in elementary students' assignments under the then-existing plan. *See* Stip. Exh. 72, pp. 1-4. Since 1984, the Board has slowly and carefully converted the decree into a complex but fair student assignment plan which meets the educational needs of JCPS and accomplishes the decree's "goal of preventing racially identifiable schools [but] in a far less burdensome manner than the mandatory alphabetical busing plan." *Hampton I*, *supra*, at 777.

Each revision of the student assignment process was preceded by extensive community outreach and input. Each revision was influenced by the needs and desires conveyed to the Board by parents, educators, interested groups of stakeholders, and the public at large. *See* Stip. Exh. 70, p. 3

(1984 revision involved "assistance and advice of a representative citizens committee and other interested persons and organizations"); Stip. Exh. 72, pp. 7-10 (in 1991 revision, "[a]ll persons and groups who are affected by, or interested in, the subject of student assignment in the school district have been given the opportunity to be heard."); Stip. Exh. 73, pp. 2-4 (1996 revision involved recommendations by representatives of many civic and advocacy groups, a public forum, and a telephone survey of parents); Stip. Exh. 74, p. 3, JA 78 and Dft. Exh. 38, JA 106 (2001 revision involved public forums, a parent opinion survey, a public opinion survey, and discussions with outside experts). *See also*, Tr. 2-79 to 80 (Todd).

The Plan has prevented the resegregation that inevitably would result from the community's segregated housing patterns and that most likely would produce many schools that might be perceived as "failing." By design, the Plan "creat[es] a system of roughly equal components, not one urban system and another suburban system, not one rich and another poor, not one Black and another White." The Plan thus "invest[s] parents and students alike with a sense of participation and a positive stake in their schools and the school system as a whole." Pet. App. C-49. Because the Metro area has a countywide system of public schools that are truly unitary, it has avoided much of the race-based strife and race-conscious decisions that characterize other metropolitan areas with highly segregated public schools. In Jefferson County, public and private choices about where families will live, where companies will locate, where teachers will teach, how funds will be allocated among schools, and the like can be made on a *less* race-conscious basis than in those communities.

The Board, responding to its constituents in a manner that exemplifies effective democratic decision-making, has

skillfully converted a blunt and controversial desegregation decree into a nuanced and educationally sound student assignment plan that is broadly accepted by the community. It is an accomplishment of which the people of Jefferson County are rightly proud. *See, e.g.*, Tr. 3-61, JA 130 (Corbett). *See also Hampton I*, *supra*, at 755 ("Finally, [the story] would describe a school community which in many respects came together for a common purpose and worked at understanding one another well enough to overcome all these traumatic events. In doing so, at the very least, the Jefferson County schools created something positive and workable.").

The district court correctly held that the Plan furthers the Board's goals of more competitive and attractive public schools and broader community support for all schools in the system. Indeed, because "not one witness came forward to offer [the] view ... that integrated schools are not valuable to the system as a whole," the district court's finding with regard to this interest of the Board was "compelled." Pet. App. C-50, n. 40.

C. The Plan Provides Important Educational Benefits To JCPS Students

1. The Plan Teaches Racial Tolerance And Diminishes Racial Stereotypes.

The district court observed that while "the Board has articulated broader concerns in the different context of public elementary and secondary education," the interests identified by the Board "overlap with those of the Michigan Law School at the individual student level." Pet. App. C-37. The district court found that the Plan provides important and valid internal benefits to the Board and its students that are quite similar to those found by this Court in *Grutter*.

This Court held in *Grutter* that the admissions policy of the law school resulted in an "important and laudable" educational benefit to the school and its students -- promotion of cross-racial understanding, breaking down racial stereotypes, and enabling a better understanding of persons of different races. 539 U.S. at 330. If that is a compelling benefit for law schools and their students, it is even more so for the Board and its students. Justice Scalia noted in dissent in *Grutter* that law students are not graded on this skill, "[f]or it is a lesson of life rather than law" which should be learned in "institutions ranging from Boy Scout troops to public-school kindergartens." 539 U.S. at 347 (Scalia, J., dissenting). Indeed, the sections of KERA cited above require that students acquire the capacities and abilities to "Work[] and Play[] Well with Others." *Id.* And, not surprisingly, JCPS students *are* graded on those capacities and abilities. *See* Stip. Exh. 32, pp. 8, 14.

Racial integration significantly advances the goal of teaching students how to participate in a democracy that has formed a single society out of many diverse people. *See, e.g.*, Tr. 1-81, JA 114 (Haddad); 1-114, JA 118 (Daeschner); 2-134, (Todd) 3-30, JA 128 (Peabody); 4-92 to 93 (Castillo), 5-61 (Orfield). In fact, racial integration of the students in elementary and secondary schools *is* effective participation by students of all racial and ethnic groups in the part of the nation's civic life that is "the very foundation of good citizenship." *Brown*, *supra*, at 493; *Grutter*, 539 U.S. at 332 ("[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.")

The Board offered evidence that the benefits of racial integration in elementary and secondary schools include the important human lessons identified in *Grutter* and that they are best learned at an early age. *See, e.g.*, Tr. 3-207 (Kifer)

("It's a part of the American ethos that says we ought to learn to live together. What you are talking about is democracy.") JCPS students obtain those benefits from the Plan. *See* Tr. 3-124, JA 134 to 135 (Rodosky) (2002 University of Kentucky survey of 1997 JCPS graduates); Dft. Exh. 72, pp. 129-37 (similar 2000 survey of JCPS students by Harvard Civil Rights Project; "diversity has a positive impact on learning, on student attitudes, and on important democratic principles."). In the face of this evidence, "Plaintiffs offered nothing to the contrary." Pet. App. C-47, n. 36. The district court correctly held that "the benefits of racial tolerance and understanding are equally as 'important and laudable' in public elementary and secondary education as in higher education." Pet. App. C-46 to 47, quoting *Grutter*, 539 U.S. at 330.

2. The Plan Prepares Students For Life In A Racially Diverse Society.

Attending racially diverse schools "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals" because "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330. That conclusion is not limited to graduates of institutions of higher education who work for Fortune 500 companies and as military officers; it applies equally to graduates of JCPS who work, for example, in a local dry cleaning plant. Tr. 3-59, JA 129 (Corbett) ("[I]f we want our children to live and work in a world where they are going to be dealing with people who don't necessarily look and/or sound like they do, then what better way to prepare them for that than to be in that setting in the school building because they are going to get it in the workplace, and my company is a perfect example of how that's going to happen").

In a county in which the great majority of students attend public schools and about one-third of the population is black, the entire community has a substantial interest in a public school system whose graduates are prepared for a racially diverse workplace. JCPS students are so prepared. *See* Tr. 3-125, JA 135 (Rodosky) (2002 University of Kentucky survey of 1997 JCPS graduates regarding preparation for a diverse workplace; "88 percent of the graduates felt prepared or well-prepared"); Dft. Exh. 72, pp. 129-37 (similar 2000 survey of JCPS students by Harvard Civil Rights Project; "[o]ver 85 percent of all students believe that they are prepared to work in a diverse job setting [and] over 90 percent of all students report that they would be comfortable working for a supervisor of a different racial or ethnic background."). The district court correctly held that students educated in racially integrated schools "are better prepared for jobs in a diverse workplace and exhibit greater social and intellectual maturity with their peers in the classroom and at the job," and that this benefit of racial integration is one that was "precisely ... articulated and approved of in *Grutter*." Pet. App. C-46.

3. The Plan Supports The Board's Goal Of Increasing The Academic Achievement Of All Students

Petitioner would measure the relative educational success of elementary and secondary schools primarily, if not exclusively, by scores on standardized reading and mathematics tests.[26] It is clear from the argument above that

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[26] Petitioner's cursory brief in this Court simply states, "If educational benefit is the true test of compelling interest, than [sic] JCPS fails their own test." Brief of Petitioner ("Pet. Brf.") p. 8. Respondents believe, given the arguments made by Plaintiffs in district court, that Petitioner means that JCPS has not closed the achievement gap between white and

improvement in such test scores is not the only governmental purpose of elementary and secondary schools. Nevertheless, that form of student achievement is important to the Board, because assessment of and accountability for schools' progress on such tests is a key component of state and federal legislation.[27]

The Board offered evidence that racial integration provides substantial academic benefits to black students without harming white students: "[A] vast body of research" shows that "black students gain in terms of educational achievement measured by test scores from desegregated experiences" but "there is not a significant effect on white students one way or another in terms of test score outcome." Tr. 5-14, JA 140 (Orfield). Moreover, the black-white achievement gap in JCPS has been narrowed on each successive state-mandated test. Tr. 3-160 to 162, JA 135-36 (Rodosky). The Board's success in dealing with the gap was cited by the Broad Foundation when it named JCPS as one of the top five school districts in the nation in 2003. Tr. 2-71 to 72 (Todd).

The district court was well aware of "the huge body of conflicting opinion about the [achievement] benefits of racial integration." Pet. App. C-48, n. 37. Because the evidence in

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black students. *See, e.g.*, Reply Brief for Plaintiffs (R. 56); Tr. 4-143 to 149 (Plaintiffs' cross-examination of Joseph Burks).

[27] *See* KRS 158.6455; 20 U.S.C. § 6311(b). KERA recognizes, however, that not all abilities that schools are required to develop can be captured in a test score. *See* KRS 158.6453(1) (state assessment shall not measure a student's ability to become a self-sufficient individual or to become a responsible member of a family, work group or community). The "report card" that KERA requires for each school includes not only performance on the state assessment but also nonacademic achievement (attendance, retention, dropout rates and transition to adult life) and school learning environment, including parental involvement. KRS 158.6453(7).

this case and *Hampton II* "seems to suggest that African-American achievement has improved substantially" and because "Plaintiffs completely failed to introduce evidence that integration is only a neutral factor," the district court concluded that the Board has valid reasons for believing that the Plan may aid student performance. Pet. App. C-49, n. 39. The district court correctly held that this is an "equally compelling" benefit of the Plan for the Board. Pet. App. C-47.

D. The Plan Is An Educational Judgment By A Locally Elected Government Body That Is Responsive To Its Constituents

1. The Plan Deserves The Deference That Federal Courts Traditionally Give To Educational Judgments Of Local School Boards

This Court held in *Grutter* that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer" because the admissions policy involved "complex educational judgments in an area that lies primarily within the expertise of the university." 539 U.S. at 328. The district court likewise gave deference to the Board's judgment that the Plan would improve its schools and the education of the children in them.

The deference that this Court gave to the law school in *Grutter* was based on "expansive freedoms of speech and thought associated with the university environment" that are grounded in the First Amendment. 539 U.S. at 329. A university's freedom to make judgments includes the selection of its student body; deference is due the university's choice of students who will produce the "robust exchange of ideas" that fulfills its mission. *Regents of University of California v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.). The district court thought that "[i]n the different context of

public school education, that concept of deference is not relevant." Pet. App. C-40, n. 31.[28]

This Court has many times in many contexts applied a different concept of deference to the educational judgments of elementary and secondary school officials. *See, e.g., Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 273 (1988) (this Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges."); *Epperson v. State of Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities.") When this Court held that *de jure* racial segregation was unconstitutional, it gave local school boards the principal role in implementing the holding: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." *Brown v. Board of Education*, 349 U.S. 294, 299 (1955). Likewise, in decisions about the dissolution of desegregation decrees, this Court has emphasized the democratic benefits of local control of schools. *See, e.g., Board of Education of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 248

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[28] The district court also noted another distinction between higher education and elementary and secondary schools that is relevant to the degree of deference, if any, that is compatible with strict scrutiny in either context. The district court observed that "Justice Thomas has argued that deference is contradictory to the very idea of strict scrutiny. ... For instance, he said that while a state may opt to create an elite law school, it has no compelling interest to do so." Pet. App. C-42, n. 32, citing *Grutter*, 539 U.S. at 362 (Thomas, J., dissenting). For the Board, however, "[e]ducating the community's children is not optional." Thus, "strict scrutiny and limited deference are compatible here." *Id.*

(1991). ("Local control over the education of children allows citizens to participate in decision making, and allows innovation so that school programs can fit local needs.")

This deference that this Court gives to local school boards is grounded in the vital civic role of their schools. This Court recognized the fundamental importance of those schools to the nation in decisions such as *Brown*, *Plyler* and *Ambach*, *supra*. Yet, "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population." *Plyler*, *supra*, at 223, citing *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, 28-39 (1973). Because the right to receive an education is not a fundamental individual right, "federal and state courts have uniformly rejected the contention of a constitutional right to attend a particular school." *Johnson v. Board of Education of the City of Chicago*, 604 F.2d 504, 515 (7th Cir. 1979), citing *McDaniel v. Barresi*, 402 U.S. 39 (1971), and other authorities.

This concept of deference has been stated by this Court in cases involving issues similar to that presented here. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), this Court said that "School authorities have wide discretion in formulating school policy.... As a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." Likewise, in *Bustop, Inc. v. Board of Education of City of Los Angeles*, 439 U.S. 1380, 1382-83 (1978), then-Justice Rehnquist denied a request to enter an injunction against the busing of students to achieve racial balance: "While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action." (emphasis

in original) And, in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), this Court reinstated the authority of the City of Seattle to implement a voluntary desegregation plan to eliminate racial imbalance in the schools, noting that "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process." *Id.* at 473.

The district court correctly concluded that it could give deference to the Board's statement of its interests under the principles outlined above: that public elementary and secondary schools perform a vital role in American life; that the fundamental importance of those schools to government does not, however, create a corresponding individual right to receive an education or to attend a particular school; and that decisions about those schools are best left to local boards of education. Those principles are especially applicable in a case involving student assignment: a task that is both very basic, because every school board must perform it, and very difficult, because it requires the board to balance a complex blend of demographics, facility planning, communitywide and neighborhood aspirations, school and program popularity, institutional and individual student stability and predictability, and the like -- all while meeting state and federal expectations for annual progress toward legislated goals. It is a task that requires educational judgments that are more wisely made by school boards than by courts.

Petitioner has relied, here and below, on this Court's decision in *Missouri v. Jenkins*, 515 U. S. 70 (1995). *See, e.g.*, Petition for Writ of Certiorari 19. That case had different facts than this one, but it presented a similar fundamental question: When does a Constitution framed on principles of federalism and separation of powers require the federal courts to intervene in the affairs of a local board of education? The answer that Justice Thomas gave to that

question in the concurring opinion cited by Petitioner is equally applicable here:

> The desire to reform a school district, or any other institution, cannot so captivate the judiciary that it forgets its constitutionally mandated role. Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers. At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions.

Id. at 138 (Thomas, J., concurring).

2. The Constitution Should Not Prevent The Board From Continuing To Make Voluntarily An Educational Judgment That Was First Imposed On It By The Constitution

The district court noted that "[i]t would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law." Pet. App. C-42. The brief *amicus curiae* of the United States takes that odd position here.

The United States concedes that government has a compelling interest in eliminating or reducing racial isolation when it is a product of *de jure* segregation. Brief of the United States, p. 15. The United States contends, however, that this worthy objective--pursued by the Board continuously and in good faith for nearly 30 years by methods substantially the same as those decreed by the district court in 1975--became non-compelling the instant the district court issued its decision in *Hampton I*. On and after that day, under this

theory, the Board could pursue racially integrated schools only by race-neutral means. *Id.* at 16.

One of the requirements for dissolution of a desegregation decree is proof that the school district has complied with its requirements in good faith. *Dowell, supra*, at 249-50. The position of the United States here is indeed odd, given that the reason for requiring a showing of good faith in connection with the dissolution of a decree is to predict the likelihood that the board will in the future adhere to the principles that caused the decree to be issued in the first place. *Hampton II, supra*, at 380. "If the Constitution somehow prohibits a school board from maintaining a desegregated school system, the good faith factor becomes something of a sham." *Id.*

The dissolution of a decree means only that, in addition to proof of the school district's good faith compliance, the "vestiges of past discrimination had been eliminated *to the extent practicable*." *Dowell, supra*, at 249-50 (emphasis added). That is somewhat less than the standard suggested by the United States here. Brief of the United States at 10 ('when all vestiges of such discrimination have been *eradicated*") (emphasis added). In any event, desegregation is an important first step but it was not the ultimate goal of those who filed *Brown* and subsequent litigation, and it is not the goal of the Board. That goal was and is racial integration.[29] That goal

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[29] "Although the terms desegregation and integration are used interchangeably, there is a great deal of difference between the two.... [D]esegregation alone is empty and shallow. Desegregation is eliminative and negative, for it simply removes legal and social prohibitions. Integration is creative...more profound and far reaching than desegregation. Integration is the positive acceptance of desegregation and the welcomed participation of Negroes into the total range of human activities. Desegregation then, rightly, is a only a short range goal." "Ethical Demands for Integration", *A Testament of Hope: The Essential Writings of Dr. Martin Luther King, Jr.* (1968), 118.

will not be maintained by dismantling the very processes that caused the School District to become desegregated. The Board has properly continued to achieve that goal by "perpetuat[ing] without interruption, although with adjustment, the racial composition guidelines originally put in place by [the decree]." *Hampton I*, *supra*, at 77.

The position taken by the United States ignores this Court's previous statements about the discretionary ability of a local board of education to achieve racial integration. *Supra*, pp.31-32. This Court has never withdrawn those statements. *See Comfort ex rel. Neumyer v. Lynn School Committee*, 283 F. Supp. 2d 328, 390, n. 102 (D. Mass. 2003), *aff'd*, 418 F. 3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (2005). ("Notably, the Supreme Court has never even suggested that a voluntarily-adopted forced busing plan would be illegal."). The voluntary continuation of the framework established by the decree has accomplished important institutional, social and academic interests of the Board. There is nothing here that should cause this Court to withdraw those statements now.

E. Plaintiffs Offered No Meaningful Evidence Contrary To The Board's Stated Interests

The briefs *amicus curiae* on both sides of this case discuss many studies about the abstract benefits, or disadvantages, of racially integrated public elementary and secondary schools. That material is interesting, and often thought-provoking, but it is not controlling here. This is a real case with a real record about a particular school system. This Court's conclusion whether racially integrated schools are a compelling governmental interest *of the Board of Education of Jefferson County, Kentucky* must ultimately be based on this record. The Board presented overwhelming factual evidence and expert opinion that racial integration *in the Jefferson County*

Public Schools furthers compelling educational, cultural, social and economic interests of the Board and the community. "Purely as a matter of evidence, JCPS more than carried its burden on this issue. ... Plaintiffs offered nothing to the contrary." Pet. App. C-47, n. 36.

F. Conclusion

The district court had "no doubt that Defendants have proven that their interest in having integrated schools is compelling by any definition." Pet. App. C-38. Indeed, the district court said that "[t]he arguments favoring the Board's compelling interest are so objectively overwhelming that deference is immaterial to the result here." Pet. App. C-43. For the reasons set out above, that holding is clearly correct.

II. The Plan Is Narrowly Tailored

A. The Plan Is Specifically And Narrowly Framed Within Its Context To Accomplish Its Purpose

"[T]he means chosen to accomplish the [Plan's] asserted purpose must be "specifically and narrowly framed to accomplish that purpose." *Grutter*, 539 U.S. at 333, quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The purpose of this requirement is "to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Id.*, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

If this case presented a newly adopted program of public employment, public contracting, or even university admissions, the possibility of illegitimate motive might exist and this Court might need to search the record closely to find or disprove it. Here, in light of the Board's long history of good faith efforts to continue to provide racially integrated schools, the district court correctly concluded that "the

Board's policy of maintaining an integrated school system is sincerely held and not intended to disadvantage any race." Pet. App. C-53. *See Hampton II, supra*, at 369-70. Moreover, "Plaintiffs did not introduce any evidence in either the *Hampton* case or this case that suggested that the Board's motives were illegitimate, improper or insincere in any manner." Pet. App. C-53, n. 42.[30]

"Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327, quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) ("[I]t is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."). This Court said that its narrow tailoring inquiry in *Grutter* "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education" because "the very purpose of strict scrutiny is to take such 'relevant differences into account.'" 539 U.S. at 334, quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995). The district court similarly evaluated the Plan "in light of the factual and analytical differences between this case and the admissions programs reviewed in *Grutter* and

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[30] The district court thought that the legitimacy of the Board's motives also had a bearing on the validity of the Board's interests. "In his *Grutter* dissent, Chief Justice Rehnquist said that, absent an adequate explanation of the law school's interest, its attempts to reach a 'critical mass' were nothing more than unconstitutional racial balancing." Pet. App. C-53, citing *Grutter*, 539 U.S. at 378-87 (Rehnquist, J., dissenting). "[T]o use race for this purpose fails for want of a compelling reason." Pet. App. C-52. Here, given the precise statement of the Board's interests and the overwhelming supporting evidence offered by the Board, "no one honestly can say that JCPS is asserting an interest in racial balancing merely for its own sake." Pet. App. C-53.

Gratz." Pet. App. C-54. When the Plan is viewed in light of the Board's statement of its interests, the narrow tailoring inquiry has a distinctly different calibration than it did there.

Some of Petitioner's *amici curiae* have noted, correctly, the difference between the goals of "diversity" in higher education and racial integration in elementary and secondary schools. They fail to understand, however, what the difference means to the narrow tailoring inquiry here. They argue that that the yardstick that was used to measure the programs in *Bakke* and *Grutter* does not, indeed cannot, fit the Plan. As the Second Circuit explained, they ask the wrong question:

> [T]he District Court asked whether the Program is narrowly tailored to achieve the goal of "true diversity" ... when the appropriate inquiry ... is whether the Program is narrowly tailored to achieve its primary goal of reducing racial isolation resulting from *de facto* segregation. The difference in these two frameworks is not mere semantics. If reducing racial isolation is -- standing alone -- a constitutionally permissible goal, as we have held it is under the *Andrew Jackson* cases, then there is no more effective means of achieving that goal than to base decisions on race. ... [T]he cases cited by the District Court in support of its decision that the use of race alone in the Program was not narrowly tailored ... only address the efficacy of employing strictly racial classification to achieve "true diversity." Those decisions are, therefore, inapplicable to the present situation where the Program's aim, as initially found by the District Court and affirmed by this Court today, is precisely to ameliorate *racial* isolation in the participating districts.

Brewer v. West Irondequoit Central School District, 212 F.3d 738, 752-53 (2d Cir. 2000) (emphasis in original).

The elements of the Plan might not constitutionally "fit" a university admissions program whose goal is to attain a broadly "diverse" student body. *Grutter*, 539 U.S. at 334, citing *Bakke*, 438 U.S. at 315. They clearly fit an elementary and secondary student assignment plan with the narrower but equally compelling goal of maintaining racial integration in all its schools. Colleges and universities pursue their goal of "diversity" with strategies that are designed to attract "a critical mass of underrepresented minority students." *Grutter*, 539 U.S. at 335. The Board does not need to attract minority students. The JCPS student body will be at least one-third black -- and even more, if the Board is not successful in pursuing strategies that attract white students. *See* Tr. 3-95 to 98 (Rodosky); Dft. Exhs. 31, 32 (JA 105), 33-36.

The district court considered, in this context, each of the measures of narrow tailoring applied by this Court in *Grutter*. Pet. App. C-55 to C-56, citing *Grutter*, 539 U. S. at 334-35, 336, 341 and 339. The district court properly calibrated each of those measures to fit the distinct issues presented by the use of race in elementary and secondary education, and correctly held for the reasons discussed below that the Plan is a specifically and narrowly framed strategy to accomplish the Board's purpose. Pet. App. C-69.[31]

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[31] In reaching its conclusion, the district court adopted Justice Kennedy's position that "the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). The district court did not give "even limited deference to the Board's implementation of its goals." Pet. App. C-54 to 55.

B. The Plan's Use Of Race Is Limited And Not Pretextual, And The Student Assignment Process Operates Flexibly

The district court addressed *Grutter's* "requirement of individualized consideration," 539 U.S. at 336, by noting that the Plan operates in the "totally different context" of an elementary and secondary school system which "does not have the goal of creating elite and highly selective school communities" but instead seeks to "create more equal school communities for educating all students." Pet. App. C-62. The process of "holistic review" urged by Petitioner simply does not fit this context.

The majority in *Grutter* and Justice Powell in *Bakke* imposed the "individualized consideration" requirement to ensure that a university's stated goal of "diversity" is not a pretext for the use of race as the sole criterion for decision in choosing any applicant. *Grutter*, 539 U.S. at 337; *Bakke*, 438 U.S. at 316. Thus, race cannot guarantee the admission of a black student instead of a farm boy from Idaho or a Bostonian; at most, race or geographic origin may "tip the balance" for one of them. To keep the university at least facially honest in implementing the process, it must disclose the "holistic" criteria that it proposes to use to admit and exclude applicants. When an elementary and secondary school district's openly stated (and constitutionally compelling) goal is racial integration of an existing student body among all its schools, there is no need to guard against pretext and thus no need even to require the use of such criteria. *See Parents Involved in Community Schools, supra*, at 1183 ("[i]f a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a individualized, holistic manner.").

Attendance in elementary and secondary schools is mandatory, and the Board is required to educate every child in its schools to a statewide standard. The concept of merit-based selection in those schools is properly the exception rather than the rule. Only a relatively small number of the 90,000 students subject to the Plan are "evaluated as an individual" by the Board in any year in the context of an application to attend a school other than a resides or cluster resides school. Moreover, many of those applications are submitted to magnet schools that since *Hampton II* have been exempt from the racial guidelines. *Supra,* p. 13. Within this framework, the decisions on the relatively small number of choice and transfer applications can be and are made for reasons other than race, and "[e]ven where race does 'tip' the balance in some cases, it does so only at the end of the process, *after* residence, choice and all the other factors have played their part." Pet. App. C-70 (emphasis in original). Thus, race is not the "defining feature" of any student's assignment. Pet. App. C-69. Petitioner's argument that race is the "sole factor" used to assign students in JCPS, Pet. Brf., p. 4, completely misapprehends the actual operation of the Plan.

The real purpose of the individualized consideration requirement is to ensure that an admissions process remains "flexible." *Grutter*, 539 U.S. at 334-37. In the context of higher education, flexibility is provided by a nuanced admissions process that does not define applicants by race or ethnicity. *Id.* at 337. In the much different context of JCPS, the same if not a greater degree of flexibility is provided by an even more complex but equally workable process that similarly submerges race in a mix of other factors. As in *Grutter* and *Bakke* "race is simply one possible factor among many, acting only occasionally as a permissible 'tipping' factor." Pet. App. C-63. For these reasons, the district court

correctly held that the "Plan incorporates some sufficient form of individualized attention in the assignment process." Pet. App. C-61.

Much attention has been paid by Petitioner and her *amici curiae* to the numbers in the Plan. Petitioner argues that the racial guidelines in the Plan constitute a "hard-core mechanized race-designated quota system." Pet. Brf., p. 5. The district court correctly rejected this argument. Under the decisions of this Court, a quota "has a precise target, and it insulates some applicants from competition with other applicants." Pet. App. C-57, citing *Grutter*, 539 U.S. at 335, quoting *J.A. Croson Co.*, *supra*, at 496, and *Bakke*, *supra*, at 317. The Plan does neither.

The racial guidelines encompass a range of 35 percentage points, from about 20% below to about 15% above the average JCPS black enrollment. The actual black enrollment among JCPS schools in 2003-2004 varied widely within this range. At elementary schools, it ranged from 20.2% to 50.4%; at middle schools, from 23.5% to 49.9%; and at high schools, from 20.1% to 49.5%. Stip. Exh. 21. The district court noted that "only about 30% of all schools show a racial mix within even five percent of either side of the system wide average," indicating "a widely dispersed range in Black students among JCPS schools rather than a precise target." Pet. App. C-58. Indeed, this Court held in *Grutter* that the variance in the percentage of minorities in the law school's classes from 1993 to 1998 of 13.5 to 20.1 percent was "a range inconsistent with a quota." 539 U.S. at 336. The district court observed that "the range in the percentage of Black students among all JCPS schools is much broader than the range in minority admissions at either Amherst College

[cited in Justice Kennedy's dissent in *Grutter* as not involving a quota] or Michigan Law School." Pet. App. C-59.[32]

The district court found that the Plan does not insulate "each category of applicants with certain desired qualifications from competition with all other applicants," quoting *Grutter*, 539 U.S. at 334. Pet. App. C-60. The choice process in the Plan does not operate to exclude or include either group absolutely from schools or programs. A student's assignment is determined by "a host of factors, such as residence, student choice, capacity, school and program popularity, pure chance and race." Pet. App. C-69. Because non-racial criteria are significant factors in assigning students, "[n]o JCPS student is insulated from competition with all other students, and no student is placed on a separate admissions track." Pet. App. C-60.[33]

Petitioner apparently assumes that any range of numbers necessarily is a quota. The court of appeals rejected that conclusion in its opinion in the *Grutter* litigation. *Grutter v. Bollinger*, 288 F.3d 732, 748 (6th Cir. 2002): ("[O]ver time, reliance on *Bakke* will always produce some percentage range of minority enrollment. And that range will always have a bottom, which, of course, can be labeled the 'minimum.' These results are the logical consequence of reliance on *Bakke* ...."). In affirming, this Court agreed that "'[s]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." 539 U.S. at 336.

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[32] *See Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting). The range of minority enrollment at Amherst College was 8.5% to 13.1%; this range extends about 21.2% on either side of the mean of 10.8%. In JCPS, the range of black enrollment was 20.1% to 50.4%; this range extends about 43% on either side of the mean of 35.2%. Pet. App. C-59, n. 46.

[33] The one exception to this conclusion -- the use of race-separate lists in the application process at magnet traditional program schools -- was struck down by the district court, and is no longer in effect. Note 18, *supra*.

Indeed, it is difficult to imagine how the Board might reach its compelling goal of racial integration without paying some attention to a range of numbers.

The guidelines simply state the outer limits for the "huge array of choices and flexibility within the assignment process." Pet. App. C-24. The limits provide the student assignment staff with an essential "yardstick" that gives them "moral authority ... to facilitate, negotiate and work collaboratively with principals and district staff to ensure that the plan is implemented." Tr. 2-134, 2-143, JA 122 (Todd); *see also*, Pet. App. C-18. The limits also provide a valuable benefit to parents and students: continuing certainty from year to year about the stability of the student body in the school they have chosen.

The district court correctly held that, because the racial guidelines are so broad and because "the evidence simply does not support the conclusion that [they] actually mask a tighter range, create a *de facto* quota or insulate one group of applicants from competition with another group," Pet. App. C-61, the Plan does not "operate as a quota." 539 U.S. at 335.

C. The Plan Does Not Cause Undue Harm

The Plan has a different goal, and presents different issues, than typical "affirmative action" programs. In those programs, tangible benefits might be granted to minorities to the detriment of other worthy applicants. A prestigious law school, for example, "excludes many applicants because of its goal of creating an elite community." State law does not permit the Board to exclude any student from JCPS. Under the Plan, therefore, "the Board uses race in a limited way to achieve benefits for all students" by "creating communities of equal and integrated schools for everyone." In this process, "no student is directly denied a benefit because of race so that

another of a different race can receive that benefit." Pet. App. C-62, 66, 67.

Government action based on race must not "unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. The Plan meets that test. The infrequent application of the racial guidelines to assign a student to one instead of another building within the Board's "communities of equal and integrated schools" does not cause undue harm.

Meredith may have a strong preference for the school to which her son was not assigned. But, as the district court noted in *Hampton II*, "matters of personal preference do not distinguish those schools in a constitutional sense." 102 F. Supp. 2d at 380, n. 43. A student who is not assigned to the JCPS school of his or her choice has not lost a government contract as in *Adarand*, or public employment as in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), or an education at a prestigious public college or graduate school as in *Gratz*, *Grutter* and *Bakke*, or even an education at a prestigious public secondary "examination school" as in *Wessman v. Gittens*, 160 F. 3d 790 (1st Cir. 1989). The student has not been denied an education, only a choice.[34] He

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[34] *See, e.g., Bakke, supra*, at 300, n. 39, in which Justice Powell noted:

> [Bakke's] position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. [The University of California] did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

While Justice Powell used the example of a desegregation decree, his conclusion about the difference in the impact on the medical student and the pupil has equal force here.

or she still will receive an appropriate public school education at a school which has been provided by the Board with the same resources, materials, services and policies as every other school. *Supra*, pp. 2-3. The district court correctly concluded that "[b]ecause all schools have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools, an assignment to one school over another does not cause constitutional harm to any student." Pet. App. C-70.

The potential for "undue harm" to students is further mitigated by the extraordinary efforts that the JCPS Parent Assistance Center makes to match students with schools that meet their needs. Tr. 2-135, 2-163 (Todd); Dft. Exh. 10. If the Plan unduly harmed members of any racial group, the several surveys of parents, students, graduates and the community in this record would not demonstrate such high levels of satisfaction with JCPS and such strong support for racial integration. *Supra*, p. 9. Likewise, if the Plan unduly harmed members of any racial group, the elected members of the Board surely would have heard that complaint from constituents. They have not. Tr. 1-83, JA 114 (Haddad).

Plaintiffs stipulated that Meredith's son did not submit a timely choice application for kindergarten, attempted to enroll late at his resides school kindergarten, was assigned to another kindergarten because there was no space in his resides school kindergarten, did not appeal the denial of his application to transfer (which for elementary students is a third-level choice) from his assigned kindergarten or submit another transfer application, and did not submit a choice application for first grade for 2003-2004. Stip. par. 5, JA 20. The ungraded primary school program, which Meredith cited as the basis for her desire to transfer her son, is in fact provided at every elementary school in accordance with state law. Tr. 1-49 to 50 (Meredith), 2-69 to 70, 2-195, JA 195

(Todd); KRS 158.031. If it is true, as Meredith argued below, that her son was asked to help other students learn English, that experience in "peer teaching" provided a powerful educational benefit. Tr. 1-129 (Daeschner). Meredith did not, because she could not, present any meaningful evidence that her son was harmed because he was not assigned to the kindergarten of his choice

The district court correctly held that, as a general proposition, the "Plan uses race in a manner calculated not to harm any particular person because of his or her race," and more specifically, "Meredith's son ... was not unduly harmed." Pet. App. C-67 and 66, n. 48.

D. The Board Has Considered, And The Plan In Large Part Uses, Race-Neutral Alternatives

The Board has satisfied the requirement that it consider "lawful alternative and less restrictive means." *Grutter*, 539 U.S. at 340, quoting *Wygant, supra*, at 280, n. 6. This aspect of the narrow tailoring doctrine "does not require exhaustion of every conceivable" substitute, only a "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339. As the court of appeals noted in its own *Grutter* opinion, "[a]n institution of higher education must consider race-neutral alternatives, but it need not abandon its academic mission to achieve absolute racial and ethnic neutrality." 288 F.3d at 750. The Board need not abandon its mission of educating all of the community's children, as required by state law and NCLB, to achieve absolute racial neutrality.

The Board has given serious, good faith consideration to achieving racially integrated schools through a student assignment process that would use entirely race-neutral criteria, or that would use race but not include racial guidelines. A system-wide assignment lottery "would require a 'dramatic sacrifice' in student choice, geographic

convenience and program specialization" and "could only be achieved at a huge financial cost." Pet. App. C-68. The Board concluded that "random sampling and socio-economic criterion do not provide an adequate substitute for the use of racial ... identity factors." *Hunter v. Regents of the University of California*, 971 F. Supp 1315, 1330 (C.D. Cal. 1997); Tr. 1-137 to 138 (Daeschner), Tr. 2-188 to 189 (Todd). More importantly, the Board concluded that JCPS would not long remain racially integrated in the absence of racial guidelines. *See Hampton II*, *supra*, at 371, n. 28 (Board's evidence of probable re- gregation absent the use of race in student assignment).

And, as the district court noted, "a vast proportion of all student assignments" under the Plan are made in a manner that "avoid[s] using race at all," because of exemptions from the racial guidelines, school geographic boundaries, and the choice application process. Pet. App. C-68. For example, the magnet traditional program schools and the middle school math-science-technology magnet programs use race-neutral lotteries. *Supra*, n. 6. Thus, the Board not only has "sufficiently considered" but actually "*used* alternatives, which either were race-neutral or made minimal use of race, to meet narrow tailoring requirements." Pet. App. C-69 (emphasis added)

Here, as in *Grutter*, this Court "cannot ignore the educational judgment and expertise of the [Board's] faculty and admissions personnel regarding the efficacy of race-neutral alternatives." 288 F.3d at 750-51. Because courts are "ill-equipped to ascertain which race-neutral alternatives merit which degree of consideration," this Court should as in *Grutter* "assume -- along the lines suggested by Justice Powell -- that the [Board] acts in good faith in exercising its educational judgment and expertise." *Id.* at 751.

E. The Plan Is Subject To Periodic Review By Democratic Processes

The narrow tailoring doctrine requires that "race-conscious admissions policies must be limited in time." *Grutter*, 539 U.S. at 342. This Court suggested in *Grutter* that this aspect of narrow tailoring can be satisfied by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* The Board, together with the people of Jefferson County, will fulfill that requirement.

The Board modified the student assignment process in 1984, 1991, 1996, and 2001, and the Board will modify the Plan in the future as required by new circumstances. Tr. 2-189 (Todd). Any action taken by an elected local board of education is inherently subject to change, as the members of the Board and public perceptions change. Elections for seats on the Board are held every other year; since the Board began its periodic revisions to the decree in 1984, there have been ten such elections. Any citizen who desired to change the Plan and who thought that Jefferson County voters shared that view could have sought a seat on the Board in any of those elections; that option remains open in the future.

F. Conclusion

Some of the arguments of Petitioner and her *amici curiae*

with respect to the tailoring of the Plan might have been validly made against the previous use of the racial guidelines at the now-exempted magnet schools or the former application process at the magnet traditional program schools, if either of those questions were now before this Court. Those arguments do not apply to the student assignment process as it has been tailored to comply with the district court's opinions in *Hampton II* and this case. For all of the reasons stated by the district court, the Plan is narrowly tailored.

CONCLUSION

For the foregoing reasons, the *per curiam* decision of the Sixth Circuit affirming the opinion of the district court should be affirmed.

Respectfully submitted,

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In the
Supreme Court of the United States

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

In support of its extraordinarily broad claim of authority to use race to assign students to public schools, Respondents argue that the judgment of elected school boards to use race to discriminate against schoolchildren is entitled to deference. Respondents' Brief (Resp. Brf.) at 29. Such a claim departs from the command of equality contained in the Equal Protection Clause and is indistinguishable from an interest in outright racial balancing, which this Court has repeatedly admonished does not justify race-based decisionmaking. Respondents assert that social science research (that is not uniform, consistent, or conclusive) can support their claim that racial balancing constitutes a compelling state interest. What Respondents ask for is an exception to the nondiscrimination principle for locally elected K-12 public school boards, so that they can decide, with virtually unfettered discretion, what kind and degree of racial mix of schoolchildren, ages 5 to 18, should be assembled in our public schools. This Court has never before approved such a standardless warrant for racial discrimination in K-12 under the exacting requirements of strict scrutiny. It should not do it now. Finally, Respondents ignore the unique harm created and imposed on pupils by their racial balancing policy—including the stigma of racial classification and racial balancing itself. Last, even if this Court were to accept the notion that Respondents have a compelling state interest, these measures cannot be, and are not, narrowly tailored.

ARGUMENT

I

PLAINTIFF HAS STANDING TO BRING THIS ACTION

The "injury in fact to a cognizable interest" necessary to establish standing in an equal protection case is the denial of

equal treatment resulting from the imposition of a barrier, not the ultimate ability to obtain the benefit. *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666 (1993). The District Court found, and Respondents concede, that Joshua McDonald's application to transfer to another elementary school was denied because of his race. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 837 n.3 (W.D. Ky. 2004); Resp. Brf. at 10. It is therefore of no significance that the school Joshua McDonald was forced to attend had similar educational programs. Joshua will face the same discriminatory program when he applies to middle school and high school. *See* Resp. Brf. at 46-47. In *Gratz*, petitioner Hamacher was denied admission to the University of Michigan's undergraduate school even though an underrepresented minority applicant with his qualifications would have been admitted. Hamacher was able to satisfy the requirements of standing by showing that "he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate admissions." *Gratz*, 539 U.S. at 262. In the instant case, it has never been disputed that Joshua was "able and ready" to attend the school that he was denied admittance to by reason of his race, and that but for the District's discriminatory policy, Joshua would have enrolled in the school to which he sought a transfer.

Because Joshua was denied admittance to the school of his choice by reason of his race, and it is not disputed that but for his race he would have been granted the transfer, there can be no question that Joshua suffered an injury in fact sufficient to grant him standing to pursue his claim of damages under *Gratz*, *Northeastern Fla. Chapter* and their progeny. *See* Joint Appendix (JA) at 9 (Third Amended Complaint seeking damages for plaintiff).

II

RESPONDENTS' PLAN AMOUNTS TO "OUTRIGHT RACIAL BALANCING" AND IS THEREFORE PRESUMPTIVELY UNCONSTITUTIONAL

Absent the need to remedy a prior constitutional violation or to generate the specific kind of diversity identified in *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), a goal of "assur[ing] within [a] student body some specified percentage of a particular group merely because of its race" cannot justify the use of race in making student placement decisions. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J. opinion). Indeed, this Court has repeatedly admonished that "outright racial balancing" is "patently unconstitutional." *Grutter*, 539 U.S. at 330; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). As this Court explained in *Freeman v. Pitts*: "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." 503 U.S. 467, 494 (1992).

Here, Respondents cannot assert that their plan is remedial. Any lingering effects of the previous dual school system operated by Respondents have been eliminated. *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000) ("To the greatest extent practicable, the Decree has eliminated the vestiges associated with the former policy of segregation and its pernicious effects"). *After* Respondents were discharged from the consent decree, they chose to adopt the racial balancing plan at issue here. Respondents' overall student assignment plan is designed to achieve a pre-set racial mix of black and white students in the public schools. This is simple racial balancing, which the Constitution forbids.

Respondents compelling interest boils down to their unsupported assertion that the Jefferson County public schools

will become resegregated if they do not use a racial balancing plan. Resp. Brf. at 23. By "resegregation," Respondents do not mean that black students will be intentionally excluded. Rather, they use this provocative term to indicate that certain schools will have fewer black students than others because of housing patterns. In *Freeman*, 503 U.S. at 494, this Court stated plainly that "[o]nce the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors." *See Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) ("the Constitution is not violated by racial imbalance in the schools, without more").

III

DEFERENCE TO LOCAL BOARDS ON THE USE OF RACE IN PUBLIC SCHOOLS IS INCOMPATIBLE WITH THE EQUAL PROTECTION CLAUSE

There should be no mistaking what the Respondents and their *amici* are asking this Court to do. They seek a decision that permits locally elected school boards to decide, with virtually unfettered discretion, what kind and quantity of racial mix of schoolchildren should be assembled in the public schools under their control. Resp. Brf. at 29. The argument that local officials should be granted deference in deciding whether and how to employ race in the service of educating our children is one that has previously been made and rightly rejected by this Court. It should not be given credence now, fifty-two years after *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The following year in *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-301 (1955) (*Brown II*), this Court declared that the ultimate objective in eliminating *de jure* segregation is to "achieve a system of determining admission to the public schools on a nonracial basis."

Far from having any support in modern jurisprudence, Respondents' view represents a troubling departure from the

demands of strict scrutiny to which all governmental racial classifications must be subjected. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995), this Court reiterated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). In *Grutter*, this Court said "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' " *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227). In *Johnson v. California*, 543 U.S. 499, 507-508 (2005), this Court rejected the application of any lesser standard than strict scrutiny. All racial classifications by government are "inherently suspect," *Adarand*, 515 U.S. at 223, and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Thus, this Court's decisions repeatedly confirm that all racial classifications are subject to the "strictest of judicial scrutiny," regardless of the allegedly benign motives and good intentions of the government.

Further, in *Grutter*, the deference accorded officials sprang from the university's unique First Amendment interests. *Grutter*, 539 U.S. at 328-29. Similarly, in *Bakke*, Justice Powell made it clear that his analysis considered only whether diversity could be a "constitutionally permissible goal for an institution of higher education" such as the medical school. *Bakke*, 438 U.S. at 311-12 (Powell, J., opinion). The First Amendment rights of institutions of higher education are not part of the education mission of K-12 public schools. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988), and cases cited therein.

Respondents do an admirable job of supporting what is not contested, i.e., that the indisputably important task of educating children is properly and best discharged by parents, teachers, and state and local officials citing to *Kuhlmeier*, 484 U.S. at 273 (school officials' discretion to promulgate rules of

conduct). Respondents cite in this context *Epperson v. Arkansas*, 393 U.S. 97 (1968). Resp. Brf. at 30. In *Epperson*, this Court recognized that courts will not intervene in conflicts arising in the daily operation of school systems as long as they "do not directly and sharply implicate basic constitutional values. On the other hand, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Id.* at 104. Here, of course, Respondents' actions are implicating core constitutional values by assigning students on the basis of race to public schools in violation of the Equal Protection Clause.

Clearly, local school boards do not receive special dispensation from the dictates of the Equal Protection Clause by virtue of the *general* importance of their responsibility to educate the state's schoolchildren. "The undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). Indeed, no court has ever held that the strict scrutiny that otherwise applies to racial classifications is diluted or otherwise subordinate to the deference accorded local school boards in the discharge of their administrative functions.

This Court uses strict scrutiny to test the validity of the means chosen by a state to accomplish its race-conscious purposes. In *Johnson*, 543 U.S. at 512, this Court refused to defer to the judgment of state prison officials on race even where "those officials traditionally exercise substantial discretion;" in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (plurality), this Court rejected a school board's judgment regarding the educational benefits of a racially diverse faculty; and in *Goss v. Lopez*, 419 U.S. 565, 574 (1974), this Court held that the "Fourteenth Amendment . . . protects citizen[s] against the State itself and all of its creatures—Boards of Education not excepted."

The assertion that Respondents' racial balancing plan is intended to bestow a benefit upon historically disadvantaged students does not justify, much less require, a more lenient standard of review. In *Croson*, 488 U.S. at 469, this Court invalidated an elected local city council's voluntary race-based preference program, fearing that it was adopted for the purpose of "racial politics." The enactment of racially discriminatory programs merely as a part of the political process to better the condition of one group is not permitted under the Constitution. *Croson*, 488 U.S. at 495-96. As pointed out in Pacific Legal Foundation, et al.'s Amicus Brief at 9, elected school boards, like elected city councils, are not insulated from the temptation of "racial politics." "Racial politics" not only helps one's own race, it is used to curry votes. Respondents concede that their racial balancing plan is responsive to its constituents and thus, is political in nature. Resp. Brf. at 20.

Moreover, Respondents acknowledge that their racial balancing plan is designed to remedy the "community's segregated housing patterns." Resp. Brf. at 23. This is nothing less than an attempt to impose racially discriminatory classifications to offset general societal discrimination, which has been forcefully rejected by this Court. *See Wygant*, 476 U.S. at 274.

Respondents' reliance on dicta in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971), is of little weight.[1] Resp. Brf. at 31. Decided 18 years before *Croson* settled the question of the level of scrutiny to apply to all race-based classifications, the language of *Swann* implies that a school board's use of race-based classifications is subject

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[1] "The language quoted in Respondents' brief was mistakenly attributed to *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 16. However, the quoted language actually appears in the companion case of *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

to the same deferential standard of review as any other decision arising from the board's plenary power to establish and implement educational policy. This Court's pronouncement in *Croson*, *Johnson*, *Adarand*, and *Grutter*, that all racial classifications are subject to strict scrutiny absolutely forecloses any such implication.

Furthermore, *Swann* did not address the level of scrutiny to be given to local school boards' political decisions; rather, it addressed the wholly distinct issue of the scope of federal court powers to adopt desegregation policies where the governing school district has failed to do so. Within this context, this Court recognized that "[r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." *Swann*, 402 U.S. at 16.

If one had to choose a context in which deference would NOT be appropriate—based on the experiences of the past half century of local school districts making race-based student assignments—one would be hard pressed to find a better choice than a local school board imposing nonremedial race-based school assignments because the policy is favored by its political constituency.

IV

RACIAL BALANCING IS NOT A COMPELLING INTEREST SUFFICIENT TO JUSTIFY DISCRIMINATING AGAINST STUDENTS IN K-12 PUBLIC SCHOOLS

A. Social Science Research Does Not Support the Conclusion That Racial Diversity Provides Educational Benefits to Students

Respondents' assertion that its racial balance plan "provides important education benefits," Resp. Brf. at 24, is based primarily on controversial and one-sided social science

evidence introduced at trial. *See* Resp. Brf. at 35. Respondents also claim that "this Court's conclusion . . . must ultimately be based on this record," *id.*, rendering the numerous studies and discussion presented in the *amicus curiae* briefs irrelevant. Petitioner respectfully disagrees. Whether racial balance plans produce educational benefits that rise to a compelling state interest is an urgent and critical issue. In *Grutter*, this Court recognized and evaluated *amici* arguments on precisely this question. 539 U.S. at 328, 330-32. There is an even greater need to do so here; the very limited record fails to reflect the sheer volume and complexity of social science research that is reviewed in *amici* briefs.[2]

Petitioner agrees with the Brief *Amicus Curiae* of Armor, Thernstrom, and Thernstrom filed in support of Petitioner whose well-documented brief notes that "the scholarship discussing the relationship between attendance at racially diverse or integrated schools and student achievement is not uniform, consistent, or sufficiently conclusive to support a finding that achieving a particular degree of racial balance constitutes a 'compelling' state interest." Thus, Petitioner disagrees with both *amici* American Educational Research Association (AERA) and the 553 social scientists who assert that the Armor brief relies on a small number of older studies and ignores more recent ones demonstrating educational benefits.

The more recent studies AERA's *amici* claim are allegedly ignored by Armor are three on race relations and two on achievement. One is a meta-analysis of over 500 smaller studies, many of which do not deal with K-12 desegregation.

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[2] The *amici* briefs most relevant to this discussion are those by Armor, Thernstrom, and Thernstrom; Murphy, Rossell, and Walberg; the American Educational Research Association; and 553 Social Scientists.

Thus it is of marginal relevance.[3] The other two studies of race relations involve small samples of white students in integrated and segregated schools, and were done at different times and locations with no (apparent) controls for possible differences in the two populations.[4]

One of the achievement studies cited by AERA is mischaracterized as assessing "minority" achievement when in fact it looks at whole schools (segregated and desegregated), rather than at students, whose performance is the question.[5] AERA also refers to an unpublished paper by Armor and Watkins using NAEP data. (This study has now been published as an appendix to a briefing report by Armor written for the U.S. Commission on Civil Rights.)[6] Armor did find

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[3] Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY, vol. 90, 2006, at 751. The meta-analysis included non-educational settings, college settings, adults, and non-U.S. settings.

[4] Heidi McGlothlin et al., *European-American Children's Intergroup Attitudes about Peer Relationships*, BRITISH JOURNAL OF DEVELOPMENTAL PSYCHOLOGY, vol. 23, 2005, at 227 and Heidi McGlothlin & Melanie Killen, *Intergroup Attitudes of European American Children Attending Ethnically Homogeneous Schools*, CHILD DEVELOPMENT, vol. 77, Sept./Oct. 2006, at 1375. These two articles did not compare outcomes for white students at the integrated school with the segregated school.

[5] Kathryn M. Borman et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, AMERICAN EDUCATIONAL RESEARCH JOURNAL, vol. 41, 2004, at 601.

[6] David J. Armor, Statement to the U.S. Commission on Civil Rights: *The Outcomes of School Desegregation in the Public Schools*, July 28, 2006. The 8th grade math effect was less than 4.5 points for a

(continued...)

segregation to have some impact on black math and reading achievement, but not on that of Hispanic children. Moreover, the size and direction of that impact varied enormously from state to state. In Virginia, New York, Illinois, and Georgia, for instance, no significant relationship between math achievement and school racial composition can be found.

Finally, the AERA brief emphasizes the study by Hanushek, et al. who were impressed by the very significant difference desegregation made in Texas schools. But a new paper by Armor and Duck presented at the Association for Public Policy Analysis and Management reports some computational problems in that work, raising questions about Hanushek's conclusion. The authors also replicated Hanushek's study using North Carolina data, and found that segregation had only a very small effect on math and reading achievement.[7]

The small amount of new research cited in the AERA and Social Scientists *amicus* briefs do not change the overall conclusion about the impact of racial diversity or racial balance on educational attainment. Since the impact of racial diversity is highly variable—depending on the period studied, the age of the students, their geographic location, the methodology used and other factors—that impact should not be elevated to the status of compelling government purpose.

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[6] (...continued)
60% difference in percent black, compared to a reading effect of only 2 points. On the 2003 NAEP tests, the black-white gaps are 35 points in math and 33 points in reading, so the effects in standard deviations are .13 and .06, respectively.

[7] David Armor & Stephanie Duck, *Unraveling the Effect of Black Peers on Black Achievement*, paper presented to the Association for Public Policy Analysis & Management, Nov. 4, 2006. The reading and math effects in North Carolina were approximately .05 standard deviation for a 50-point difference in school % black for 6 years.

B. Marginal Increase in Education Outcomes Does Not Rise to the Level of a Compelling State Interest

The function of public K-12 schools is to educate students. As the social science evidence shows, at best the educational benefits asserted by Respondents are only marginal. That is, it cannot be credibly asserted that racial classifications and racial balancing are essential to effective education. The overwhelming majority of school districts do not and many *could* not use race-based assignments—given their demographics. And yet the education they provide does not seem distinctively worse than in those with desegregation policies. For this reason, as well, racial diversity does not rise to a compelling state interest in K-12.

C. Racial Balancing Harms and Stigmatizes Children

Respondents claim that the racial balancing plan does not cause harm to children. Resp. Brf. at 44. To the contrary, it teaches children precisely the wrong lessons, and thereby harms them. This Court has repeatedly emphasized that state-sponsored racial preferences imposes real harms and costs on the individuals affected by them and on society at large. In *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), this Court explained: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." As this Court warned in *Shaw*, 509 U.S. at 643, racial preferences "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."

Nonetheless, Respondents argue that they should be permitted unfettered discretion to discriminate against schoolchildren in deciding what school a child should be assigned to based upon his or her skin color. Resp. Brf. at 21,

26, 38-40. Under Respondents' plan, it is not necessary to ascertain whether the dangers, and harms in the nature of stigma, racial hostility, and division outweigh the asserted educational benefits. That simply does not satisfy the demanding requirements of strict scrutiny because there is an inherent cost in classifying children and treating them differently on account of their race that cannot be eliminated by any amount of narrow tailoring. *See* Amicus Brief for Asian American Legal Foundation (AALF) describing the plight of Chinese American children in this country being denied assignment to K-12 public schools because of their race. The harm of telling schoolchildren that they will or won't be allowed to attend the school they prefer, depending on their skin color, is severe indeed. For example, Lee Cheng, Secretary of the AALF testified before the U.S. House of Representatives, Sub-Committee on the Constitution:

> Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

AALF Brf. at 16.

Moreover, the burden of these racial balancing schemes fall heaviest on students from poorer and disadvantaged families who do not have the option of moving or sending their children to private schools. AALF Brf. at 3. *See* Amicus Brief of Various School Children from Lynn, Massachusetts at 3 (identifying the harm to families and children resulting from classifying students on the basis of race).

The use of discrimination to address naturally occurring housing patterns does as much to stigmatize children as any other discriminatory policy used by government. It teaches the lesson that race matters more than any other individual

characteristic. It is socially and psychologically myopic to assert that Respondents' plan will not, by its very nature, harm and stigmatize the children who are subject to it. No amount of narrow tailoring can eliminate these harms and it is too high a cost for these children to bear.

V

RESPONDENTS' PLAN IS NOT NARROWLY TAILORED

A. The Plan Is Not "Specifically and Narrowly Framed" to Accomplish Its Purpose; It Is an Impermissible Continuation of a Prior Remedial Plan

Refuting Respondents' arguments, the history of Respondents' 2001 Plan demonstrates it was not "specifically and narrowly framed to accomplish" its present stated purpose of promoting benefits for "everyone." *See Grutter*, 539 U.S. at 333. Instead, the plan is a continuation of a desegregation order framed in 1975—not to promote diversity—but to restore to black students their usurped constitutional rights, by eliminating "all vestiges of state-imposed segregation." *See McFarland*, 330 F. Supp. 2d at 841; *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578, 579 (6th Cir. 1975). Respondents proudly declare: "The Board has properly continued to achieve that goal by 'perpetuat[ing] without interruption, although with adjustment, the racial composition guidelines originally put in place by [the decree].'" Resp. Brf. at 35 (alterations in original). Indeed, the 2001 Plan betrays its remedial origin in that, for purposes of maintaining 15%-50% black student enrollment in each school, it classifies all students as either "black" or "white." *McFarland*, 330 F. Supp. 2d at 840 n.6. That is, white, Hispanic, Asian, American-Indian and all other non-black students are lumped together—a practice that makes no sense outside of the original purpose of desegregating schools with respect to black students.

Respondents are wrong to think that they may constitutionally continue to pursue the consent decree's "goal." As this Court explained in *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991), once a school district has been, as here, restored to unitary status, there is no longer justification for imposition of the remedial classifications; and any future voluntary plans must be evaluated "under appropriate equal protection principles." The situation is also similar to that in *Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246 (5th Cir. 2005), where the school district insisted on continuing to use race-based admissions begun under a prior desegregation decree. As the Fifth Circuit explained, "the School Board's use of a racial quota supposedly pursuant to the 1981 Consent Decree but more than twenty years after the signing of the decree—and more than a decade after the 1990 [unitary] Order—is hardly a "starting point" and appears rather to be an improper "inflexible requirement." *Id.* at 260.

Therefore, by admitting that their plan is a continuation of the 1975 desegregation plan, Respondents concede the plan cannot have been "specifically" framed to accomplish any presently stated pedagogical purpose.

B. Respondents Use Race as the Defining Feature in Admissions in Order to Maintain Racial Balances

There is no merit to Respondents' somewhat contrary arguments that the plan merely uses race as a "tipping" factor, after considering other factors such as residence and choice; and that the plan "submerges race in a mix of other factors." Resp. Brf. at 41. As this Court found in *Grutter*, an admission plan may not "assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Grutter*, 539 U.S. at 329 (citing *Bakke*, 438 U.S. at 307).

Respondents' plan shows nothing but forbidden racial balancing. Contrary to Respondents' assurances, in Jefferson County, race is never "submerged" in factors such as "residence" and "choice." Residence determines the available choices. *McFarland*, 330 F. Supp. 2d at 843. Then race determines whether a student's "choice" is attainable: "that student is assigned to his or her resides school unless that school exceeds its capacity or hovers at the extreme ends of the racial guidelines [i.e., near quota limits] . . . . Acceptance by transfer depends upon the racial guidelines and program capacity . . . the student is assigned to a school within his or her resides cluster depending upon capacity and the racial guidelines." *Id.* at 844-45. As the district court expressly found, "In a specific case, a student's race, whether Black or White, could determine whether that student receives his or her first, second, third or fourth choice of school." *See McFarland*, 330 F. Supp. 2d at 842. Respondents concede that Joshua McDonald's application was "denied under the guidelines." Resp. Brf. at 10. Thus, at the point where race is considered, race is always the defining factor.

C. By Arguing "Holistic" Evaluation Is Not Required in K-12 Admissions, Respondents Argue For an Unconstitutional Expansion of *Grutter*

By arguing that, because they seek only racial diversity, they need consider only race, Respondents concede their plan is not narrowly tailored under *Grutter*. *See* Resp. Brf. at 37-39. In *Grutter*, this Court held that, even where a university may lawfully use race, it must show that it evaluates an individual "holistically," without race as the "defining" factor. *Grutter*, 539 U.S. at 336-38. The Court found "individualized consideration in the context of a race-conscious admissions program" to be "paramount." *Id.* at 337. The requirement of individual consideration is consistent with this Court's teaching

that equal protection rights belong to the individual, not group. *See Adarand*, 515 U.S. at 227.

Respondents fail to show that their plan evaluates individuals holistically. Going further, they argue that a K-12 admission plan promoting "racial integration" may consider race alone and that there is "no need even to require the use of the 'criteria' " found paramount in *Grutter*. *See* Resp. Brf. at 40. Clearly, Respondents concede that their plan fails under the standards articulated in *Grutter*, while arguing for an expansion of its holdings beyond constitutional limits.

D. Respondents' Plan Operates as a Quota

Respondents' attempt to create a semantical difference between their "flexible" "guidelines" and a "quota" is absurd. "Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded." *Grutter*, 539 U.S. at 335 (internal quotations omitted) (quoting *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 495 (1986)). Far from flexible, the plan "requires each school to seek a Black student enrollment of at least 15% and no more than 50%." *McFarland*, 330 F. Supp. 2d at 842. District schools enforce this balance. *See id.* at 857; Resp. Brf. at 42. Therefore, there is both a "percentage which must be attained" and a "percentage . . . which cannot be exceeded." This is patently a quota, similar to "diversity" quotas found in other cases. *See, e.g., Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 856-57, 861-62 (9th Cir. 1998) (San Francisco school district imposed "quota" requiring four racial groups at each school and capping each race at 40 or 45 percent.).

The plan bears all the hallmarks of a quota system. It is unrefuted that Joshua McDonald was denied admission to his neighborhood school because of his race, even though there were empty desks at the school. JA 70. Thus, there were "seats" from which Joshua was "insulated" because of his race and for which he was not allowed "to compete," exactly as is

the case with a quota. *See Grutter*, 539 U.S. at 334; *Bakke*, 438 U.S. at 315. Also, the plan seeks to enroll a strictly defined range of black students, quite unlike the undefined "critical mass" of minority students found not to constitute a quota in *Grutter*. 539 U.S. at 335-36. As Joshua's example illustrates, there is absolutely no "flexibility" or "choice" when a child runs afoul of the district's quota system. Respondents' impermissible goal is "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *See id.* at 329 (quoting *Bakke*, 438 U.S. at 307).

E. Respondents Failed To Pursue Race-Neutral Alternatives

Respondents' contention that they properly considered less restrictive or race-neutral alternatives is contradicted by the record. *See Grutter*, 539 U.S. at 340 ("the Law School sufficiently considered workable race-neutral alternatives"). Respondents say the Board of Education concluded random sampling and socio-economic criteria " 'do not provide an adequate substitute for the use of racial . . . identity factors.' " Resp. Brf. at 48 (citing case; alteration in original). However, a search for exact proxies for race hardly constitutes honest consideration of race-neutral alternatives. In fact, many school districts that have looked beyond race have found that socio-economic integration plans are very effective in promoting educationally-useful diversity.[8]

As previously stated, the plan is not "specifically" framed to meet Respondents' presently-stated pedagogical goals at all.

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[8] *See* Richard D. Kahlenberg, The Century Foundation, *Economic School Integration: An Update*, Sept. 16, 2002, *available at* http://www.tcf.org/Publications/Education/economicschoolintegration.pdf ("The number of students attending public schools with economic integration plans has jumped from roughly 20,000 in 1999 to more than 400,000 today.")

Instead, after the district was declared unitary in 2000, Respondents simply continued the 1975 court-ordered remedial plan "without interruption." Resp. Brf. at 35; *McFarland*, 330 F. Supp. 2d at 841. It therefore strains credulity that the 15%-50% desegregation range, used in the present non-remedial context, can be anything but capricious. *See Croson*, 488 U.S. at 507 (arbitrary 30% racial quota "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing").

Respondents misleadingly suggest that in large part they use race-neutral alternatives, because, they say, many student assignments are made without recourse to race. *See* Resp. Brf. at 48. In fact, except for the minority of students attending magnet and certain other schools not subject to the 15%-50% quota, *all* district students are classified by race—whether or not they are ultimately assigned based on those racial classifications. *See Ho*, 147 F.3d. at 862 ("classification" consists of forcing parents to check off "box" designating race of child).

Respondents also incorrectly suggest they must use race to prevent "probable resegregation," pointing to the *Hampton II* findings. Leaving aside Respondents' apparent confusion as to the difference between *de jure* and *de facto* segregation, in fact, in *Hampton II*, the district court found, examining several available options, that without the racial assignment plan, the district could easily maintain considerable racial diversity. *See Hampton*, 102 F. Supp. 2d at 371 n.29. "If JCPS could still use its resides areas in conjunction with maximum school choice, virtually none of its middle or high schools would be outside 15%/50%, though many elementary schools would." *Id.* Of course, Respondents insist on maintaining exactly the same racial balance mandated by the desegregation decree—without any showing that the mandated racial mixtures work any better at producing educational benefits than the racial diversity that would be achieved without the imposition of racial

classifications. Again, because Respondents' goal is racial balancing for its own sake, they failed to explore obvious race-neutral alternatives.

CONCLUSION

For these reasons, the decision below should be reversed.

DATED: November, 2006.

Respectfully submitted,

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No. 05-915

In the Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD, PETITIONER

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Jefferson County's race-based student assignment plan violates the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether Jefferson County's race-based student assignment plan violates the Equal Protection Clause of the Constitution. The Department of Justice has significant responsibilities for enforcing the Equal Protection Clause in the context of public education, see 42 U.S.C. 2000c-6, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* The Department of Education has responsibility for enforcing federal civil rights laws affecting educational institutions, including Title VI.

STATEMENT

1. In 1973, a federal court found that the Jefferson County Public Schools (JCPS) had engaged in *de jure* segregation in violation of the Fourteenth Amendment and ordered JCPS to

desegregate. *Newburg Area Council, Inc.* v. *Board of Educ. of Jefferson County*, 489 F.2d 925 (6th Cir.). A desegregation decree was entered in 1975 that established a race-based student assignment plan and imposed countywide busing. Pet. App. C14-C15; *Hampton* v. *Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 762-765 (W.D. Ky. 1999). JCPS operated under the 1975 decree until 2000, when the district court found that JCPS had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved unitary status. *Hampton* v. *Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000). The 1975 decree was thus dissolved in 2000. Pet. App. C15-C16.[1]

In 2001, after the 1975 decree had been dissolved, JCPS adopted a voluntary race-based student assignment plan. Pet. App. C17. The plan categorizes all students as either "black" or "other," and incorporates racial guidelines that require "each school to seek a Black student enrollment of at least 15% and no more than 50%." *Id.* at C11 n.6, C17-C18. JCPS based this numerical range on the overall racial demographics of public school students in Jefferson County. Of all students enrolled in JCPS, approximately 34% are black and 66% are "other." Stip. of Facts para. 36. The plan's set racial range for black students was designed to be "equally above and below Black student enrollment systemwide." Pet. App. C18.[2]

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[1] The United States, as amicus curiae, filed a Post-Hearing Memorandum Regarding Plaintiffs' Motion for Unitary Status in the *Hampton* case. The Memorandum urged the district court to deny the motion for unitary status, pointing in particular to evidence of racial disparities in an advance program and the assignment of administrators and para-professional staff in the district. However, the Memorandum did "not address * * * the constitutionality of using race as a factor in student assignments in a post-unitary district." U.S. Post-Hrg. Mem. at 2 n.2.

[2] The district court further explained that although JCPS's racial guidelines recognize only two races—"black" and "other"—"JCPS is a school district almost entirely populated by only Black and White students," and "[s]tudents of other races and backgrounds, such as Latino and Asian students, are represented only in very small numbers." Pet. App. C11-C12 n.6.

Use of the racial guidelines occurs primarily at the elementary school level and in admissions to specialized programs (such as magnet schools and optional programs within non-magnet schools, neither of which are at issue in this case), but the guidelines also apply to transfer requests between schools. At the elementary school level, JCPS has established a series of attendance zones, determined by a student's residence, which are referred to as "resides areas." Pet. App. C18-C20. Each resides area contains a non-magnet elementary school that is designated as the "resides school" for students living in that area. JCPS combines several of these "resides areas" into clusters and provides students with a limited opportunity to choose among schools in their assigned cluster.[3] *Id.* at C18-C20, C24. The elementary schools are clustered "so that combined attendance zones, assuming normal voluntary choice, will produce at each school student populations somewhere within the racial guidelines." *Id.* at C19. Each non-magnet middle and high school corresponds to its own resides area. *Ibid.*

In general, "[a] student is assigned to his or her resides school unless that school exceeds its capacity or hovers at the extreme ends of the racial guidelines," Pet. App. C24, or unless the student applies to and is accepted to a specialized school or program. After the initial assignment process, a student may request a transfer to any non-magnet school in the district.[4] Whether a given transfer is ultimately granted depends on the racial guidelines. *Id.* at C22-C25 & n.15.

JCPS considers the racial guidelines, in addition to specific academic criteria and school capacity, in granting students' applications to magnet and other specialized programs. Pet. App.

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[3] An elementary school student may select a first and second choice school within his or her cluster, as well as a first and second choice specialized school or program in or out of his or her cluster. Pet. App. C20-C21, C24.

[4] High school freshmen have the additional option of applying for "open enrollment." If their request is granted, their receiving school becomes their "resides school." Pet. App. C22-C23.

C26-C27. That is, students will be denied admission to a magnet or specialized program if their race would place the school outside of the 15% to 50% black student enrollment required under the racial guidelines. See *id.* at C17-C18.

2. a. A group of parents—including petitioner—whose children were either not assigned to, or denied a transfer into, their schools of choice, challenged the legality of the plan under the Equal Protection Clause of the Fourteenth Amendment. After a five-day hearing, the district court rejected that claim. The court held that, with one exception not relevant here,[5] JCPS's race-based assignment plan served a compelling state interest and was narrowly tailored to achieve that interest. Pet. App. C3-C9.

b. The district court found that JCPS's interests in "giv[ing] all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system," Pet. App. C37 n.29, are compelling. The court reasoned that JCPS's asserted interests "overlap with those" approved in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and that JCPS "has articulated broader concerns in the different context of public elementary and secondary education." Pet. App. C37. The district court also concluded that other benefits identified by JCPS, such as improved educational settings for all students and the creation of a unified school system, indicate that JCPS's student assignment plan "is both important and valid." *Id.* at C50-C51.

c. The district court also concluded that JCPS's assignment plan was narrowly tailored (except for traditional schools, which are not at issue here, see p. 4 n.5, *supra*). See Pet. App. C54-C70.

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[5] The district court found that, with respect to student assignments at traditional schools, the plan was not narrowly tailored because it put black and nonblack students on different assignment tracks, and because its use of four separate lists—one each for black males, black females, nonblack males and nonblack females—"appears to be completely unnecessary to accomplish the Board's goal." See Pet. App. C32, C70-C76. That portion of the district court's decision is not at issue here.

The court reasoned that the plan, "for the most part," lacked attributes of a racial quota, because it presented a "flexible and broad target range" of black student enrollment. *Id.* at C57. Citing "a wide dispersal among the [target] percentages of Black students" in JCPS schools, *id.* at C58, the court distinguished the facts here from the narrow band of percentages Justice Kennedy found to be tantamount to quotas in *Grutter*. *Ibid.* The court also reasoned that this fluctuation in percentages suggests the plan does not have a specific target of black student enrollment, and suggests a "lesser use of race" than that found permissible in *Grutter*. *Id.* at C59. The court further found that neither black nor nonblack students are guaranteed assignment to a particular school, and that neither category of applicants is isolated from competition with the other. *Id.* at C59-C60.

The district court next found that the plan provides "individualized attention of a different kind in a different context" than this Court embraced in *Grutter*. Pet. App. C63. The court reasoned that, unlike a law school, JCPS does not deny admission to any student, does not aim to create selective, elite school communities, and does not weigh "comparative criteria in a competitive manner." *Id.* at C62. However, the court concluded that the individualized attention that the plan does provide—consideration of a student's race along with place of residence, choice of school or program, and, in some cases, placement in a lottery—is sufficient. *Id.* at C60-C63.

The district court also found that the plan's use of race does not unduly harm members of any racial group, reasoning that schools within the district are "basically equal," and that the plan "neither denies anyone a benefit nor imposes a wrongful burden" because of his or her race. Pet. App. C66 (quoting *Hampton*, 102 F. Supp. 2d at 380). The court further concluded that JCPS considered and implemented certain race-neutral strategies to achieve its goal of integrated schools, including the use of voluntary choice and geographic boundaries, which "account for a vast proportion of all student assignments" and "create a certain degree of integration" within the schools. *Id.* at C68.

3. Petitioner Crystal Meredith—whose son was denied a transfer to a non-magnet, JCPS elementary school "because the transfer would have had an adverse effect on the compliance of [his assigned school] with the racial guidelines contained in the student assignment plan," Stip. of Facts para. 5—appealed. In a summary per curiam opinion, the court of appeals affirmed on the basis of the district court's decision. Pet. App. B1-B3.

SUMMARY OF ARGUMENT

The County's race-based student assignment plan violates the Equal Protection Clause of the Fourteenth Amendment.

In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Court held that intentionally classifying students on the basis of race violates the Equal Protection Clause, and declared the ultimate objective in eliminating such *de jure* segregation to be "achiev[ing] a system of determining admission to the public schools on a nonracial basis." *Brown* v. *Board of Educ.*, 349 U.S. 294, 300-301 (1955) (*Brown II*). More recently, the Court has repeatedly confirmed that all government classifications based on race must be subjected to strict scrutiny and, accordingly, are constitutional only if narrowly tailored to further a compelling government interest.

The County has not demonstrated any compelling interest to justify its use of race. To be sure, the government has a compelling interest in remedying the effects of past intentional discrimination. But JCPS's plan was adopted after a federal court had found that the past vestiges of *de jure* segregation had been eliminated at JCPS. Nor does the plan implicate the only other compelling interest that the Court has recognized in the public education context—the diversity interest identified in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), and *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). The JCPS plan is not designed to assemble a genuinely diverse student body and thus provides for no individualized, holistic consideration of students. Instead, the plan involves "outright racial balancing," which is "patently unconstitutional." *Grutter*, 539 U.S. at 330. Whatever the outer

boundaries of what the Equal Protection Clause permits, it clearly prohibits the kind of racial balancing at issue here and the Court therefore need go no further in deciding this case.

The JCPS plan likewise fails each of the narrow tailoring factors identified in *Grutter* and *Gratz*. First, the plan provides for nothing approaching the holistic, individualized consideration that this Court has stressed is the hallmark of a constitutionally permissible race-conscious admissions process. Second, the plan is indistinguishable from a quota, because it operates based on a fixed percentage of "black" and "other" students at JCPS schools. Third, the County failed seriously to consider race-neutral alternatives for eliminating or reducing minority isolation. Fourth, the plan unfairly burdens innocent third parties because it denies certain students admission to the school of their choice solely on the basis of their race. Finally, the plan has no fixed or logical end point.

School districts have an unquestioned interest in reducing minority isolation through race-neutral means. But the solution to addressing racial imbalance in communities or student bodies is not to adopt race-conscious measures. Such measures are not only at odds with *Brown*'s ultimate objective of "achiev[ing] a system of determining admission to the public schools on a nonracial basis," *Brown II*, 349 U.S. at 301, but contravene the fundamental liberties guaranteed to each citizen by the Equal Protection Clause.

ARGUMENT

In *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), this Court held that state laws that intentionally segregate public school students on the basis of race violate the Equal Protection Clause. The Court described the ultimate goal in eliminating such *de jure* segregation as "achiev[ing] a system of determining admission to the public schools on a nonracial basis." *Brown* v. *Board of Educ.*, 349 U.S. 294, 300-301 (1955) (*Brown II*). Since *Brown*, the federal courts have taken extraordinary measures to eradicate not only *de jure* segregation in public

schools, but any lingering effects of such segregation. The Nation has benefitted immensely from those efforts, and such efforts are ongoing in school districts that remain subject to federal court desegregation decrees. Moreover, school districts across the country—including those not subject to desegregation decrees—have undertaken a variety of race-neutral measures to promote integration of public schools.

This case, like *Parents Involved In Community Schools* v. *Seattle School District No. 1 (Seattle)*, No. 05-908, involves the use of a racial classification to achieve a pre-determined racial balance rather than to eliminate the lingering effects of any *de jure* segregation. Although JCPS was at one time subject to a finding of *de jure* segregation and a federal court desegregation decree, that decree was dissolved in 2000 after a finding of unitary status. As a result, the plan at issue was adopted after the district court found that the vestiges of prior *de jure* discrimination had been eliminated. This case is therefore just like *Seattle* in that the race-based plan at issue is purely voluntary and not designed to eliminate *de jure* segregation. For the same basic reasons discussed in the United States' amicus brief in *Seattle*, the Equal Protection Clause forbids JCPS's race-based student assignment plan, just as it forbids *de jure* segregation itself.

I. JCPS'S RACE-BASED STUDENT ASSIGNMENT PLAN MUST SATISFY STRICT JUDICIAL SCRUTINY

The central purpose of the Equal Protection Clause is to guarantee "racial neutrality in governmental decisionmaking." *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995). Thus, the Clause seeks to "do away with all governmentally imposed discriminations based on race" and create "a Nation of equal citizens * * * where race is irrelevant to personal opportunity and achievement." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984)); see *Grutter* v. *Bollinger*, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting) ("Preferment by race, when resorted to by the State,

can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."). In light of the vital role of education, this Court has repeatedly emphasized that the state must make educational opportunity "available to all on equal terms." *Plyer* v. *Doe*, 457 U.S. 202, 223 (1982) (quoting *Brown I*, 347 U.S. at 493); *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

The right to equal protection is "personal" and "guaranteed to the individual." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948)). Moreover, "[r]acial and ethnic distinctions of any sort are inherently suspect and * * * call for the most exacting judicial examination." *Miller*, 515 U.S. at 904 (quoting *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)). That includes so-called "'benign' racial classifications." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 226 (1995). As the Court has explained, "[m]ore than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification system." *Id.* at 226; see *Croson*, 488 U.S. at 493-495. Thus, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); *Johnson* v. *California*, 543 U.S. 499, 507-508 (2005). And, as such, a racial classification is constitutional only if it is narrowly tailored to further a compelling government interest. *Grutter*, 539 U.S. at 326. Because JCPS's student assignment plan is patently race-based, that plan must survive strict scrutiny review.

II. JCPS'S RACE-BASED ASSIGNMENT PLAN IS NOT BASED ON A COMPELLING GOVERNMENTAL INTEREST

A. The Government's Unquestioned Interest In Using Race-Based Measures To Eliminate The Vestiges Of Past Discrimination Is Not Implicated Here

The prototypical government interest that warrants the use of race-based measures is remedying a finding of *de jure* segregation. See *Brown II*, *supra*; *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992). This Court has approved a variety of race-based measures, including student assignment plans, to eliminate "all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); see, *e.g.*, *McDaniel* v. *Barresi*, 402 U.S. 39 (1971). The 1975 decree adopted with respect to JCPS employed such measures, and the United States supported those efforts. See p. 2 n.1, *supra*.

Like the *Seattle* case, however, this case does not implicate that unquestioned remedial interest. Although JCPS was subject to a prior finding of *de jure* segregation and a related court decree, the district court in 2000—before the adoption of JCPS's current student placement plan—dissolved that decree after finding that JCPS had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects." *Hampton*, 102 F. Supp. 2d at 360. The County's plan therefore cannot be justified as an effort to eliminate the vestiges of past unconstitutional discrimination and, as a result, the plan at issue stands on the same legal footing as the plan at issue in the *Seattle* case. The compelling interest in remedying past discrimination does not sanction the use of race-based measures when all vestiges of such discrimination have been eradicated.

B. The *Grutter* Interest In Obtaining A Genuinely Diverse Student Body With A Critical Mass Of Minority Students Is Not Implicated Here

Three years ago, this Court recognized a second compelling interest that permits the limited consideration of race to attain a genuinely diverse student body, including a critical mass of minority students, at universities and graduate schools. See *Grutter*, 539 U.S. at 328; *Gratz* v. *Bollinger*, 539 U.S. 244, 268-269 (2003). That interest, however, is not implicated here.

1. In *Grutter* and *Gratz*, the Court upheld the goal of assembling a "broadly diverse" class as compelling because "attaining a diverse student body is at the heart of [a law school's] proper institutional mission." *Grutter*, 539 U.S. at 329 (citation omitted); *Gratz*, 539 U.S. at 268. The Court emphasized, however, that such "diversity" was much broader than simple "racial" diversity. *Grutter*, 539 U.S. at 324-325 (quoting *Bakke*, 438 U.S. at 314-315). Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 325 (quoting *Bakke*, 438 U.S. at 315). Using race in that limited manner was permissible, the Court explained, because the law school considered "a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body" (*e.g.*, foreign language fluency, extensive travel, past personal adversity, family hardship, extensive community service, employment experience, personal background, etc.). *Id.* at 338-339.

The Court emphasized that such individualized consideration of each student's "background, experiences, and characteristics" is necessary to assess a student's "individual 'potential contribution to diversity.'" *Gratz*, 539 U.S. at 274 (quoting *Bakke*, 438 U.S. at 317). Indeed, the Court held that "individualized consideration in the context of a race-conscious admission program is paramount," and the degree of individualized consideration is largely what distinguished the law school program upheld in

Grutter from the undergraduate program struck down in *Gratz*. See *Grutter*, 539 U.S. at 337; *Gratz*, 539 U.S. at 273. By considering race as just one of many factors that would contribute to a broadly diverse student body, the law school was "not simply * * * 'assur[ing] within its student body some specified percentage of a particular group merely because of its race.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 307). Such a practice, the Court observed, "would amount to outright racial balancing, which is patently unconstitutional." *Id.* at 330.

Unlike the law school in *Grutter*, JCPS does not seek a genuinely diverse student body in its elementary schools whereby "all factors that may contribute to student body diversity are meaningfully considered alongside race." *Grutter*, 539 U.S. at 337. In determining which students must be admitted to resides schools, JCPS considers race—and only race—to maintain student bodies that include pre-set percentages of black and nonblack students. No other aspect of an individual's background is considered. Indeed, the program employs a binary conception of race, classifying students only as "black" or "other." In addition, assignment decisions are based on whether a student's race will maintain the County's pre-set racial balance, not on whether a student's individual characteristics contribute to a broadly diverse student body and foster "the educational benefits that diversity is designed to produce." *Id.* at 330. JCPS's plan therefore fails to "treat[] each applicant as an individual in the admissions process." *Bakke*, 438 U.S. at 318.[6]

In light of the absence of any individualized consideration under the aspects of the plan at issue here, affirming the Sixth

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[6] JCPS has stated that a limited degree of individualized consideration (*e.g.*, the consideration of personal essays) is undertaken with respect to assignments to certain magnet or other specialized schools. See Br. in Opp. 5-6. That aspect of the plan is not at issue here. In any event, the greater individualized consideration afforded in that context only underscores that individualized consideration of students may be possible in at least certain circumstances in the elementary and secondary school context. But cf. 05-908 Pet. App. 40a-41a n.24.

Circuit's decision would remove the critical requirement that individuals be considered as individuals and open the way for the wholesale consideration of race in which students are labeled solely on the basis of their race and then granted or denied admission based on that label in order to achieve a pre-set racial balance among students. Such an endorsement would provide a limitless, circular justification for race-based decisionmaking because it identifies a race-based assignment to be the goal in itself. See U.S. Br. in *Seattle* at 13.[7]

C. JCPS's Objective Amounts To "Outright Racial Balancing," Which This Court Has Repeatedly Admonished Does Not Justify Race-Based Decisionmaking

1. Absent the need to remedy a prior constitutional violation or the specialized kind of diversity objective identified in *Grutter*, a goal of "assur[ing] within [a] student body some specified percentage of a particular group merely because of its race" cannot justify the use of race in making student placement decisions. *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). Indeed, the Court has repeatedly admonished that "outright racial balancing" is "patently unconstitutional." *Grutter*, 539 U.S. at 330; *Croson*, 488 U.S. at 507; *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). As the Court explained in *Freeman*: "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." 503 U.S. at 494; see *Missouri* v. *Jenkins*, 515 U.S. 70, 118-123 (1995) (Thomas, J., concurring).

As discussed, JCPS's racial guidelines cannot be justified as an effort to remedy any constitutional violation. See Part II.A, *supra*. Rather, the County's overall student assignment is

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[7] The County's broad categorization of all nonblack students into the single racial category of "other" further undermines its claim of pursuing the type of "highly individualized, holistic review" claimed in *Grutter*. 539 U.S. at 337; cf. *Wygant*, 476 U.S. at 284 n.13 (noting that the "definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan") (citation omitted).

concededly designed to achieve a pre-set racial balance between black and nonblack students in JCPS schools. In effect, the racial guidelines apply to maintain in each school a range intended to approximate—within roughly 15 percentage points—the overall racial balance between black and nonblack students that exists in the public school system as a whole. Pet. App. C18.

That means that the plan requires, *inter alia*, that students such as petitioner's son, who desire to transfer from one elementary school to another, may do so only if the transfer will not cause either the student's current school or the proposed transfer school to fall outside the required racial range. As the district court found, "where the racial composition of an entire school lies near either end of the racial guidelines, the application of any student for open enrollment, transfer or even to a magnet program could be affected," and "a student's race, whether Black or White, could determine whether that student receives his or her first, second, third, or fourth choice of school." Pet. App. C18.

As explained above, JCPS does not base its rigid race-based range on a finding that a certain percentage is necessary to achieve particular educational benefits associated with broadly diverse student bodies. Rather than working forward toward a particular pedagogical conception of diversity, JCPS—like the Seattle school district, see U.S. Br. in *Seattle* at 16—simply works backward from the total percentage of black student enrollment systemwide and tolerates only a preset percentage of deviation (which itself is not targeted to any educational goal). Pet. App. C17-C18. This is simple racial balancing, which the Constitution forbids. See p. 13, *supra*; *Grutter*, 539 U.S. at 386 (Kennedy, J., dissenting) (calibrating "admission to members of selected minority groups in proportion to their statistical representation in the applicant pool" is "racial balancing").

2. The district court concluded that JCPS is not seeking a pre-set racial balance "for its own sake," but rather to achieve the educational and social benefits of racially diverse schools.

Pet. App. C53. But a well-intentioned quota is still a quota and an asserted interest in seeking educational and social benefits that are similar to those that flow from a genuinely diverse student body, see *Grutter*, 539 U.S. at 329-330, cannot transform an unconstitutional plan of racial balancing into a constitutional one. The Court in *Grutter* emphasized that individualized consideration was critical, such that "an interest *in simple ethnic diversity*, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," is constitutionally forbidden. *Id.* at 324-325 (quoting *Bakke*, 438 U.S. at 315) (emphasis added). JCPS's plan seeks exactly that. In JCPS, "a specified percentage" (between 15% and 50%) of each school's student body "is in effect guaranteed to be [black students]." *Ibid.* Regardless of JCPS's stated ultimate interest, its assignment plan in fact maintains a pre-set racial balance of black and nonblack students in Jefferson County schools. Race-based decisionmaking to accomplish such a balance is "patently unconstitutional." *Grutter*, 539 U.S. at 330.

The district court also pointed to the County's interest in avoiding racially concentrated schools as a potential compelling interest justifying the County's rigid racial guidelines. That purpose is undoubtedly legitimate and important, and school districts across the country have used a variety of race-neutral methods to address it. See pp. 21-22, *infra*. However, the legitimate purpose of avoiding racial isolation cannot justify the race-based plan at issue here. This Court has never recognized an interest in eliminating *de facto* racial concentration as a compelling interest that justifies racial balancing, and there are good reasons not to do so here.

To be sure, the government has a compelling interest in eliminating or reducing minority group isolation that is the product of *de jure* segregation. See Part II.A, *supra*. But the district court's decision in 2000 dissolving the mandatory desegregation plan makes clear that any racial concentration that may exist in the JCPS is not traceable to the County's prior

regime of *de jure* segregation. See *Hampton*, 102 F. Supp. 2d at 360.

And this Court "has consistently held that the Constitution is not violated by racial imbalance in the schools, without more." *Milliken* v. *Bradley*, 433 U.S. 267, 280 n.14 (1977); see *Freeman*, 503 U.S. at 494. The government has a legitimate interest in seeking to address such concerns through race-neutral means, such as establishing magnet schools, opening school enrollment, and reallocating resources to attract more students to particular schools. The legitimate purpose of reducing minority group isolation, however, is not, in itself, sufficient to warrant resort to the racial classification at issue.

III. JCPS'S RACE-BASED STUDENT ASSIGNMENT PLAN IS NOT NARROWLY TAILORED

Like the plan at issue in the *Seattle* case, JCPS's race-based student assignment plan is also not narrowly tailored because it fails to meet *any* of the "hallmarks" (*Grutter*, 539 U.S. at 334) of a constitutionally permissible race-conscious program.

A. JCPS's Plan Treats Students Solely As Members Of Racial Groups And Denies Them Individualized, Holistic Consideration

As this Court stressed in *Grutter*, individualized consideration is "paramount" in any race-conscious admissions program, 539 U.S. at 337, because "the Fourteenth Amendment protects *persons*, not *groups*," *id.* at 326 (quoting *Adarand*, 515 U.S. at 227) (internal quotation marks and brackets omitted). Thus, "[t]o be constitutional, a university's interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process." *Id.* at 392 (Kennedy, J., dissenting). Indeed, individualized consideration is the critical factor that differentiates the diversity interest identified in *Grutter* from the kind of racial balancing condemned in *Grutter* and a host of this Court's decisions. Far from minimizing the use of race in its assignment plan and maximizing the concept of

individualized consideration, the County labels applicants based on race alone, and makes assignment decisions based on those labels.

Wholly unlike the admissions plan upheld in *Grutter*, JCPS's plan considers a student's race in an "[in]flexible, []mechanical way" to achieve a pre-set racial balance of students in each of its schools. *Grutter*, 539 U.S. at 334. By doing so, it fails to treat individual students *as* individuals, which is a fatal flaw under the Court's cases. See *Bakke*, 438 U.S. at 318. When a school employs a student assignment plan that considers only whether a student's race will help or hinder a school's effort to achieve a pre-set racial balance, it defies the Constitution's "simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911 (quoting *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

Although the district court described JCPS's target racial balance as "flexible," Pet. App. C69, the consideration of a student's *race* in administering the plan is not. The plan results in the "automatic acceptance or rejection" of some students' assignment choices based solely on their race. *Grutter*, 539 U.S. at 337. For example, if a student's race would "imbalance" either his assigned school or his school of choice, his transfer request will be denied under the racial guidelines. See Pet. App. C7 n.3 (explaining that petitioner's son was denied a transfer to his school of choice because it "would have had an adverse effect" on his current school's racial composition and would have violated the racial guidelines); see also *id.* at C18 (explaining that "where the racial composition of an entire school lies near either end of the racial guidelines, the application of any student * * * could be affected"); *ibid.* (explaining that "a student's race, whether Black or [non Black], could determine whether that student receives his or her first, second, third or fourth choice of school"). By treating race as "the defining feature" of a student's assignment request, JCPS's plan contradicts a central objective of the

Equal Protection Clause. *Grutter*, 539 U.S. at 337; see *Bakke*, 438 U.S. at 318 (opinion of Powell, J.).

The district court mistakenly characterized the County's plan as providing individualized review because, in addition to race, the plan also considers "the individual characteristics of a student's application, such as place of residence and student choice of school or program." Pet. App. C62-C63. But a student's place of residence itself determines which schools are available choices, and the student's choice of schools is used to determine whether his choice would "imbalance" the chosen school. Even the administration of a quota at a school would require consideration of whether the student chose to apply to the school or program subject to the quota. Clearly, such a myopic consideration of "individual" attributes is far from the type of "*highly* individualized, holistic review" required by *Grutter*, and is manifestly not designed to select a genuinely diverse student body whereby "*all* factors that may contribute to student body diversity are meaningfully considered alongside race." 539 U.S. at 337 (emphases added).

Similarly unavailing is the district court's attempt to rely on contextual differences between public high schools and selective graduate programs. Pet. App. C62. According to the court, "[u]nlike the law school, JCPS does not deny anyone the benefits of an education"; "does not have the goal of creating elite and highly selective school communities"; and does not "weigh[] comparative criteria in a competitive manner." *Ibid.* Instead, JCPS's "goal is to create more equal school communities for educating all students." *Ibid.* But none of those differences, assuming they exist, justifies disregarding or diluting the "paramount" narrow-tailoring factor of holistic, individualized consideration.

First, while it is true that student assignments in the elementary and secondary school context are typically not subject to the type of selective consideration common in the university admissions process, that does not mean that individualized consideration is inherently infeasible in the elementary and

secondary school admissions context. To the contrary, magnet school programs, which are typically designed to attract minority students, often include individualized-type consideration including personal essays, background information, and student interviews as part of the admissions process. And it appears that some of the magnet schools in JCPS—not at issue here—actually employ a more individualized admissions process, which includes review of personal essays. See p. 12 n.6, *supra*.

More fundamentally, regardless of the relative feasibility of individualized consideration in this context, adopting the district court's reasoning that individualized consideration is less relevant here and therefore optional wholly undermines the narrow-tailoring analysis and would mean that individualized consideration is no longer "paramount" in a race-conscious admissions program. 539 U.S. at 337. The fact that a plan, such as JCPS's, fails to provide meaningful individualized consideration has to mean that the plan *fails* to satisfy the first prong of the narrow-tailoring analysis, not that the first prong drops out of the analysis or becomes less relevant. See U.S. Br. in *Seattle* at 20-21.

To the extent that the district court was suggesting that the requirements of *Grutter* are inapplicable on the theory that educational opportunities within JCPS are fungible, that argument also should be rejected. The idea that *de jure* racial discrimination is permissible as long as the educational opportunities are equal or fungible was decisively rejected in *Brown*. Moreover, as a practical matter, the facts that some schools are more popular than others, and that students want to transfer from their assigned school to a different one, demonstrate that parents and students, who are in the best position to judge, do not view the schools as fungible. See 05-908 Pet. App. 105a ("It is common sense that some public schools are better than others.").

B. JCPS's Plan Operates As A Quota

The County's plan is indistinguishable from a quota because it imposes "a fixed * * * percentage which must be attained, or which cannot be exceeded," in its schools. *Grutter*, 539 U.S. at 335 (quoting *Local 28 of the Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 495 (1986)). Like the plan at issue in the *Seattle* case, JCPS's plan is designed to approximate, within a rigid, numerical band, the balance between black and nonblack students that exists in the district as a whole. See U.S. Br. in *Seattle* at 21-22.

JCPS's plan "*requires* each school to seek a Black student enrollment of at least 15% and no more than 50%," and provides school administrators with the authority "*to maintain* schools within the 15-50% range." Pet. App. C17-C18 (emphasis added). In practice, if granting a student's assignment request would "imbalance" either the student's resides school or his preferred school, JCPS will deny the student's request under the guidelines. *Id.* at C24-C25. It is clear that this program is driven by the numbers. Accordingly, the plan's purpose and the County's conduct demonstrate that JCPS is adhering to a rigid, mechanical process to achieve a "fixed * * * percentage" of white and nonwhite students in its schools. *Grutter*, 539 U.S. at 335; see *Bakke*, 438 U.S. at 316 (opinion of Powell, J.) (approving of the Harvard Plan in part because it "has no[] set target-quotas").

That the plan determines black and nonblack student enrollment in accordance with a fixed numeric range, rather than a single fixed number, makes no difference. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312, 332 n.12 (1974) (Douglas, J., dissenting) (concluding that it is "irrelevant to the legal analysis" whether the admissions committee has "chosen only a range" or "set a precise number in advance" for minority admissions); *Fishermen's Dock Coop., Inc.* v. *Brown*, 75 F.3d 164, 169 (4th Cir. 1996) (defining quota as a range). Indeed, the "range" here can be understood as simply setting two quotas—both a minimum and a maximum number of black students at each school. As a

constitutional matter, those quotas are just as infirm as picking a single number of desired students from a particular race.

The County's goal of enrolling a pre-set balance of students differs substantially from the Michigan law school's goal of enrolling a "critical mass" of underrepresented minority students. See *Grutter*, 539 U.S. at 335-336. In *Grutter*, this Court approved of the law school's efforts to enroll an *undefined*, "meaningful number[]" of minority students to achieve the educational benefits of a *genuinely diverse student body*. *Id.* at 318. Here, JCPS seeks to enroll a *defined* number of "black" and "other" students in its schools, and that number derives its "meaning[]" solely from the County's demographics. Pet. App. C18 (explaining that the racial guideline "reflects a broad range equally above and below Black student enrollment systemwide"). The County is thus seeking to "assure within [each school's] student body [a] specified percentage of a particular group merely because of its race." *Grutter*, 539 U.S. at 329-330.

JCPS's plan also operates as a quota because it "insulates a category of applicants with certain desired qualifications from competition with other applicants." *Grutter*, 539 U.S. at 334. Specifically, the plan renders some applicants ineligible for consideration for assignment at certain schools (or any school if the student's race ameliorates the imbalance at the assigned school) simply because of their race. A JCPS student requesting an assignment to or from a school that "hovers at the extreme ends of the racial guidelines," Pet. App. C24, will *not* be considered alongside an applicant of a different race if the requested transfer would contribute to a racial imbalance at either school.

C. JCPS Failed To Pursue Race-Neutral Means of Achieving Racially Integrated Schools

The County's plan is also not narrowly tailored because its goal of achieving racially integrated schools can be achieved effectively through race-neutral alternatives. For example, race-neutral decisions about resource allocation, personnel, and curriculum can—and do—have a substantial impact on the racial composition of schools, particularly where, as here, the school district incorporates student choice into its assignment plan. See U.S. Br. in *Seattle* at 23-27; see also *Swann*, 402 U.S. at 20 (discussing how the "construction of new schools and the closing of old ones" may have "far reaching" consequences with respect to the racial balance of schools). School districts have a legitimate interest in seeking to employ such race-neutral measures to reduce racial isolation and achieve other legitimate educational objectives, and such race-neutral efforts have been adopted across the country. See, *e.g.*, Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* 63, 66-71 (2004).[8]

Moreover, school districts have a strong interest in providing a high quality education to all students, and should continue to seek innovative solutions to improve educational opportunities for all children, including race-neutral choice and open enrollment programs. The County here, however, failed adequately to consider race-neutral alternatives.

D. The County's Plan Unfairly Burdens Innocent Third Parties

While JCPS's plan does not deny any student the opportunity to attend *a* public school, it does deny those students whose race would negatively affect a school's racial balance the opportunity

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[8] Of the potential race-neutral alternatives available to school districts, Congress has determined that the use of magnet schools is a particularly effective means of addressing minority group isolation and has funded magnet school programs. See U.S. Br. in *Seattle* at 25-26.

to attend the school of their choice, including the ability to attend the most sought-after schools and programs in the school district solely because of their race. Having acknowledged the benefits of educational choice, the County has denied some students their school of choice solely on the basis of race. *Grutter* emphasized that the Constitution protects a student from being "foreclosed from all consideration * * * simply because he was not the right color or had the wrong surname." 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 318 (opinion of Powell, J.)). The County's plan forecloses certain students "from all consideration" at imbalanced schools if they are "not the right color" for the predefined, acceptable racial balance at that school. *Ibid.* Indeed, if a student's presence at the assigned school ameliorates its racial imbalance, that student is effectively trapped there and denied the ability to transfer to any other school that would otherwise be an available choice. As this Court has explained, "[t]he exclusion of even one [person] * * * for impermissible reasons harms that [individual] and undermines public confidence in the fairness of the system." *J.E.B.* v. *Alabama*, 511 U.S. 127, 142 n.13 (1994). Thus, if denying (or granting) a student's assignment request based *solely* on his race is the price of achieving racially "balanced" schools, then "the price is too high to meet the standard of the Constitution." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630 (1991); see *Wygant*, 476 U.S. at 280-281 (plurality opinion); *Metro Broad.*, 497 U.S. at 630 (O'Connor, J., dissenting).

E. The County's Plan Is Not Limited In Time

Race-based policies in an educational setting "must be limited in time" and "have a logical end point." *Grutter*, 539 U.S. at 342. Thus, admission plans in furtherance of a compelling interest may consider race as a factor so long as they incorporate "sunset provisions" and "periodic reviews" to determine the continued need of the race-based programs. *Ibid.* The JCPS plan does not contain any such mechanism. Moreover, because the County has chosen to justify its plan based in part on the goal of maintaining

integrated schools within a district that is *not* racially integrated as a residential matter, the County's plan has no logical, much less fixed, end point.

* * * * *

The promise of *Brown* and its progeny was "to effectuate a transition to a racially nondiscriminatory school system," and thus "achieve a system of determining admission to the public schools on a nonracial basis." *Brown II*, 349 U.S. at 300-301. The United States remains deeply committed to that objective. But once the effects of past *de jure* segregation have been remedied, the path forward does not involve new instances of *de jure* discrimination. A federal court found in 2000 that all vestiges of past discrimination had been eliminated in JCPS. JCPS's voluntary race-based school assignment plan—adopted after that court finding—does not advance the objective of "a racially nondiscriminatory school system," *id.* at 301, and the "unhappy consequence [of such a race-based measure] will be to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). "Th[at] perpetuation, of course, would be the worst of all outcomes." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are former high-ranking leaders of the Department of Defense ("DoD") and the armed forces.[1] They are deeply interested in this case, not only because voluntary integrative measures have been critical to the military's fulfillment of its core missions, but also because the military's experience with its own highly integrated schools has shown the significant benefits that accrue to children from a racially diverse educational environment.

Amici are concerned about the negative consequences that would flow from a broad ruling that maintaining and promoting racial integration in public elementary and secondary schools is not a compelling governmental interest. The integration of the military, and the expansion of the integrated schools operated by the military, were in large part voluntary measures undertaken to ensure a cohesive fighting force and to secure for military dependents the significant educational and other benefits of integrated schools later recognized by this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Both measures have proved overwhelmingly successful. Not only has an integrated military increased our national security immeasurably, but the military's schools have among the highest levels of both racial diversity and minority educational achievement in the Nation.

Amici believe that the experience of these schools, as well as the general experience of the military with voluntary integration, reinforces a critical premise of *Brown* and its progeny—that maintaining and promoting a racially integrated educational environment is a compelling governmen-

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

tal interest. Amici therefore urge the Court to uphold this central tenet of *Brown*, and reject the notion advanced by petitioners that this interest is anything less than compelling.

The following are brief biographies of the individual *amici curiae*:

Honorable Clifford L. Alexander, Jr. was Secretary of the Army from 1977 to 1981. He was previously Chairman of the Equal Opportunity Employment Commission, Special Consultant to the President on Civil Rights, and Foreign Affairs Officer of the National Security Council.

Lieutenant General Julius W. Becton, Jr. served in the U.S. Army for 40 years. He also served five years as president of Prairie View A&M University, and subsequently served as Superintendent of the Washington, D.C. Public Schools.

Honorable Louis E. Caldera, a West Point graduate and former Army officer, was Secretary of the Army from 1998 to 2001. He was previously Managing Director and Chief Operating Director of the Corporation for National and Community Service, which supports Americorps, the National Service Corps, and Learn and Serve America. He is also a former President of the University of New Mexico.

Admiral Archie Clemins, retired 4-star, served as Commander in Chief, U.S. Pacific Fleet, from 1996-99. The U.S. Pacific Fleet is the world's largest combined-fleet command.

Honorable William S. Cohen served as the 20th Secretary of Defense from 1997-2001. He also served as U.S. Senator from Maine from 1979-1997, and chaired the Armed Service Committee's Seapower and Force Projection Subcommittee.

Honorable John H. Dalton, a Naval Academy graduate and Naval officer, was Secretary of the Navy from 1993-98.

Honorable Rudy F. deLeon was Deputy Secretary of Defense from 2000-2001. He previously served as Under

Secretary of Defense for Personnel and Readiness, Under Secretary of the Air Force, and Special Assistant to the Secretary of Defense.

Honorable F. Whitten Peters was Secretary of the Air Force from 1999-2001. He previously served as Acting Secretary and Under Secretary of the Air Force.

Joe R. Reeder, a West Point graduate and Army officer, was the 14th Under Secretary of the Army from 1993-97.

Togo D. West, Jr. was Secretary of the Army from 1993 to 1998, and Secretary of Veterans Affairs from 1998-2000. He has also served as General Counsel of the Departments of Defense and the Navy. Secretary West was commissioned a second lieutenant in the U.S. Army.

SUMMARY OF ARGUMENT

In complying with President Truman's command to end segregation, the military fought not only entrenched racial attitudes within its ranks, but also a sometimes hostile response by the civilian world that had powerful Congressional support. Nevertheless, recognizing that segregation was incompatible with a successful fighting force and the American ideals for which it fought, after World War II the military leadership implemented voluntary integrative policies that have achieved a level of diversity which, while still insufficient in certain areas, is largely unparalleled elsewhere in our society. In carrying out this mission, however, the military has not merely reflected societal preferences or limited its actions to compliance with court orders.

One of these voluntary integrative policies was the establishment of integrated Department of Defense schools, which was a direct response to the refusal of surrounding communities to provide such facilities. Even before this Court's decision in *Brown*, the military determined that providing a fully integrated environment for its soldiers included providing a fully integrated education to their children. The mili-

tary's choice to adopt this voluntary integrative measure has been extraordinarily successful. In addition to increasing our national security through a diverse, motivated, and dedicated fighting force, the military has created an academic environment that demonstrably benefits children of all races. The Department of Defense schools are among the most racially integrated of any in the country and, not coincidentally, have the very highest levels of achievement for minority students.

The experience of the military in creating a diverse fighting force, and in voluntarily establishing integrated schools that have resulted in extraordinary levels of overall and minority achievement, demonstrate the compelling interest in maintaining and promoting integration in elementary and secondary education. Ever since *Brown*, this Court has repeatedly stressed the overriding benefits of an integrated education. Contrary to the contentions of petitioners and their amici, the compelling governmental interest in securing those benefits does not suddenly become less than compelling merely because they are not imposed forcibly through a court order. Government officials should be able voluntarily to use those narrowly-tailored means which, in their considered judgment, are needed to secure the benefits of an integrated education for all children.

ARGUMENT

I. THE HISTORY AND EXPERIENCE OF THE U.S. MILITARY SHOWS THE IMPORTANCE OF VOLUNTARY MEASURES TO PROMOTE RACIAL INTEGRATION IN PUBLIC EDUCATION.

This Court has previously heard, credited, and relied on the judgment of former military officials that promoting racial diversity in the officer corps and training academies is a compelling and necessary governmental interest. *See Grutter* v. *Bollinger*, 539 U.S. 306, 331 (2003). As the Court noted, continuing racial disparities in the military and in the civilian arena have necessitated the use of race-conscious measures

by the military to ensure racial diversity in the officer corps: "[t]o fulfill its mission, 'the military must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.'" *Id.* (quoting Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* ("Becton Br.") at 29) (emphasis in original). The Court credited the judgment of former military officials that employing such measures is "essential to the military's abilities to fulfill its princip[al] mission to provide national security." *Id.* (citation omitted).

This integrative mission, however, has never been limited to the officer corps. Nor has it been limited to simply ceasing overt discriminatory policies or complying with court orders. To the contrary, and despite attempts by some to halt such efforts, since World War II the military has also taken voluntary measures to increase its own diversity and to combat the effects on military families of racial isolation in the civilian sphere, including in public education. Those measures were, and continue to be, critical to the military's overriding goal of building and maintaining a cohesive, unified, and motivated fighting force.

Indeed, the military places special emphasis on the education of its members and their children. For example, the Army considers it "imperative" to promote the continuing personal and professional development of its soldiers and their children. The Army also deems it imperative to address the unique individual needs of military dependent students. *See* Army Families Online, *Army Well-Being, Education and Development* (http://www.armyfamiliesonline.org). The Air Force, Marines, and Navy have similar commitments. *See* U.S. Air Force, *Air Force Strategic Plan 2006-2008*, at 5 (http://www.af.mil/shared/media/document/AFD-060919-008.pdf); U.S. Marine Corps, *Education* (http://www.usmc-mccs.org/education/fl/Index.cfm); U.S. Navy, *Staying the Course: A Commitment to Children* (http://www.

news.navy.mil/search/display.asp?story_id=8685). The reasons are clear: ensuring quality education for servicemembers and their children is integral to attracting and retaining dedicated and motivated personnel. As the Navy puts it, "[w]e recruit [s]ailors but we retain families." *Id.*

A. Since World War II, the Military Has Engaged in Voluntary Efforts to Integrate Both Its Ranks and the Education Provided to Dependent Children.

The idea that the military should act voluntarily to ensure racial integration did not come without resistance from both inside the military and from some in Congress. President Truman's Executive Order 9981, the official end to segregation in the United States military, was signed in 1948, years before this Court overruled the "separate but equal" doctrine in *Brown*. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (Jul. 26, 1948). But that Order's end of officially segregated units did not mean that the military was fully integrated or that equal opportunity for all service members was guaranteed. The Order placed integration in the hands of military commanders, and granted them the discretion to carry it out as they deemed appropriate. What commanders initially deemed appropriate was not necessarily rapid integration. For example, in 1951 the Air Force claimed that its implementation of Executive Order 9981 could not interfere with local custom. *See* Morris J. MacGregor, Jr., *Integration of the Armed Forces 1940-1965*, at 479 (1980) (hereinafter "*Integration of the Armed Forces*"). That same year, the Army Chief of Staff defended the Army's practice of maintaining large training camps in localities that openly discriminated against black soldiers because the Army had "no control over nearby civilian communities." *Id.*

Some in Congress also attempted to limit the effect of Executive Order 9981 to simply removing overt official segregation. For example, Senator Richard B. Russell of Georgia proposed an amendment to the draft law, which had

come up for renewal in 1950. *See* 100 Cong. Rec. 8412 (1950). That amendment would have allowed "inductees and enlistees, upon their written declaration of intent, to serve in a unit manned exclusively by members of their own race." *Integration of the Armed Forces*, *supra*, at 389. In other words, the Russell amendment would have permitted servicemembers to choose voluntarily whether they would serve with servicemembers of other races. While this proviso, in the eyes of some, might have removed official discrimination by relying instead on the voluntary preferences of servicemembers, it would not have embodied the integrative purpose of President Truman's Order or the military necessity that prompted that order. Though the amendment was ultimately defeated on the Senate floor, 100 Cong. Rec. 9074 (1950), it cleared the Senate Armed Forces Committee with the members' unanimous approval. *Id.* at 8412. Members of the House of Representatives also challenged the military's authority to implement other voluntary integrative measures in carrying out Executive Order 9981. When a later DoD directive authorized officers to prohibit personnel from patronizing businesses that practiced discrimination,[2] the head of the House Armed Services Committee introduced a bill that would have made implementing this directive a court martial offense. *See Integration of the Armed Forces*, *supra*, at 551; *see also* H.R. 8460, 88th Cong. (1963).

Notwithstanding the lack of enthusiasm of some in Congress and in its own ranks, by the early 1950s the military proceeded voluntarily to fully integrate its ranks even in the absence of a court order or legal requirement to do so. *See* Bernard McNalty & Morris MacGregor, *Blacks in the Military—Essential Documents* 314-15 (1981) (hereinafter *"Blacks in the Military"*). This necessarily included assignments and reassignments necessary to avoid segregation. *See*, *e.g.*, *id.* at 299-309. Thus, whereas two-thirds of black

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[2] Dep't of Defense Directive 5120.36 (Jul. 26, 1963).

Air Force personnel were assigned to majority-black units in 1949, by 1954 no majority-black units remained anywhere in the military. *Id.* at 299-300.

The critical benefits to national security of a fully integrated fighting force have already been presented to, and accepted by, this Court. *See Grutter*, 539 U.S. at 331; Becton Br. at 12-13; Dep't of Defense Directive 1350.2, § 4.4 (Aug. 18, 1995) (describing plans to increase diversity as a "military necessity" that is necessary for "combat readiness and mission accomplishment"). The military's ongoing efforts to maintain and promote diversity have proved very successful, as the military remains one of the most integrated institutions in American society. In fact, the overall racial composition of the military is very similar to that of the general U.S. population, although disparities between enlisted personnel and the officer corps still exist. *See* Dep't of Defense, *Population Representation in the Military Services Fiscal Year 2004*, at iii-iv (May 2006) (http://www.defenselink.mil/prhome/poprep2004/download/2004report.pdf).

But the military's voluntary efforts at integration involved more than just personnel policies. Together with integration of its ranks, the armed services also integrated base housing after 1948. *See, e.g.*, Air Force Letter 35-3 (May 11, 1949). In addition, the military began voluntary desegregation of the schools operated for military dependents even before the *Brown* decision was rendered. *See Integration of the Armed Forces*, *supra*, at 490.

The desegregation of schools already operated by the Department of Defense ("DoD") was relatively uncomplicated. Though the DoD had long operated schools for dependents in the United States, the DoD schools in Japan and Germany were established after the end of World War II and had always been integrated. *Id.* The DoD-operated schools in the United States were fully integrated by the fall semester of 1953, before the *Brown* decision. *Id.*

But integrating the schools operated by local governments for military personnel was not so simple. Many state governments and their Congressmen protested that operating integrated schools would violate state laws. *Id.* at 492-93 (citing Letter from Rep. Arthur Winstead to Charles Wilson, Secretary of Defense (Feb. 18, 1954)). The military, however, was not content simply to yield to these local officials where the education of military dependents was at stake. In January 1954—before this Court decided *Brown*—the Department of Defense ordered the rapid integration of these schools. *See* Memorandum from Charles Wilson, Secretary of Defense to Joint Chiefs (Jan. 12, 1954), *reprinted in Blacks in the Military*, *supra*, at 315. The DoD gave base commanders a short September 1955 deadline for reaching agreement with local governments to desegregate schools serving military dependents. *Id.* Should no agreement to desegregate be reached, DoD would voluntarily provide integrated education facilities of its own for its servicemembers' children. *See id.* In some cases, the DoD did just that, when local governments refused to comply. *Integration of the Armed Forces*, *supra*, at 492-96. By 1956, the military had not only integrated hundreds of school classrooms, it had also integrated classes conducted by local universities for military personnel, which were voluntarily attended by servicemembers in off-duty hours. *Id.* at 495-96

In sum, although the military did not fully embrace the mission until after World War II, it came to understand the critical need for voluntary measures to ensure and maintain diversity and integration not only in its ranks but also in the education provided to its dependents. The military has not been content simply to accept prevailing societal preferences in this regard. Out of military necessity, it has not allowed servicemembers to choose racially isolated units. And when faced with recalcitrant local governments, the military voluntarily established its own schools rather than subject its dependent children to racially isolated schools.

B. The DoD Schools Demonstrate the Significant Benefits of Integrated Education.

One result of these voluntary efforts by the military to achieve integration in the face of local opposition was the expansion of the Department of Defense schools, which educate children of military members who serve overseas and those who reside on military bases stateside. *See* Claire Smrekar, et al., *March Toward Excellence: School Success and Minority Student Achievement in Department of Defense Schools* at ii (Sept. 2001) (hereinafter "*March Toward Excellence*"); Congressional Budget Office, *Budget Options for National Defense* 86 (Mar. 2000) (domestic DoD schools are "mainly a historical accident, dating to the time when segregated public schools in the South did not adequately serve an integrated military"). DoD schools now enroll more than 104,000 students at 223 schools, which makes the DoD system roughly the same size as the public school system in Charlotte-Mecklenburg, North Carolina. *See March Towards Excellence*, *supra*, at ii; *see also* Dep't of Def. Educ. Activity, *Facts 2003* (http://www.dodea.edu/communications/dodeafacts.htm). This school system, perhaps as much as any other in the Nation, exemplifies the benefits of, and compelling governmental interest in, a fully integrated educational environment.

The DoD schools are among the most racially diverse of any school system in the country. Approximately 54% of the students enrolled in DoD schools are members of a minority group. *See* Dep't of Def. Educ. Activity, *An Overview* (June 2004) (http://www.dodea.edu/aar/2004/students.htm). Of that 54%, approximately 18% of the students are African-American, 11% are Hispanic, 14% are bi- or multi-racial, 7% percent are Asian, and 2% are classified as other. *Id.* Because the military is fully integrated across geographic areas, the DoD schools are integrated as well, with each school having approximately the same racial makeup. *See id.*; *see also* Charles Brown, *Relatively Equal Opportunity in*

the Armed Forces: Impacts on Children of Military Families 8 (draft Jan. 2006) (on file with counsel for *amici*).

By contrast, the average African-American or Hispanic student enrolled in a civilian school attends a school in which only a third of students are white or Asian, with many schools experiencing extreme racial isolation. *See* Brown, *supra*, at 9 & Table 3. Whereas 41% of African-American civilian students attend schools that are less than 20% white or Asian, there are *no* African-American students attending such racially isolated schools in the DoD system. *See id.* The average white civilian student attends a school where 81% of his or her fellow students are white. *See* Gary Orfield & John T. Yun, *Resegregation in American Schools* 15 (1999). This is a very different experience from that of the average white DoD student, who attends a school where slightly less than half of his or her fellow students are white.

The educational achievement of students attending DoD schools, and particularly minority students, is extremely high, notwithstanding significant challenges faced by these students. Eighty percent of DoD students are children of enlisted parents, who often lack college degrees and earn incomes at or near the national poverty line. *See March Toward Excellence*, *supra*, at ix. As can be expected of military families, student transience is very high at DoD schools. The average student turnover rate at DoD schools is 35% each school year, which is similar to the rate experienced by inner city schools. *Id.* at 44. Yet despite relatively low parental incomes and high student population turnover, the DoD students' reading, writing, and mathematics scores are consistently among the highest in the nation. *See* Dep't of Def. Educ. Activity, *National Assessment of Educational Progress 2000-2003 Score Rankings* (http://www.dodea.edu/aar/2004/NAEP.htm). If the DoD school system were a state, its 1998 scores for all students would place it within the top two school systems in the nation. *March Toward Excellence*, *supra*, at viii-ix. In 2005, DoD students performed in

the top eight in the nation, as compared with the states, in all categories on the National Assessment of Educational Progress ("NEAP"). *See* Dep't of Def. Educ Activity, *News Releases* (Oct. 25, 2005) (http://www.dodea.edu/communications/news/releases/102805_math.htm *and* http://www.dodea.edu/communications/news/releases/102805_reading.htm).

While the overall statistics are impressive, the achievement of minority students at DoD schools is nothing short of superb. As compared to achievement for students in each of the states, the reading, writing, and mathematics scores of the African-American and Hispanic students within the DoD system are consistently among the top three nationwide, with minority DoD students in Grade 8 placing first in the nation in both reading and mathematics on each NEAP test since 2000. *See id.* Other scores are just as extraordinary: in 2005, for example, African-American DoD students in Grade 4 placed first and third in the nation, respectively, in reading and mathematics on the NEAP. *Id.*

To be sure, there are certain characteristics of DoD schools and military families that account for some of the achievement differences, including school resources,[3] higher parental achievement, and a greater family emphasis on education. *See March Toward Excellence*, *supra*, at 33; Claire Smrekar

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[3] In 2000, the average civilian school system spent an average of $7,682 per student, whereas the DoD schools spent an average of $9,503. *See* Dep't of Def. Educ. Activity, *Budgets* (2000) (http://www.dodea.edu/aar/2000/budget.htm). But while DoD per-student spending is higher than the national average, it is less than what is typically spent in large U.S. systems with comparable minority student populations. *See March Toward Excellence*, *supra*, at x. Moreover, civilian school systems often receive additional support through state, federal, and private sector grant programs. *See* Dep't of Def. Educ. Activity, *Budgets* (2000). This additional financial support, which is not reflected in the published per student costs, may represent a significant percentage of a civilian school system's budget. *Id.*

& Debra Owens, *It's a Way of Life For Us: High Mobility and Achievement in Department of Defense Schools*, 72 J. Negro Educ. 173 (Winter 2003). But even accounting for all available socioeconomic and resource variables, there remains a significant unexplained variation in the achievement of African-American DoD students as compared to their civilian counterparts. According to one detailed study, even when such variables are factored in, between one quarter and one third of the achievement gap remains unexplained. *See* Brown, *supra*, at 21. By contrast, available socioeconomic and resource variables appear to account for all of the civilian-DoD achievement differentials for white students and almost all of the differentials for Hispanic students. *See id.* In other words, an African-American student in a DoD school will perform better than his or her similarly-situated civilian counterparts, even when all available socioeconomic variables are taken into account.[4]

It may be that the beneficial effects of reducing racial isolation cannot be precisely quantified, and that these effects will not be experienced by all students or at all times. Nevertheless, the experience of DoD schools provides a persuasive—indeed, compelling—case for the benefits of an integrated education, particularly for African-American students. Established in large part through the military's voluntary integrative efforts some fifty years ago, the diverse DoD schools have continued to perform better than their civilian counterparts. Indeed, some military members are so committed to having their children attend these schools that they will go to great lengths to ensure that attendance. *See* Fredreka Schouten, *Military Schools Producing Army of Solid Performance*, USA Today (Mar. 31, 2004) (describing an army

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[4] These educational benefits, moreover, are in addition to the numerous other significant social, economic, and community benefits that result from integrated schools, which will be addressed by respondents and by other *amici curiae*.

major who purchased a recreational vehicle and parked it on base as living quarters so that his children could attend base schools).

II. PROMOTING AND MAINTAINING RACIAL INTEGRATION IN ELEMENTARY AND SECONDARY SCHOOLS IS A COMPELLING GOVERNMENTAL INTEREST.

Ever since *Brown*, this Court has consistently held that racially isolated public schools are particularly detrimental to minority students, and that racially integrated schools are beneficial to all students. Yet while they concede the legitimacy of governmental efforts to promote and maintain racial diversity in elementary and secondary schools,[5] petitioners and their amici steadfastly refuse to recognize that interest as a compelling one, except in the narrow instance where integration is achieved forcibly through a court order. That cramped view of the law squares neither with this Court's precedents nor human experience. Indeed, the experience of the military and its own schools since World War II demonstrates why the goal of voluntary racial integration should not be relegated to second-class status.

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[5] *See* U.S. Br., No. 05-908, at 27 ("the interest in reducing, eliminating, or preventing minority group isolation in public schools is a legitimate and important purpose"); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1175 (9th Cir. 2005) ("[e]ven the Parents' expert conceded that * * * 'integration is a desirable policy goal.'"); *McFarland* v. *Jefferson Co. Pub. Schs.*, 330 F. Supp. 2d 834, 853 (W.D. Ky. 2004) (finding the benefits of racial tolerance and understanding as important and laudable as those approved in *Grutter* and noting that plaintiffs did not challenge the evidence regarding those benefits); *id.* at n.39 (finding that the Board of Education has "valid reasons for believing race conscious assignment policies may aid student performance" and noting that "plaintiffs produced no contrary evidence").

In *Brown*, the Court identified two different harms arising from racial segregation in public schools. The Court embraced a lower court's finding that "'[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. *The impact is greater* when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.'" 347 U.S. at 494 (citing factual findings; emphasis added). Thus, the Court's reference to the harms of "segregation" embodied more than just state-sanctioned separation: while the harms are greater when there is *de jure* segregation because of the imposed stigma of inferiority, the harms to children exist regardless of how the segregation was achieved. Likewise, the tangible and intangible benefits of an integrated education exist equally for all students regardless of whether those benefits were secured through a court order or voluntarily. *See, e.g.*, *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982) (it is "clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom'") (citations omitted).

After *Brown*, this Court made clear that the judiciary may impose narrowly-tailored race-conscious measures to remedy *de jure* segregation. *See, e.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-25 (1971). Contrary to petitioners' arguments, however, the interest in preventing and eliminating the harms of racially isolated schools, and achieving the benefits of integration, does not suddenly become less than compelling simply because it is not effectuated through a court order. It is true that *courts* lack remedial competence and power to effectuate integration measures where there is no finding of intentional segregation, or where all vestiges of *de jure* segregation have been eliminated. But just because integrative measures are not constitutionally required, that does not mean that the elected branches of government are constitutionally forbidden from pursuing such measures voluntarily. Given that there is a

compelling interest for courts to use all appropriate measures to remedy the harms to children caused by unconstitutional segregation, there is an equally compelling basis for school officials to similarly employ narrowly-tailored measures on a voluntary basis to prevent and rectify those same harms.

Indeed, at the same time that it confirmed the limits of judicial powers in this area, this Court recognized that the powers of the political branches are not so limited:

> School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that, in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of the school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Swann, 402 U.S. at 16; *see also Washington*, 458 U.S. at 474 ("[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.").

In deference to the greater powers and competence of elected officials, the Court has consistently invalidated overly intrusive judicial remedies for segregation. *See, e.g.*, *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992) ("Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."); *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974) ("This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of their schools through their elected representatives."). That same judicial restraint counsels strongly against a holding that furthering racial integration in elementary and secondary schools is not a compelling governmental

interest, such that governments are *never* justified in using even narrowly-tailored race-conscious measures to achieve it.

The experience of the military shows the importance of allowing governmental officials to pursue voluntary integrative measures, not merely for their own sake but for the acknowledged benefits that will result. The Court has already recognized that race-conscious measures to increase diversity in the armed forces are "essential to the military's ability to fulfill its princip[al] mission to provide national security." *Grutter*, 539 U.S at 331 (citation omitted). In determining unit assignments, military commanders do not acquiesce to perceived societal preferences where those preferences conflict with the critical objective of maintaining a diverse, cohesive, and unified, fighting force. *Cf. Integration of the Armed Forces*, *supra*, 389-90, 545 (noting efforts to require military to accept individual segregative preferences).

The same is true for the education of military dependents. The military pursued voluntary integrative measures because they were deemed important to its core mission, to the point of establishing its own integrated schools in defiance of surrounding local preferences. The military did this because leadership recognized that it could not fulfill its commitment to a diverse fighting force if that commitment ended when servicemembers were off-duty. Ensuring a quality, integrated education for its dependents is a top military priority because it promotes servicemembers' motivation and dedication, fosters a sense of true equality, and helps retain key military personnel. Moreover, given that many military officers and enlisted members come from the ranks of military families, exposing military dependents to the benefits of a diverse, quality education will help prepare them as future leaders of the integrated military.

The fully integrated schools of the military have resulted in demonstrated benefits to all the dependent children they serve, and particularly African-American children. Achiev-

ing that goal is no less compelling than the goal of increasing diversity in the officer corps, which this Court has already recognized as a compelling governmental interest. Neither the military, nor the surrounding communities in which most military children are educated, should be disabled from employing whatever narrowly-tailored measures may be needed, in the considered judgment of governmental officials, to accomplish that compelling objective.

CONCLUSION

For the foregoing reasons, and those set forth in the briefs of respondents, the judgments of the courts of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

—v.—

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,
Petitioner,

—v.—

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF KENTUCKY, AND THE ACLU OF WASHINGTON IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared in numerous cases before this Court, both as direct counsel and as *amicus curiae*, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). The ACLU of Kentucky and the ACLU of Washington are state affiliates of the national ACLU.

SUMMARY OF ARGUMENT

This brief addresses the question of whether race-neutral alternatives to race-conscious school assignments sufficiently remedy racial segregation in public schools to qualify as less-restrictive alternatives under the Fourteenth Amendment. Several *amici* writing in support of Petitioners, including the United States, agree that school districts maintain an "important" interest in reducing racial segregation in elementary and secondary schools. Yet, they contend that the goal of racially integrated schools can be achieved without resort to race-conscious remedies by relying instead on such race-neutral alternatives as (1) the use of socioeconomic status ("SES") to assign students to schools, and (2) the creation of magnet school programs. Neither Petitioners nor

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. Pursuant to Rule 37.3, the parties have given general consent to the filing of *amicus* briefs.

their *amici*, however, cite any evidence in support of their claims.

In fact, the available empirical evidence suggests that while these race-neutral alternatives may sometimes have a marginal beneficial impact on integrating public schools, they present, at best, only a partial solution and, at worst, exacerbate existing segregation. In light of the evidence that race-neutral student assignment policies, by themselves, do not achieve sufficient integration, school districts should be permitted to use school assignment policies that flexibly consider race as one of several factors to achieve additional progress toward the reduction of minority isolation. Nothing in the Constitution requires school districts to accept partial solutions to the problem of racial segregation.

ARGUMENT

These cases do not seriously call into question the importance of reducing racial isolation in public elementary and secondary schools that are, distressingly, subject to increasing re-segregation across the country. Far from suggesting that diversity should play no role in the K-12 context, the Solicitor General, writing in support of both Petitioners, explicitly endorses a state interest in racially and ethnically desegregating elementary and secondary schools. The United States agrees that "even in the absence of" past *de jure* segregation, "school districts can pursue a legitimate and important purpose in seeking to reduce or eliminate minority group isolation in public schools," Brief for the United States as Amicus Curiae Supporting Petitioner at 17, Parents Involved in Community Schools (P.I.C.S.) v. Seattle School Dist. No. 1, et al., No. 05-908 (U.S. Aug. 21, 2006), and that the purpose of "avoiding racially concentrated schools" is "undoubtedly legitimate and important," Brief for

the United States as Amicus Curiae Supporting Petitioner at 15, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Aug. 21, 2006).[2]

Implicit in that acknowledgement is a recognition of the ongoing prevalence of segregation in elementary and secondary schools. Nationally, over one-third of African-American and Latino students attend "intensely segregated minority schools," where 90% or more of the student body is minority. Gary Orfield & Chungmei Lee, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 6, 9-11 (2006). Over one in six African-American students attends "apartheid" schools with 99% or more minority enrollment, as does more than one in ten Latino students. *Id.* at 10-11.

Notwithstanding significant differences between student assignments in elementary and secondary education and student admissions in higher education, racial integration in K-12 education fits comfortably within the framework announced in *Grutter v. Bollinger*, which held student body racial diversity to be a compelling interest in the context of higher education. 539 U.S. 306, 328-33 (2003). The rationales relied upon in *Grutter* to justify race-conscious school admissions policies --- including not only improvements in academic outcomes but also the promotion of sociological and democratic values --- are as applicable in the context of K-12 public schools, if not more so. By "promot[ing] cross-racial understanding," race-conscious

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[2] Nor could the United States reasonably adopt a contrary position. Congress has enacted educational programs which have operated for decades with explicitly race-conscious goals. An express purpose of the Magnet School Assistance Program ("MSAP") is the "elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students." 20 U.S.C. § 7231(b)(1).

admissions and assignment policies in both the K-12 context and in higher education "help[] break down racial stereotypes, and enable[] [students] to better understand persons of different races." *Id.* at 330. Similarly, racial integration in elementary and secondary schools, as in universities, "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* In addition, it ensures that all students obtain the "exposure to widely diverse people, cultures, ideas, and viewpoints" that is critical to our nation's global competitiveness, economically and militarily. *Id.* at 330-31.

Indeed, as articulated by other *amici* supporting the School Districts, racial integration in public schools is even more compelling in the K-12 context than it is in higher education, in large part because K-12 education, which must be provided for all students, reaches more students, and at an earlier stage of their development when they are more impressionable. Given the rates of racial re-segregation and racial isolation in those schools, and the impressionability of schoolchildren, the educational stakes are undeniably high. It is not surprising, therefore, that the central role of K-12 education informed this Court's opinion in *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954). The *Brown* Court recognized primary and secondary education as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.* at 493. Consequently, the Court reasoned, the harms of racially separated public schools "apply with added force to children in grade and high schools." *Id.* at 493-94.

Rather than challenging the importance of racially integrating the nation's public elementary and secondary schools, Petitioners' supporters principally challenge school assignment policies that include race consciousness on the

ground that they are not narrowly tailored. They posit that less restrictive alternatives --- specifically, student assignments based on socioeconomic status and magnet programs --- satisfy this well-established interest. *See, e.g.*, Brief of Petitioner at 18, 40, P.I.C.S. v. Seattle School Dist. No. 1, et al., No. 05-908 (U.S. Aug. 21, 2006) (proposing, *inter alia*, magnet programs and the use of socioeconomic factors as race-neutral alternatives); Br. of the U.S. for Meredith at 16, 22 (proposing magnet schools as a race-neutral alternative); Br. of the U.S. for P.I.C.S. at 25-27 (offering SES-based assignments and magnet programs as race-neutral alternatives). Under this Court's constitutional jurisprudence, however, these measures cannot be considered "alternatives" unless they are as effective as race-conscious remedies in achieving the stated government interest.

As the Court explained in *Grutter*, the central question is not whether the proffered race-neutral alternatives have any value but, rather, whether they serve the government's interests "about as well" as the challenged policy. 539 U.S. at 339 (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986)); *see also Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (noting that the appropriateness of race-neutral remedies must consider their efficacy).[3] Here, the

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[3] The challenged policies in the two districts at issue here, Seattle and Louisville, both used race-conscious measures in conjunction with race-neutral measures, confirming that the appropriate inquiry is not to compare the efficacy of race-neutral alternatives against the efficacy of race-conscious measures, but rather to determine whether race-neutral alternatives alone are as effective as the challenged plans which utilized both race-conscious measures and race-neutral alternatives. *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1167, 1169 (9th Cir. 2005) (describing district's use of race-conscious measures in conjunction with race-neutral ones, including, *inter alia*, implementing magnet programs, adopting a weighted funding formula, improving facilities, and developing innovative academic programs);

government's interest is to achieve racially integrated public schools --- not only for the resulting improvements in academic outcomes, but also to promote sociological and democratic values similar to those described in *Grutter* and in *Brown*. Thus, it is not enough to say that student assignments based on socioeconomic status and magnet programs can produce many educational benefits --- for example, reduced poverty concentration, improved school quality, introduction of innovative educational instruction and increased choice for students and their parents. Even assuming that is true, which may be the case in some circumstances, the issue of whether these programs constitute viable "race neutral alternatives" that preclude any use of race-conscious assignment policies depends on their effectiveness in racially integrating K-12 schools. If these alternatives are sufficient by themselves to create integrated schools, then the use of race-conscious measures would be difficult if not impossible to justify. If, on the other hand, these alternatives, without more, have proven inadequate in most circumstances to achieve the compelling state interest in an integrated school system, then school districts should be granted the discretion to experiment with school assignment policies that use race "in a flexible nonmechanical way," *Grutter*, 539 U.S. at 334, in their effort to address the problem of racial segregation and isolation in America's public schools. *Compare id.* at 342 ("The States may perform their roles as laboratories for experimentation to devise various solutions where the best solution is far from clear," quoting *United States v. Lopez*, 514 U.S. 549, 581 (Kennedy, J. concurring)).

McFarland v. Jefferson Cty. Public Schools, 330 F. Supp.2d 834, 861 (W.D. Ky. 2004), *aff'd* 416 F.3d 513 (6th Cir. 2005) (noting that the Board utilized race-neutral alternatives in addition to race-conscious measures).

In short, facts matter, and "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). Yet, not a single brief in support of Petitioners cites any evidence supporting their argument that their proffered alternatives do "about as well" as race-conscious school assignment policies in promoting integrated schools. Instead, P.I.C.S. and *amici* supporting both Petitioners rely on bald assertions, such as "race neutral alternatives would likely increase diversity just as much as the race preference." Br. of P.I.C.S. at 22. *See also* Br. of the U.S. for Meredith at 22 (asserting, without evidence, that the "goal of achieving racially integrated schools can be achieved effectively through race-neutral alternatives"); Br. of the U.S. for P.I.C.S. at 23 (same). Not only are claims that race-neutral measures work "about as well as" as race-conscious measures counterintuitive, *see, e.g., Brewer v. West Irondequoit Centr. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) ("[T]here is no more effective means of achieving th[e] goal of [reducing racial isolation] than to base decisions on race"), but they also are demonstrably inconsistent with the experience of actual districts employing these measures. The empirical evidence shows that, at best, SES-based assignment policies and magnet programs provide only a partial and insufficient integration solution and, at worst, exacerbate segregation and hyper-segregation. In the five school districts profiled by the United States Department of Education employing SES-based measures, none eliminated racial segregation. Even worse, the introduction of SES-based policies coincided with an exacerbation of racial isolation in those districts where it existed. Similarly, a review of districts receiving funds through the United States Department of Education's Magnet Schools Assistance Program ("MSAP") shows that, at best, the individual schools targeted for grant funds experienced mixed results in reducing racial segregation and isolation, and that the impact

of the grant across the entire district was even more limited. Because race-neutral alternatives alone cannot achieve the government's compelling interest, school districts should be entitled to utilize race-conscious measures that will further the government's goal of an integrated school system. The evidence demonstrates that there simply is no less restrictive alternative that is as effective as including race-conscious school assignment policies in efforts to achieve racial integration in our nation's public schools.

I. RELYING SOLELY ON SOCIOECONOMIC STATUS FOR SCHOOL ASSIGNMENTS HAS A LIMITED IMPACT ON RACIALLY INTEGRATING PUBLIC SCHOOLS

Petitioners' *amici* propose using socioeconomic status to assign students to schools as a race-neutral alternative for reducing racial segregation in public schools. *See, e.g.*, Brief of Drs. Murphy, Rossell & Walberg as Amici Curiae Supporting Petitioner at 24-25, P.I.C.S. v. Seattle School Dist. No. 1, et al., No. 05-908 (U.S. Aug. 21, 2006) (proposing SES-based assignments as a race-neutral alternative); Brief of Pacific Legal Foundation as Amici Curiae Supporting Petitioner at 25, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Aug. 21, 2006) (same). In support of that contention, the United States in particular relies on a report issued by the Office for Civil Rights of the United States Department of Education, ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004) (hereinafter OCR, ACHIEVING DIVERSITY), touting the use of SES-based assignments to racially integrate public schools and describing five model school districts that have utilized this method. Br. of the U.S. for P.I.C.S. at 25; Br. of the U.S. for Meredith at 22. But neither *amici*'s briefs nor the OCR Report cite any evidence to demonstrate that SES-based measures actually succeed in achieving racial integration.

Proponents of SES-based school assignments argue that such programs advance important government interests independent of racial integration, such as the improvement of academic outcomes for low-income students. *See, e.g.*, OCR, ACHIEVING DIVERSITY 63-64; Richard D. Kahlenberg, *Socioeconomic School Integration*, POVERTY & RACE (Poverty & Race Research Action Council, Washington, D.C.), Sept./Oct. 2001. They also suggest that, to the extent that race and poverty are correlated, these measures may assist in reducing racial segregation in schools. *See, e.g., id.* What they do not claim is that SES-based assignments are a *substitute* for race-conscious assignments. Even Richard Kahlenberg, cited by the United States Department of Education as "one of the leading experts on the issue of socioeconomic diversity," OCR, *ACHIEVING DIVERSITY* 63, states, "class should be a supplement to rather than a replacement for race" in school assignments, contrary to the position of Petitioners and their *amici*. Richard D. Kahlenberg, *Socioeconomic School Integration - A Reply to the Responses*, POVERTY & RACE (Poverty & Race Research Action Council, Washington, D.C.), Nov./Dec. 2001 (internal quotations omitted).

The Office for Civil Rights report relied upon by the Solicitor General profiles the following five school districts as models for using SES-based assignments as a race-neutral alternative to achieving student body diversity: Charlotte-Mecklenburg, North Carolina; Wake County, North Carolina; San Francisco, California; Brandywine, Delaware; and La Crosse, Wisconsin.[4] OCR, ACHIEVING DIVERSITY 61-62, 66-

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[4] OCR, ACHIEVING DIVERSITY also mentions that Cambridge, Massachusetts employs a SES plan, but it does not describe this plan in detail. Cambridge's plan, in fact, is not race-neutral as it continues to consider race as a factor in student assignments. CAMBRIDGE PUBLIC SCHOOLS, CONTROLLED CHOICE PLAN 9 (Dec. 18, 2001), *available at*

71. An analysis of the racial composition of the schools in these districts before and after the adoption of the SES assignment plans, however, reveals that, at best, SES-based assignments provide only a partial solution to racially integrating schools.

To determine the impact of the SES assignment plan in each district profiled by the OCR report, ACHIEVING DIVERSITY, we used publicly available data from the United States Department of Education's Common Core of Data ("CCD")[5] to identify changes in the degree of segregation and hyper-segregation that resulted after each district abandoned race-conscious school assignment policies and/or implemented a SES-based assignment policy. For analytical purposes, we define a segregated school as one in which the percentage of minority enrollment deviates by more than 15% from the district-wide proportion of minority students.[6] By this measure, if a district's minority enrollment constitutes 30% of the student population, then a school with less than 15% or more than 45% minority populations is considered segregated. Following the Harvard Civil Rights

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http://www.cpsd.us/Web/PubInfo/ControlledChoice.pdf; *see also,* Sara Rimer, *Schools Try Integration By Income, Not Race*, N.Y. TIMES, May 8, 2003, at A1 (noting that Cambridge, Massachusetts, continues to use race "as a last resort" in making school assignments).

[5] The Common Core of Data, a database maintained by the United States Department of Education's National Center for Education Statistics, provides statistics on public school enrollment disaggregated by race/ethnicity. It is accessible via the internet at http://nces.ed.gov/ccd/.

[6] Standards such as these have been frequently employed in school desegregation cases. Although courts have adopted a range of deviations, a 15% deviation has been commonly used. *See, e.g., Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 7 (1st Cir. 2005); *Davis v. East Baton Rouge Parish School Bd.*, 721 F.2d 1425, 1430-31 (5th Cir. 1983); *Brinkman v. Gilligan*, 583 F.2d 243 (7th Cir. 1978).

Project's definition of "intensely segregated minority schools," Orfield & Lee, RACIAL TRANSFORMATION 6, we define a hyper-segregated school --- a measure of racial isolation --- as one with more than 90% minority enrollment.[7] In each instance, we compared the data from the year before the SES policy was adopted, to data from the 2004-2005 year, the most recent year for which CCD statistics are available.

Although touted as successes by the OCR, ACHIEVING DIVERSITY report, none of the five districts that adopted SES policies succeeded in eliminating segregation or hyper-segregation. In fact, the adoption of SES-based policies exacerbated segregation in two districts, and introduced or increased racial isolation in three districts. The following tables summarize the results:[8]

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[7] We use the Civil Rights Project's definition here, although we acknowledge that schools with more than 90% non-minority enrollment may be considered "hyper-segregated" and implicate some of the same types of harms as those with more than 90% minority enrollment.

[8] We acknowledge that this analysis does not control for demographic changes in each district. The percentage change in racial composition is likely to be small over a span of only a few years, and such an analysis is beyond the scope of this brief.

Extent of Racial Segregation			
District (Year Before the Policy Change)	Percentage of Students in Racially Segregated Schools Prior to Policy Change	Percentage of Students in Racially Segregated Schools in 2004-2005	Difference in Percentage of Students in Racially Segregated Schools
Charlotte-Mecklenburg, NC (2000-2001)	48.35%	73.64%	+25.29%
Wake County, NC (1999-2000)	25.48%	32.40%	+6.92%
San Francisco, CA (2000-2001)	7.93%	6.18%	-1.75%
Brandywine, DE (2001-2002)	12.24%	10.77%	-1.47%
La Crosse, WI (1991-1992)	10.89%	7.64%	-3.25%

Extent of Racial Isolation			
District (Year Before Policy Change)	Percentage of Students in Racially Hyper-Segregated Schools Prior to Policy Change	Percentage of Students in Racially Hyper-Segregated Schools in 2004-2005	Difference in Percentage of Students in Racially Hyper-Segregated Schools
Charlotte-Mecklenburg, NC (2000-2001)	3.30%	19.03%	+15.73%
Wake County, NC (1999-2000)	0%	0.17%	+0.17%
San Francisco, CA (2000-2001)	55.93%	63.16%	+7.23%
Brandywine, DE (2001-2002)	0%	0%	0%
La Crosse, WI (1991-1992)	0%	0%	0%

Charlotte-Mecklenburg, North Carolina: In the Charlotte-Mecklenburg district, the adoption of the SES plan coincided with a dramatic re-segregation of students.

According to OCR, *Achieving Diversity*, the Charlotte-Mecklenburg district adopted a SES assignment plan to replace race-conscious measures in August of 2001. OCR, ACHIEVING DIVERSITY 70. During the 2000-2001 school year, the year prior to the policy change, 48% of students in the district attended racially segregated schools; that number rose to an alarming 74% of students in 2004-2005. The data are similarly disturbing with respect to racial hyper-segregation. During the 2000-2001 school year, only 3% of Charlotte-Mecklenburg students attended hyper-segregated schools. That figure rose to 19% in 2004-2005, an increase of sixteen percentage points.

Wake County, North Carolina: Like the district in Charlotte-Mecklenburg, Wake County school district experienced re-segregation upon abandoning a race-conscious plan in favor of a SES-based plan. OCR, *Achieving Diversity* reports that Wake County operated under a court-ordered desegregation plan using race-conscious assignments from its formation in 1976 until it achieved unitary status in 1982. *Id.* at 66. It continued to use race-conscious measures on a voluntary basis, and in 1998 added socioeconomic status as an additional factor in school assignments. *Id.* at 66-67. Then, beginning with the 2000-2001 school year, the district abandoned the use of race-conscious policies but retained consideration of socioeconomic status. *Id.* at 67. CCD enrollment data revealed that before the policy change in 2000-2001, 25% of the Wake County student body was enrolled in racially segregated schools. After the abandonment of the race-conscious plan, the use of SES in student assignments resulted in 32% of the student body attending racially segregated schools, an increase of seven percentage points. In addition, abandoning race and relying on SES in school

assignments resulted in racial hyper-segregation in Wake County schools for the first time.

San Francisco, California: San Francisco's abandonment of race-conscious school assignments in favor of SES-based school assignments yielded mixed results: the adoption of the plan coincided with a marginal decrease in racial segregation, but a marked increase in racial isolation. Beginning with the 2001-2002 school year, San Francisco abandoned race-conscious policies and began relying in part on socioeconomic status for student assignments. *Id.* at 70. During the 2000-2001 school year, 8% of students were enrolled in racially segregated schools, and that percentage dropped to 6% for the 2004-2005 school year, suggesting a modest improvement in the percentage of students in segregated schools. The change in the degree of racial isolation, however, presents a very different picture. During the 2000-2001 school year, 56% of San Francisco's students attended hyper-segregated schools, and that figure rose to 63% for the 2004-2005 school year. Thus, abandonment of race in favor of a SES plan coincided with an increase of seven percentage points in the percentage of students attending racially hyper-segregated schools. This finding is consistent with the conclusions of the monitor of San Francisco's racial desegregation consent decree in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 284 F.3d 1163 (9th Cir. 2002), who found an increase in the number of severely re-segregated schools in each year after the SES-based program was implemented. Stuart Biegel, FINAL SUPPLEMENTAL REPORT OF THE CONSENT DECREE MONITOR REGARDING DESEGREGATION AND ACADEMIC ACHIEVEMENT 3-4 (Dec. 28, 2005). For a comprehensive discussion of re-segregation in San Francisco, *see* Brief of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area as Amicus Curiae Supporting Respondents at 12-

14, P.I.C.S. v. Seattle School Dist. No. 1, et al., No. 05-908, and Meredith v. Jefferson County Bd. of Educ., et al., No. 05-915 (U.S. Oct. 10, 2006).

Brandywine, Delaware: Brandywine has enjoyed marginal success in racially integrating schools through a SES-based plan. Brandywine is a small school district enrolling approximately 10,500 students, about 45% of whom are minority. In March 2002, the Delaware State Board of Education approved a school assignment plan using SES. OCR, ACHIEVING DIVERSITY, at 71. Adoption of this plan coincided with a modest decrease in racial segregation: in 2001-2002, 12% of Brandywine's students attended racially segregated schools, and that percentage dropped to 11% in 2004-2005. Brandywine had no racially isolated schools either before or after adoption of the SES plan.

La Crosse, Wisconsin: Like Brandywine, La Crosse enjoyed modest success in improving racial integration with a SES plan. Also like Brandywine, La Crosse is a relatively small school district, enrolling approximately 7,500 students, less than one-fifth of whom are minority. In 1992, La Crosse became one of the first school districts in the United States to use SES as a factor in school assignments. William Celis, *Income-Based School Busing Stirs Anger in Wisconsin*, N.Y. TIMES, July 16, 1992, at B12. During the 1991-1992 school year, the last year before the plan was adopted, 11% of La Crosse students attended racially segregated schools. In 2004, after twelve years of implementation, the SES-based plan reduced the percentage of students in segregated schools to 8%. Like Brandywine, La Crosse did not have any hyper-segregated schools either before or after the SES plan was adopted.

The Office for Civil Rights of the Department of Education presented these five districts as having

successfully used SES-based school assignment policies to achieve diversity in public schools. The federal government's own statistical evidence, however, does not support that claim. Two of the five districts --- Charlotte-Mecklenburg and Wake County --- experienced *increases* in the percentage of students in segregated schools. The three remaining districts --- San Francisco, Brandywine, and La Crosse --- only modestly reduced the percentage of students attending segregated schools, and none actually succeeded in eliminating segregation. And, where hyper-segregation existed --- in San Francisco, Charlotte-Mecklenburg, and Wake County --- relying on SES exacerbated rather than remedied the problem. Although it is difficult to draw broad conclusions based on a sample of five districts, these data suggest that the use of socioeconomic status for school assignments, standing alone, has not succeeded in desegregating public schools, particularly in larger districts. Based on that evidence, there is certainly no basis for suggesting --- as Petitioners and their *amici* argue --- that the use of socioeconomic status for school assignments is an adequate alternative for school districts seeking to further their compelling interest in racial integration.

II. Relying Solely on Magnet School Programs Has A Limited Impact on Racially Integrating Public Schools

Petitioners' supporters also repeatedly cite magnet schools as a race-neutral alternative that will racially integrate public schools. *See, e.g.*, Br. of Pacific Legal Foundation for P.I.C.S. at 24 (proposing magnet programs as a race-neutral alternative). The Solicitor General specifically highlights the United States Department of Education's Magnet Schools Assistance Program ("MSAP") to this end. Br. of the U.S. for Meredith at 22 n.8; Br. of the U.S. for P.I.C.S. at 25-27. Yet, the proponents of reliance on race-

neutral magnet programs again neglect to provide any empirical evidence that supports the effectiveness of this alternative. And, once again, there is little evidence that race-neutral magnet school programs alone, whatever their other merits, can achieve the level of racial integration that school districts plainly are entitled to seek. Even magnet programs receiving generous federal funding through the MSAP have had only modest success in achieving racial integration.[9] The empirical evidence demonstrates that, like SES-based assignments, magnet programs provide, at best, only a partial and insufficient approach to achieving integration. Accordingly, even one of the leading advocates for magnet programs, the Magnet Schools of America, has signed an *amicus* brief in support of the School Districts in these cases.

Under the MSAP, the Department of Education provides discretionary grants to local school districts to develop magnet schools for the purpose of, *inter alia*, eliminating, reducing, or preventing minority group isolation in public schools. 20 U.S.C. § 7231(b)(1) (2002). Grants are awarded on a competitive basis and provide significant federal funds, up to $3,000,000 per year for three years. *See* Magnet School Assistance Program, Notice Inviting Applications for New

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[9] This brief does not contest that magnet schools may present valuable benefits independent of racial integration, *see, e.g.*, 20 U.S.C. § 7231 (identifying goals of Magnet School Assistance Program to include, *inter alia*, developing innovative educational methods), and, even, that magnet schools may help achieve a measure of racial integration in some circumstances, *see, id.* (finding that magnet schools constitute a "significant part" of efforts to racially desegregate schools). As detailed *infra*, however, they cannot and should not be viewed as a complete solution to the problem of racial segregation that continues to plague so many school districts. And, magnet programs would play a more vital role in racial desegregation efforts were race-conscious student assignment policies permitted.

Awards for Fiscal Year (FY) 2001, 65 Fed. Reg. 46698-01 (July 31, 2000). In addition, grantees benefit from oversight, guidance, and technical assistance from the Department of Education throughout the term of the grant. *See* U.S. Dept. of Educ., Office of the Undersecretary, EVALUATION OF THE MAGNET SCHOOLS ASSISTANCE PROGRAM, 1998 GRANTEES (2003) at IV-4 n.5 (hereinafter, U.S. Dep't of Educ., *1998 Evaluation of MSAP*) (noting that the Department provides technical assistance to grantees experiencing difficulties in obtaining desegregation goals).

Despite these advantages, MSAP recipients have enjoyed only limited success in desegregating schools. Indeed, the Department of Education's most recent evaluation of the MSAP, released in 2003 and reviewing the 1998-2001 grant cycle, conceded that MSAP recipients "overall made only modest progress in reducing minority group isolation" in the individual magnet schools targeted by the MSAP grant, U.S. Dep't of Educ., *1998 Evaluation of MSAP*, at x, defining "minority group isolation" as the degree to which a school enrolled more than 50% minority students, *id.* at IV-1 (citing 34 C.F.R. § 280.4).[10] In 43% of the 294 schools targeted for desegregation during the grant cycle, the degree of minority group isolation (MGI) actually *increased* or remained the same. *Id.* at xiii. The remaining 57% of schools succeeded in reducing minority group isolation, but 35% of the targeted schools did so by less than five percentage points.[11] *Id.* at xii-xiii.

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[10] The limitations of this definition of "minority group isolation" are discussed *infra*.

[11] Only 17% of the targeted schools reduced MGI by five percentage points or more. 28% reduced MGI by between one and five percentage points. 7% of the targeted schools reduced MGI by less than one percentage point. *Id.* at xiii.

Perhaps most damaging to the Solicitor General's claims, the Department of Education's own report states that one probable explanation for these disappointing results was that many grantees were prohibited from using race-conscious assignment policies. Specifically, it cites "limitations placed on the use of race as a factor in selection of students" as a "potentially important factor[]" that may "help explain why more than 40 percent of desegregation-targeted schools were not successful in making progress on their desegregation objective." *Id.* at IV-11. The report further explains, "[I]n District C, for example, the project director contended that it is difficult to meet the desegregation objective when school officials are prohibited from taking race into account in making school assignments, even though administrators did consider eligibility for reduced-price lunches and reading scores instead." *Id.* at VI-13.[12]

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[12] A comparison of the efficacy of race-neutral MSAP programs to race-conscious MSAP programs is beyond the scope of this brief, largely because of the failure of the federal government to maintain and make available the data that would make such a study possible. First, there is no reliable indicator as to which MSAP recipients relied exclusively on race-neutral means. Although the Solicitor General states that since 1999, "the Department has not approved any use of race in assigning students to magnet schools in voluntary plans," Br. of the U.S. for P.I.C.S. at 26-27 n.8, there is no publicly available source to determine which recipients under mandatory court orders utilized race-conscious plans. Additionally, the Solicitor General's statement is inconsistent with press accounts reporting that even after 1999, MSAP recipients continued to use race-conscious measures. For example, the Los Angeles Unified School District and the Berkeley Unified School District --- neither of which was under a mandatory plan --- received MSAP grants for the 1998 and 2001 grant cycles yet continued to use race-conscious assignment policies. *See* Mitchell Landsberg, *L.A. Unified Sued Over Race Issues*, L.A. TIMES, Oct. 13, 2005, at 8 (reporting that the Pacific Legal Foundation filed suit against the district for using race-conscious admissions policies in their magnet schools); *Desegregation in Four Cities*, ALAMEDA TIMES-STAR (California), May 10, 2004, WL 20564473 (describing Berkeley's use of

Moreover, this evaluation, while telling, does not identify the extent to which MSAP recipients remedied actual segregation because its measure of "minority group isolation" does not measure the extent to which a targeted magnet school's minority distribution deviates from the district's minority distribution.[13] Additionally, the 1998 Evaluation does not provide any measure of racial isolation, *i.e.*, hyper-segregation, among targeted magnet schools. Nor does it say anything about the extent to which MSAP grantees addressed segregation or hyper-segregation throughout the district beyond the individual targeted schools. Given that most of the recipient-districts targeted only a handful of magnet schools, one would expect that even if an individual magnet school succeeded in becoming more diverse, it would have little impact on the majority of other schools across the district.

In light of the limited utility of the 1998 Evaluation, we conducted an independent evaluation for the most recent grant cycle for which Common Core of Data information is available, the 2001 grant cycle, which lasted from 2001 to 2004. This analysis confirms that even the most advantaged programs, those funded under the MSAP, enjoy only limited

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race as a factor in the assignment of students to public schools in a zoning program in effect from 1995 through 2004).

Second, a comparison of race-neutral MSAP programs to race-conscious MSAP programs is not the appropriate inquiry for this brief. Rather, this brief argues that magnet programs, standing alone, do not achieve racial integration. For this reason, districts should be entitled to resort to race-conscious measures, including district-wide programs that apply more broadly than magnet schools, to further progress in achieving its compelling state interest.

[13] As mentioned above, the Department of Education's evaluation limited its measure of "preventing, reducing, or eliminating minority group isolation" to determining the extent to which a school had more than 50% minority enrollment through the term of the grant.

success in reducing segregation and hyper-segregation among the magnet schools targeted by the grants. Additionally, the data suggest that the success of MSAP grants in achieving integration across the entire recipient-district, rather than on the individual magnet schools, was even more limited.

A. Impact of MSAP Grants on Reducing Segregation and Hyper-Segregation Within Individual Targeted Magnet Schools

During the 2001 grant cycle, the Department of Education awarded grants to 66 school districts nationwide, targeting a total of 333 magnet schools within those districts collectively.[14] To determine the impact of MSAP grants on the magnet schools targeted by the program, we first determined the extent to which these targeted schools reduced segregation during the course of the grant cycle, defining a "segregated" school as one that deviates by more than 15 percent from the district-wide proportion of minority students. Second, we determined the extent to which racial isolation decreased among the targeted magnet schools, defining a "hyper-segregated" school as one where minority enrollment exceeds 90%.[15] In our review of MSAP recipients, we did not control for district-wide demographic changes during the course of the grant because few districts are likely to experience significant demographic shifts during the three-year period.

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[14] A list of abstracts identifying each recipient district and each magnet school targeted within the district for the 2001 grant cycle was obtained from the United States Department of Education, Magnet Schools Assistance Program.

[15] Again, we acknowledge that schools with over 90% non-minority enrollment likewise may be considered "hyper-segregated" but do not include such schools in our definition here. *See supra* n.7.

In the first step of the analysis, evaluating the success of MSAP in reducing racial segregation within the targeted magnet schools, we used information from the Common Core of Data to compare the racial composition of each of the targeted magnet schools from 2000-2001, the year before the grants were awarded, to that of 2003-2004, the last year of the grant cycle. Due to data constraints, our analysis is limited to 313 of the total 333 targeted magnet schools.[16] We found that 124 of the targeted schools were racially segregated before the grant was awarded. Although 22 of these individual schools no longer were considered segregated at the end of the cycle, 40 of them experienced an exacerbation of the degree of segregation. Moreover, 18 schools that were not racially segregated prior to the grant became segregated by the third year of the grant. These data suggest that during the 2001 cycle, as during the 1998 cycle, only some of the targeted schools experienced gains in racial integration, while others became more segregated. The results of these findings appear in Appendix 1a.

In the second step of the analysis, evaluating the success of MSAP in reducing racial isolation within targeted magnet schools, the results likewise were mixed. Of the 92 schools that had more than 90% minority enrollment prior to the grant award, 81 continued to be hyper-segregated at the end of the cycle. In fact, 55 of those schools became even more racially isolated. Eighteen (18) additional schools were not hyper-segregated before the grant but became hyper-segregated at the end of the grant. Thus, the total number of

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[16] Fifteen schools were omitted because CCD data was absent for them. Two additional schools were omitted because conversations with the recipient districts indicated that the MSAP funds were not used for those schools. Three additional schools were omitted because during the course of the grant, they were subdivided into multiple schools, precluding a "before and after" comparison of enrollment.

targeted schools that were hyper-segregated increased during the grant term. These results appear in Appendix 1b.

In sum, the available evidence indicates that the ability of MSAP grants to eliminate segregation and hyper-segregation within targeted magnet schools is, at best, mixed.

B. Impact of MSAP Grants on Reducing Segregation and Hyper-Segregation Across the Recipient-District

To evaluate the efficacy of magnet schools as a race-neutral alternative to plans seeking broad integration of schools, examining the effect of a magnet plan on an individual school is insufficient. Rather, the success of a magnet plan in a district for these purposes must be measured by its impact on schools in the district as a whole to determine if the program has achieved the district's goal of integrating schools. To this end, we analyzed whether MSAP recipient-districts experienced reductions in segregation and racial isolation district-wide, using the same definitions for segregated and hyper-segregated schools as employed in the earlier analyses.[17]

To measure the degree of success in reducing segregation across the MSAP recipient-district, we calculated the percentage of students attending segregated schools across the entire district at the beginning of the grant cycle and compared it to the percentage of students attending segregated schools across the district at the end of the grant

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[17] Although the Department of Education awarded MSAP grants to 66 districts, comparable CCD data was available for only 57 districts. The eight New York City Community School Districts that received grants are subdivisions of the New York City Public Schools, and CCD tracks data only for the New York City Public Schools as a whole. Hamilton County, like all districts in Tennessee, does not provide CCD data broken down by race.

cycle. This analysis revealed that 27 of the 57 recipient districts experienced an *increase* in the percentage of students attending racially segregated schools, notwithstanding the adoption of the MSAP. Among those districts that succeeded in decreasing racial segregation, only 9 districts did so by more than five percentage points, *i.e.*, came more than five percentage points closer to the district-wide racial distribution. None of the districts managed to eliminate segregation through the MSAP.[18] These results appear in Appendix 2a.

Similarly, we measured the degree of success in reducing racial isolation across all of the schools within a MSAP-recipient district. We found that more than half of the MSAP recipient districts experienced an exacerbation of racial isolation during the course of the grant. Among the 57 district recipients for which CCD data are available, 35 had more students enrolled in hyper-segregated schools in 2004 than before they received the grant. In many of these districts, the increase was substantial: 10 districts experienced an increase of ten percentage points or more in the percentage of students attending hyper-segregated schools. As for the districts that experienced a reduction in the degree of racial isolation, the success was marginal: more than half improved by less than one percentage point.[19] These results appear in Appendix 2b.

The experience of the Magnet Schools Assistance Program, touted forcefully by the United States, casts serious doubt on the likelihood that magnet plans, much less ones that are not the beneficiaries of significant federal

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[18] Two school districts had no students enrolled in segregated schools either before or at the end of the grant cycle.

[19] Eight school districts had no hyper-segregated schools either before or after the grant cycle.

investment, could by themselves provide a sufficient remedy for segregation and hyper-segregation in K-12 public schools.

CONCLUSION

This Court has long recognized that "[t]here is no universal answer to the complex problems of desegregation; there is obviously no one plan that will do the job in every case." *United States v. Paradise*, 480 U.S. 149, 184 (1987) (quoting *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 439 (1968)). Although these complexities originally arose in the context of efforts to desegregate schools in cases seeking to remedy *de jure* segregation, the lack of a single approach to integrate schools applies whenever there is a governmental interest in providing integrated schools. SES-based assignments and magnet programs may present their own benefits, but they simply are not sufficient proxies to race-conscious assignments in achieving the goal of racially integrating schools. There is no less restrictive race-neutral alternative that is as effective as race-conscious measures for this goal. If eliminating racially and ethnically segregated classrooms is a compelling governmental interest, states and school districts should be permitted to carefully craft measures that flexibly use race as one of several factors to achieve that goal. For these reasons, we urge this Court to affirm the lower court decisions in both cases.

Respectfully submitted,

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APPENDIX

Appendix 1a: MSAP Impact on Targeted Magnet Schools: Segregation

			Deviation from District-Wide Distribution of Minority Students 2000-2001 (A)[1]	Deviation from District-Wide Distribution of Minority Students 2003-2004 (B)	Difference in Deviation from District-Wide Distribution During Grant Cycle (C)
AL	Selma	SCHOOL OF DISCOVERY GENESIS CENTER	2.59%	3.11%	0.52%
AL	Selma	SELMA MIDDLE CHAT ACADEMY	4.62%	3.65%	-0.97%

Blank spaces in table indicate school was not open in that year. N/A indicates change value not applicable because school was not open in both years. Bolded type indicates school met the definition of segregation (>15% deviation from district-wide enrollment levels) in at least one of the years.

[1] On subsequent pages, columns will be headed simply (A), (B), and (C).

* School name was changed prior to 2000. Name in capital letters appears in the Common Core of Data; name in parentheses appears in Department of Education records.

**School name was changed during the grant cycle (i.e. between 2000 and 2003). First name indicates the school's name in 2000, as listed on the Common Core; name following the slash (/) is the 2003 name, again as listed on CC.

			(A)	(B)	(C)
AR	Hot Springs	GARDNER MAGNET SCHOOL	4.08%	5.89%	1.81%
AR	Hot Springs	HOT SPRINGS HIGH SCHOOL	1.55%	0.53%	-1.02%
AR	Hot Springs	HOT SPRINGS MIDDLE SCHOOL	1.69%	0.81%	-0.88%
AR	Hot Springs	LANGSTON MAGNET SCHOOL	**13.11%**	**15.95%**	**2.84%**
AR	Hot Springs	OAKLAWN MAGNET SCHOOL	1.65%	0.69%	-0.96%
AR	Hot Springs	PARK MAGNET SCHOOL	**14.36%**	**18.36%**	**4.00%**
AR	Little Rock	CLOVERDALE MIDDLE SCHOOL	**20.54%**	**20.56%**	**0.02%**
AR	Little Rock	J.A. FAIR HIGH SCHOOL	9.86%	9.47%	-0.39%
AR	Little Rock	MABELVALE MIDDLE SCHOOL	9.43%	2.94%	-6.49%
AR	Little Rock	MCCLELLAN MAGNET HIGH SCHOOL	**19.58%**	**20.34%**	**0.76%**
CA	ABC	ARTESIA HIGH	0.90%	0.25%	-0.65%

			(A)	(B)	(C)
CA	ABC	ELLIOTT (WILLIAM F.) ELEMENTARY	14.97%	12.51%	-2.46%
CA	Berkeley	LECONTE ELEMENTARY	5.18%	6.86%	1.68%
CA	Berkeley	THOUSAND OAKS ELEMENTARY	8.24%	6.70%	-1.54%
CA	Berkeley	WASHINGTON ELEMENTARY	2.84%	10.75%	7.91%
CA	Desert Sands	EARHART ELMENTARY SCHOOL OF INTERNATIONAL STUDIES		**23.44%**	**N/A**
CA	Desert Sands	JOHN GLENN MIDDLE SCHOOL OF INTERNATIONAL STUDIES		**19.27%**	**N/A**
CA	Desert Sands	LA QUINTA MIDDLE	**17.12%**	**4.15%**	**-12.97%**
CA	Fresno	EDISON HIGH	3.23%	1.61%	-1.62%
CA	Fresno	FORT MILLER PREPARATORY MIDDLE	7.29%	5.02%	-2.27%

			(A)	(B)	(C)
CA	Fresno	HERBERT HOOVER HIGH	**21.50%**	**20.37%**	**-1.13%**
CA	Fresno	KING ELEMENTARY	**18.42%**	**15.07%**	**-3.35%**
CA	Fresno	MCLANE HIGH	8.37%	7.50%	-0.87%
CA	Fresno	ROOSEVELT HIGH	11.41%	10.53%	-0.88%
CA	Fresno	TERRONEZ (ELIZABETH) MIDDLE	14.32%	11.31%	-3.01%
CA	Long Beach	BARTON ELEMENTARY	14.53%	14.24%	-0.29%
CA	Long Beach	HARTE ELEMENTARY	12.56%	11.07%	-1.49%
CA	Long Beach	LINCOLN ELEMENTARY	**16.32%**	**15.61%**	**-0.71%**
CA	Long Beach	MUIR ELEMENTARY	**15.08%**	**15.24%**	**0.16%**
CA	Long Beach	SIGNAL HILL ELEMENTARY	11.08%	12.06%	0.98%
CA	Long Beach	WEBSTER ELEMENTARY	**15.82%**	**15.38%**	**-0.44%**
CA	Los Angeles	AUDUBON MIDDLE	9.82%	8.98%	-0.84%
CA	Los Angeles	BIRMINGHAM SENIOR HIGH	**15.60%**	**11.84%**	**-3.76%**
CA	Los Angeles	FAIRFAX SENIOR HIGH	4.67%	1.87%	-2.80%
CA	Los Angeles	GAGE (HENRY T.) MIDDLE	9.53%	8.84%	-0.69%

			(A)	(B)	(C)
CA	Los Angeles	GARFIELD (JAMES A.) SENIOR HIGH	9.59%	8.85%	-0.74%
CA	Los Angeles	PURCHE AVENUE ELEMENTARY	9.01%	8.68%	-0.33%
CA	Los Angeles	SEVENTY-FOURTH STREET ELEMENTARY	9.76%	9.01%	-0.75%
CA	Los Angeles	SUNLAND ELEMENTARY	**42.44%**	**37.58%**	**-4.86%**
CA	Los Angeles	TAPER AVENUE ELEMENTARY	**30.67%**	**23.67%**	**-7.00%**
CA	Los Angeles	VERDUGO HILLS SENIOR HIGH	**22.38%**	**21.15%**	**-1.23%**
CA	Los Angeles	WRIGHT (ORVILLE) MIDDLE	3.69%	2.36%	-1.33%
CA	Moreno Valley	ARMADA ELEMENTARY	11.10%	9.13%	-1.97%
CA	Moreno Valley	BEAR VALLEY ELEMENTARY	10.49%	6.67%	-3.82%
CA	Moreno Valley	BUTTERFIELD ELEMENTARY	8.33%	7.05%	-1.28%
CA	Moreno Valley	HENDRICK RANCH ELEMENTARY	7.90%	7.53%	-0.37%

			(A)	(B)	(C)
CA	Moreno Valley	HONEY HOLLOW ELEMENTARY	8.00%	4.43%	-3.57%
CA	Pasadena	BLAIR HIGH	6.67%	8.07%	1.40%
CA	Pasadena	WILLARD ELEMENTARY	5.38%	5.86%	0.48%
CA	Pasadena	WILSON MIDDLE	0.07%	0.28%	0.21%
CA	Redwood City	ADELANTE SPANISH IMMERSION ELEM.	4.15%	6.34%	2.19%
CA	Redwood City	KENNEDY (JOHN F.) MIDDLE	4.71%	0.67%	-4.04%
CA	Redwood City	McKINLEY INST of TECH	1.02%	2.45%	1.43%
CA	Redwood City	NORTH STAR ACADEMY	**37.55%**	**39.24%**	**1.69%**
CA	Redwood City	ORION ALTERNATIVE	**26.35%**	**15.10%**	**-11.25%**

			(A)	(B)	(C)
CA	San Diego	CREATIVE PERFORMING AND MEDIA ARTS MAGNET (BVTA Middle)*		12.53%	N/A
CA	San Diego	MISSION BAY SENIOR HIGH	0.37%	0.63%	0.26%
CA	San Diego	OAK PARK ELEMENTARY	**5.46%**	**15.89%**	**10.43%**
CA	San Diego	WEBSTER ELEMENTARY	**19.95%**	**22.34%**	**2.39%**
CA	San Francisco	ENOLA D. MAXWELL MIDDLE OF THE ARTS	6.62%	3.93%	-2.69%
CA	San Francisco	HARTE (BRET) ELEMENTARY	10.01%	8.67%	-1.34%
CA	San Jose	BURNETT (PETER) MIDDLE	**15.05%**	**20.34%**	**5.29%**
CA	San Jose	HOOVER (HERBERT) MIDDLE	8.79%	10.55%	1.76%
CA	San Jose	SAN JOSE HIGH ACADEMY	9.00%	11.84%	2.84%
CA	San Jose	STEINBECK MIDDLE	6.04%	7.75%	1.71%
CA	West Contra Costa	NYSTROM ELEMENTARY	**16.04%**	**13.87%**	**-2.17%**

			(A)	(B)	(C)
CA	West Contra Costa	WASHINGTON ELEMENTARY	8.44%	7.59%	-0.85%
CT	New Haven	DAVIS 21st CENTURY MAGNET ACAD. (Davis Street School)*	4.41%	3.13%	-1.28%
CT	New Haven	METROPOLITAN BUSINESS HIGH SCHOOL		3.17%	N/A
CT	New Haven	MICROSOCIETY MAGNET SCHOOL	2.28%	6.66%	4.38%
CT	New Haven	SHERIDAN COMMUNICATIONS & TECHNOLOGY MAGNET	5.31%	0.42%	-4.89%
CT	New Haven	VINCENT E. MAURO SCHOOL	10.86%	6.47%	-4.39%
FL	Broward County	CRYSTAL LAKE COMMUNITY MIDDLE	14.79%	13.34%	-1.45%
FL	Broward County	DEERFIELD BEACH MS	12.74%	11.56%	-1.18%
FL	Broward County	LYONS CREEK MS	**21.61%**	**23.16%**	**1.55%**

			(A)	(B)	(C)
FL	Broward County	POMPANO BEACH MS	10.72%	4.34%	-6.38%
FL	Escambia County	BRENTWOOD ELEMENTARY	10.27%	2.38%	-7.89%
FL	Escambia County	BRENTWOOD MS	14.94%	13.93%	-1.01%
FL	Hillsborough County	BLAKE HIGH SCHOOL	**13.07%**	**15.71%**	**2.64%**
FL	Hillsborough County	FRANKLIN MIDDLE SCHOOL	**35.01%**	**32.74%**	**-2.27%**
FL	Hillsborough County	LOCKHART ELEMENTARY MAGNET	**47.31%**	**23.99%**	**-23.32%**
FL	Hillsborough County	LOMAX ELEMENTARY SCHOOL	**47.83%**	**8.57%**	**-39.26%**
FL	Hillsborough County	WILLIAMS MAGNET SCHOOL	**20.65%**	**8.61%**	**-12.04%**

			(A)	(B)	(C)
FL	Manatee County	BALLARD ELEMENTARY SCHOOL	18.42%	20.29%	1.87%
FL	Manatee County	BLANCHE H. DAUGHTREY ELEMENTARY	44.60%	50.76%	6.16%
FL	Manatee County	FRANCES WAKELAND ELEMENTARY SCHOOL	51.04%	51.13%	0.09%
FL	Manatee County	JAMES TILLMAN ELEMENTARY SCHOOL	60.65%	59.55%	-1.10%
FL	Manatee County	LINCOLN MIDDLE SCHOOL	17.37%	14.59%	-2.78%
FL	Manatee County	LOUISE R. JOHNSON MIDDLE SCHOOL	18.04%	24.11%	6.07%
FL	Manatee County	MANATEE ELEMENTARY SCHOOL	57.37%	55.94%	-1.43%
FL	Manatee County	SARA SCOTT HARLLEE MIDDLE SCHOOL	22.51%	22.84%	0.33%

			(A)	(B)	(C)
FL	Miami-Dade	JOHN F. KENNEDY MIDDLE SCHOOL	4.64%	4.13%	-0.51%
FL	Miami-Dade	MIAMI SENIOR HIGH	8.58%	7.01%	-1.57%
FL	Miami-Dade	NORTH DADE MIDDLE	8.16%	8.96%	0.80%
FL	Pinellas County	CAMPBELL PARK ELEMENTARY SCHOOL	**37.53%**	**23.55%**	**-13.98%**
FL	Pinellas County	GULFPORT ELEMENTARY SCHOOL	**17.58%**	**23.79%**	**6.21%**
FL	Pinellas County	MAXIMO ELEMENTARY SCHOOL	**32.91%**	**30.92%**	**-1.99%**
FL	Seminole County	CROOMS ACADEMY/INFO TECHNOLOGY	**34.27%**	**12.00%**	**-22.27%**
IL	Rockford	DENNIS NATURE SCIENCE MAGNET	**8.42%**	**16.08%**	**7.66%**
IL	Rockford	ELLIS ARTS ACADEMY	**9.46%**	**25.05%**	**15.59%**
IL	Rockford	ROCKFORD SCIENCE & TECH ACADEMY	**9.99%**	**19.34%**	**9.35%**

			(A)	(B)	(C)
IL	Rockford	WASHINGTON COMMUNICATION ACAD	**10.34%**	**24.37%**	**14.03%**
IN	Fort Wayne	WHITNEY M YOUNG EARLY CHILDHOOD		8.54%	N/A
IN	Indianapolis	ARLINGTON HIGH SCHOOL	**13.27%**	**18.39%**	**5.12%**
IN	Indianapolis	CHARLES W FAIRBANKS SCH 105	**20.90%**	**21.76%**	**0.86%**
IN	Indianapolis	COLD SPRING SCHOOL	**20.78%**	**24.92%**	**4.14%**
IN	Indianapolis	EMMERICH MANUAL HIGH SCHOOL	**27.58%**	**28.52%**	**0.94%**
IN	Indianapolis	THEODORE POTTER SCHOOL 74	4.52%	9.00%	4.48%
IN	Indianapolis	THOMAS CARR HOWE ACADEMY	**12.43%**	**15.94%**	**3.51%**
LA	Rapides Parish	ALEXANDRIA MIDDLE MAGNET SCHOOL	**29.54%**	**28.15%**	**-1.39%**
LA	Rapides Parish	ARTHUR F. SMITH MIDDLE MAGNET SCHOOL	**21.99%**	**50.72%**	**28.73%**

			(A)	(B)	(C)
LA	Rapides Parish	PEABODY MAGNET HIGH SCHOOL	**48.48%**	**50.73%**	**2.25%**
LA	Rapides Parish	PEABODY MONTESSORI ELEMENTARY SCHOOL	**19.18%**	**10.51%**	**-8.67%**
LA	Rapides Parish	ROSENTHAL MONTESSORI ELEMENTARY SCHOOL	**54.04%**	**25.55%**	**-28.49%**
LA	Rapides Parish	W.O. HALL ELEMENTARY SCHOOL	**54.67%**	**51.86%**	**-2.81%**
MA	Boston	BOSTON HIGH/COMMUNITY LEADERSHIP ACAD.**	2.62%	1.03%	-1.59%
MA	Boston	CLARENCE R EDWARDS MIDDLE	6.60%	5.32%	-1.28%
MA	Boston	HYDE PARK HIGH SCHOOL	7.71%	8.93%	1.22%
MA	Springfield	ALFRED G ZANETTI	6.48%	1.77%	-4.71%
MA	Springfield	BOLAND SCHOOL (Armory Elementary)*	7.67%	1.74%	-5.93%
MA	Springfield	HIGH SCHOOL OF COMMERCE	7.83%	7.26%	-0.57%

			(A)	(B)	(C)
MA	Springfield	HOMER STREET	**13.71%**	**16.18%**	**2.47%**
MA	Springfield	KENSINGTON AVENUE	12.08%	8.01%	-4.07%
MD	Prince George's County	ERNEST EVERETT JUST MIDDLE (East Central)*		5.84%	N/A
MD	Prince George's County	JOHN HANSON MONTESSORI SCHOOL (South Montessori K-8)*	6.44%	2.28%	-4.16%
MD	Prince George's County	ROBERT GODDARD FRENCH IMMERSION-NORTH (Rogers Heights K-8 French Immersion)*		**27.71%**	N/A
MD	Prince George's County	ROBERT GODDARD MONTESSORI-NORTH (North Montessori PK-8)*		6.03%	N/A
MD	Prince George's County	BERWYN HEIGHTS ELEMENTARY		5.63%	N/A

			(A)	(B)	(C)
MD	Prince George's County	HIGHLAND PARK ELEMENTARY	9.81%	7.68%	-2.13%
MD	Prince George's County	HYATTSVILLE MIDDLE SCHOOL	5.59%	3.62%	-1.97%
MI	Kalamazoo	MAPLE STREET MAGNET (South MS Center for the Arts)*	2.69%	4.93%	2.24%
MI	Kalamazoo	NORTHGLADE MONTESSORI SCHOOL	**18.19%**	**29.26%**	**11.07%**
MI	Kalamazoo	SPRING VALLEY CENTER FOR EXPLORATION	10.66%	1.30%	-9.36%
MI	Kalamazoo	WOODS LAKE ELEMENTARY:A MAGNET CENTER FOR THE ARTS	10.72%	5.56%	-5.16%
MI	Lansing	CLCCA 6-8		**16.17%**	N/A
MI	Lansing	GRAND RIVER MAGNET SCHOOL	12.76%	11.79%	-0.97%

			(A)	(B)	(C)
MI	Lansing	PLEASANT VIEW MAGNET SCHOOL	**19.92%**	**7.15%**	**-12.77%**
MI	Lansing	VIVIAN RIDDLE MAGNET MIDDLE SCHOOL	**16.49%**	**5.21%**	**-11.28%**
MI	Lansing	WOODCREEK MAGNET SCHOOL	**31.40%**	**22.99%**	**-8.41%**
MN	Minneapolis	FRANKLIN MID.	**17.76%**	**24.69%**	**6.93%**
MN	Minneapolis	NORTH SR.	**17.52%**	**22.30%**	**4.78%**
MN	St. Paul	BATTLE CREEK MAGNET EL.	1.97%	0.34%	-1.63%
MN	St. Paul	CLEVELAND QUALITY MID.	**18.85%**	**18.31%**	**-0.54%**
MN	St. Paul	COMO PARK SR.	2.79%	11.83%	9.04%
MN	St. Paul	HARDING SR.	4.01%	3.32%	-0.69%
MN	St. Paul	HIGHLAND PARK JR.	1.13%	4.45%	3.32%
MN	St. Paul	WORLD CULTURES & LANG/MNDS PRK.	**16.82%**	**19.35%**	**2.53%**
MS	Harrison County	NORTH GULFPORT SEVENTH AND EIGHTH	**18.77%**	**21.96%**	**3.19%**

			(A)	(B)	(C)
NC	Charlotte-Mecklenburg	COCHRANE MIDDLE	**39.97%**	**34.63%**	**-5.34%**
NC	Charlotte-Mecklenburg	EASTWAY MIDDLE	**31.73%**	**29.67%**	**-2.06%**
NC	Charlotte-Mecklenburg	GARINGER HIGH	**27.03%**	**30.55%**	**3.52%**
NC	Charlotte-Mecklenburg	HARDING UNIVERSITY HIGH	**9.33%**	**22.69%**	**13.36%**
NC	Charlotte-Mecklenburg	OLYMPIC HIGH	12.88%	1.63%	-11.25%
NC	Charlotte-Mecklenburg	ROBERT F KENNEDY MIDDLE	**6.45%**	**24.01%**	**17.56%**
NC	Charlotte-Mecklenburg	SMITH LANGUAGE ACADEMY	10.53%	7.57%	-2.96%
NC	Charlotte-Mecklenburg	WEST MECKLENBURG HIGH	**12.88%**	**16.25%**	**3.37%**

			(A)	(B)	(C)
NC	Charlotte-Mecklenburg	COLLINSWOOD LANGUAGE ACDMY	**28.98%**	**25.81%**	**-3.17%**
NC	Forsyth	ASHLEY ELEMENTARY	**52.59%**	**45.97%**	**-6.62%**
NC	Forsyth	DIGGS ELEMENTARY	**53.93%**	**45.76%**	**-8.17%**
NC	Forsyth	HILL MIDDLE	**46.62%**	**44.70%**	**-1.92%**
NC	Forsyth	PAISLEY MIDDLE	**33.22%**	**12.88%**	**-20.34%**
NC	Guilford County	ERWIN MONTESSORI	**41.87%**	**8.27%**	**-33.60%**
NC	Guilford County	WALDO C. FALKENER SR ELEMENTARY		**41.99%**	N/A
NC	Guilford County	W M HAMPTON ELEMENTARY	**45.79%**	**42.55%**	**-3.24%**
NC	Guilford County	MONTLIEU AVE. ELEMENTARY	**45.50%**	**36.51%**	**-8.99%**
NC	Guilford County	PEELER OPEN ELEMENTARY	14.46%	7.99%	-6.47%
NC	Wake County	BROOKS ELEMENTARY	**16.93%**	**13.01%**	**-3.92%**

			(A)	(B)	(C)
NC	Wake County	JOYNER ELEMENTARY	**18.51%**	**18.00%**	**-0.51%**
NC	Wake County	MILLBROOK HIGH	3.08%	9.48%	6.40%
NC	Wake County	MOORE SQUARE MUSEUM MAGNET MID		14.00%	N/A
NC	Wake County	POWELL ELEMENTARY	**24.80%**	**29.00%**	**4.20%**
NE	Omaha	CONESTOGA ELEM SCHOOL	**43.14%**	**33.09%**	**-10.05%**
NE	Omaha	LOTHROP ELEM SCHOOL	**42.69%**	**43.25%**	**0.56%**
NE	Omaha	SPRING LAKE MAGNET CENTER	**13.97%**	**19.23%**	**5.26%**
NM	Albuquerque	ADAMS MIDDLE	**25.95%**	**25.98%**	**0.03%**
NM	Albuquerque	ALBUQUERQUE HIGH	**20.49%**	**15.33%**	**-5.16%**
NM	Albuquerque	BARCELONA ELEMENTARY	**31.51%**	**29.63%**	**-1.88%**
NM	Albuquerque	BEL-AIR ELEMENTARY	**14.49%**	**15.89%**	**1.40%**
NM	Albuquerque	DEL NORTE HIGH	0.19%	0.03%	-0.16%
NM	Albuquerque	DURANES ELEM	**30.21%**	**26.25%**	**-3.96%**
NM	Albuquerque	E SAN JOSE ELEM	**37.28%**	**32.48%**	**-4.80%**
NM	Albuquerque	EMERSON ELEM	**29.35%**	**28.83%**	**-0.52%**
NM	Albuquerque	GARFIELD MIDDLE	**26.85%**	**28.71%**	**1.86%**

			(A)	(B)	(C)
NM	Albuquerque	HAYES MIDDLE	**14.87%**	**20.22%**	**5.35%**
NM	Albuquerque	HIGHLAND HIGH	7.37%	10.28%	2.91%
NM	Albuquerque	LA MESA ELEMENTARY	**30.41%**	**31.92%**	**1.51%**
NM	Albuquerque	LAVALAND ELEMENTARY	**30.02%**	**29.60%**	**-0.42%**
NM	Albuquerque	MARY ANN BINFORD ELE	**30.73%**	**29.69%**	**-1.04%**
NM	Albuquerque	MC KINLEY MIDDLE	1.65%	8.05%	6.40%
NM	Albuquerque	POLK MIDDLE	**29.48%**	**27.28%**	**-2.20%**
NM	Albuquerque	RIO GRANDE HIGH	**31.07%**	**29.83%**	**-1.24%**
NM	Albuquerque	TRUMAN MIDDLE	**30.52%**	**29.85%**	**-0.67%**
NM	Albuquerque	VALLEY HIGH	14.41%	12.57%	-1.84%
NM	Albuquerque	VAN BUREN MIDDLE	**17.52%**	**21.42%**	**3.90%**
NM	Albuquerque	WEST MESA HIGH	**28.10%**	**25.24%**	**-2.86%**
NV	Clark County	BRACKEN, WALTER ELEM	**39.28%**	**24.17%**	**-15.11%**
NV	Clark County	BRIDGER MIDSCH	**32.58%**	**29.26%**	**-3.32%**
NV	Clark County	DESERT PINES HS	**32.70%**	**29.41%**	**-3.29%**
NV	Clark County	MARTIN, ROY MIDSCH	**39.02%**	**33.28%**	**-5.74%**
NV	Clark County	MILLER, SANDY SEARLES ELEM		14.20%	N/A

			(A)	(B)	(C)
NV	Clark County	RANCHO HS	**23.94%**	**20.54%**	**-3.40%**
NY	Freeport	ARCHER STREET SCHOOL	7.63%	5.87%	-1.76%
NY	Freeport	BAYVIEW AVE SCHOOL	1.93%	1.54%	-0.39%
NY	Freeport	LEO F. GIBLYN SCHOOL	1.10%	1.89%	0.79%
NY	Freeport	NEW VISIONS ES	0.90%	2.11%	1.21%
NY	NYC	BARUCH COLLEGE CAMPUS HS	**18.00%**	**17.07%**	**-0.93%**
NY	NYC	IS 230	6.67%	7.13%	0.46%
NY	NYC	IS 254	**15.00%**	**12.72%**	**-2.28%**
NY	NYC	JHS 104 SIMON BARUCH JHS	**22.16%**	**19.17%**	**-2.99%**
NY	NYC	JHS 167 R. F. WAGNER SCHOOL	**24.21%**	**19.60%**	**-4.61%**
NY	NYC	JHS 202 R. H. GODDARD JHS	1.62%	7.92%	6.30%
NY	NYC	JHS 220 J. J PERSHING JHS	5.45%	4.91%	-0.54%
NY	NYC	JHS 62 DITMAS JHS	7.37%	6.57%	-0.80%
NY	NYC	JHS 80 MOSHOLU PARKWAY JHS	6.41%	7.69%	1.28%
NY	NYC	MS 137 AMERICA'S SCH-HEROES		8.89%	N/A
NY	NYC	MS 180 GERALD R. DEVER MS	6.32%	8.81%	2.49%

			(A)	(B)	(C)
NY	NYC	MS/HS 368-INFO & NETWORK TECH SCHOOL	10.68%	11.91%	1.23%
NY	NYC	PS 10	10.70%	10.99%	0.29%
NY	NYC	PS 107 JOHN W. KIMBALL SCHOOL	**13.85%**	**22.59%**	**8.74%**
NY	NYC	PS 116 MARY L. MURRAY SCHOOL	**27.77%**	**26.81%**	**-0.96%**
NY	NYC	PS 117 J. KELD BRIARWOOD SCHOOL	2.21%	0.12%	-2.09%
NY	NYC	PS 121	14.88%	13.98%	-0.90%
NY	NYC	PS 124 OSMOND A. CHURCH SCHOOL	14.71%	13.62%	-1.09%
NY	NYC	PS 131	4.76%	6.70%	1.94%
NY	NYC	PS 146 BROOKLYN NEW SCHOOL	**20.98%**	**14.62%**	**-6.36%**
NY	NYC	PS 148 RUBY ALLEN SCHOOL	13.43%	12.42%	-1.01%
NY	NYC	PS 149 CHRISTA MCAULIFFE SCHOOL	14.02%	12.89%	-1.13%

			(A)	(B)	(C)
NY	NYC	PS 151 MARY CARTER SCHOOL	0.20%	2.29%	2.09%
NY	NYC	PS 152 GWENDOLINE N. ALLEYNE SCHOOL	9.08%	10.38%	1.30%
NY	NYC	PS 161 ARTHUR R. ASHE SCHOOL	13.51%	12.64%	-0.87%
NY	NYC	PS 164 CAESAR RODNEY	6.26%	5.99%	-0.27%
NY	NYC	PS 172 BEACON SCHOOL OF EXCELLENCE	1.37%	0.06%	-1.31%
NY	NYC	PS 174 WILLIAM SIDNEY MT SCHOOL	**21.16%**	**22.08%**	**0.92%**
NY	NYC	PS 179 THE KENSINGTON SCHOOL	12.85%	10.67%	-2.18%
NY	NYC	PS 188 MICHAEL E. BERDY SCHOOL	4.13%	0.35%	-3.78%
NY	NYC	PS 206 HORACE HARDING SCHOOL	9.61%	7.01%	-2.60%
NY	NYC	PS 212	8.73%	7.47%	-1.26%

			(A)	(B)	(C)
NY	NYC	PS 212 LADY DEBORAH MOODY SCHOOL	9.65%	10.77%	1.12%
NY	NYC	PS 212 MIDTOWN WEST SCHOOL	**26.23%**	**26.57%**	**0.34%**
NY	NYC	PS 222 C.A. SANTORA SCHOOL		7.98%	N/A
NY	NYC	PS 225 SEASIDE SCHOOL	2.52%	0.05%	-2.47%
NY	NYC	PS 228		12.35%	N/A
NY	NYC	PS 238 ANNE SULLIVAN SCHOOL	**20.78%**	**18.67%**	**-2.11%**
NY	NYC	PS 280-MOSHOLU PARKWAY	4.18%	2.78%	-1.40%
NY	NYC	PS 288 SHIRLEY TANYHILL SCHOOL	14.24%	11.59%	-2.65%
NY	NYC	PS 295	6.88%	10.15%	3.27%
NY	NYC	PS 314 LUIS MUNOZ MARIN SCHOOL	12.47%	11.45%	-1.02%
NY	NYC	PS 32 BELMONT SCHOOL	12.69%	12.70%	0.01%
NY	NYC	PS 329 SURFSIDE SCHOOL	6.95%	5.27%	-1.68%
NY	NYC	PS 33 CHELSEA SCHOOL	11.25%	11.47%	0.22%

			(A)	(B)	(C)
NY	NYC	PS 360	12.68%	13.33%	0.65%
NY	NYC	PS 40 AUGUSTUS STREET GARDENS	**32.20%**	**41.98%**	**9.78%**
NY	NYC	PS 41 GREENWICH VILLAGE SCHOOL	**45.54%**	**54.23%**	**8.69%**
NY	NYC	PS 43 JONAS BRONCK SCHOOL	**16.20%**	**14.51%**	**-1.69%**
NY	NYC	PS 50 SUNNYSIDE SCHOOL	9.97%	10.21%	0.24%
NY	NYC	PS 51 ELIAS HOWE SCHOOL	6.94%	3.73%	-3.21%
NY	NYC	PS 51-BRONX NEW SCHOOL	4.74%	0.25%	-4.49%
NY	NYC	PS 63 OLD SOUTH SCHOOL	4.51%	1.03%	-3.48%
NY	NYC	PS 69		1.64%	N/A
NY	NYC	PS 69 JACKSON HTS SCHOOL	6.67%	5.12%	-1.55%
NY	NYC	PS 90 EDNA COHEN SCHOOL	5.21%	5.43%	0.22%
NY	NYC	PS 97 HIGHLAWN SCHOOL	**31.88%**	**25.83%**	**-6.05%**
NY	Yonkers	CEDAR PLACE ES	8.50%	9.23%	0.73%
NY	Yonkers	EMERSON MS	3.34%	5.02%	1.68%

			(A)	(B)	(C)
NY	Yonkers	LINCOLN HS	3.04%	5.97%	2.93%
NY	Yonkers	MARK TWAIN MS	4.34%	3.08%	-1.26%
NY	Yonkers	MUSEUM SCHOOL 25	11.97%	12.80%	0.83%
NY	Yonkers	ROOSEVELT HS	4.42%	9.05%	4.63%
NY	Yonkers	ROSMARIE ANN SIRAGUSA SCHOOL (School 14)	3.85%	0.14%	-3.71%
PA	Philadelphia	EDMUNDS HENRY R SCH	9.54%	3.16%	-6.38%
PA	Philadelphia	FRANKFORD HS	**23.05%**	**7.06%**	**-15.99%**
PA	Philadelphia	HARDING WARREN G MS	**16.09%**	**8.43%**	**-7.66%**
PA	Philadelphia	HOPKINSON FRANCIS SCH	10.53%	0.39%	-10.14%
SC	Berkeley County	CAINHOY ELEMENTARY/MIDDLE SCHOOL	**49.52%**	**49.64%**	**0.12%**
SC	Berkeley County	HOWE HALL ELEMEMTARY SCHOOL	9.26%	9.82%	0.56%
SC	Charleston County	NORTH CHARLESTON HIGH SCHOOL	**21.06%**	**27.90%**	**6.84%**

			(A)	(B)	(C)
TX	Aldine	ALDINE ELEMENTARY (Champion)*		3.09%	N/A
TX	Aldine	HARRIS MAGNET ACADEMY	1.08%	3.66%	2.58%
TX	Aldine	HOUSTON ACADEMY (Carver)*		0.07%	N/A
TX	Aldine	NORTHWEST INTERMEDIATE (West Side)*		2.10%	N/A
TX	Aldine	SMITH MAGNET ACADEMY	7.67%	4.25%	-3.42%
TX	Aldine	STOVALL ACADEMY	2.52%	1.55%	-0.97%
TX	Ector County	AUSTIN MONTESSORI MAGNET	**15.51%**	**2.21%**	**-13.30%**
TX	Ector County	CAMERON DUAL LANG MAGNET	**24.32%**	**19.41%**	**-4.91%**
TX	Ector County	ECTOR JUNIOR HS	4.93%	8.18%	3.25%
TX	Ector County	EL MAGNET AT TRAVIS	**18.39%**	**3.16%**	**-15.23%**
TX	Ector County	EL MAGNET AT ZAVALA	**23.27%**	**14.12%**	**-9.15%**
TX	Fort Worth	DUNBAR MIDDLE	**9.63%**	**14.75%**	**5.12%**
TX	Fort Worth	ELDER MIDDLE	**18.33%**	**14.09%**	**-4.24%**
TX	Fort Worth	JAMES MIDDLE	7.72%	4.79%	-2.93%

			(A)	(B)	(C)
TX	Fort Worth	MORNINGSIDE MIDDLE	**18.37%**	**16.20%**	**-2.17%**
TX	Midland	PEASE EL	**42.78%**		N/A
TX	Midland	WASHINGTON MATH/SCIENCE INSTITUTE		1.82%	N/A
TX	Victoria	DUDLEY ELEMENTARY MAGNET SCHOOL	**20.32%**	**18.07%**	**-2.25%**
TX	Victoria	HOPKINS MAGNET ACADEMY	**27.99%**	**27.57%**	**-0.42%**
TX	Victoria	JUAN LINN MATH AND SCIENCE MAGNET	12.86%	11.09%	-1.77%
TX	Victoria	O'CONNOR ELEMENTARY MAGNET SCHOOL	**24.57%**	**22.94%**	**-1.63%**
TX	Victoria	PATTI WELDER MAGNET MIDDLE SCHOOL	12.24%	10.20%	-2.04%
TX	Victoria	SHIELDS ELEMENTARY MAGNET SCHOOL	**19.94%**	**19.33%**	**-0.61%**
TX	Wichita Falls	ALAMO EL	**19.18%**	**20.58%**	**1.40%**
TX	Wichita Falls	BURGESS EL	**29.94%**	**32.64%**	**2.70%**

			(A)	(B)	(C)
TX	Wichita Falls	HUEY EL	**18.61%**	**25.86%**	**7.25%**
TX	Wichita Falls	LAMAR EL	**27.63%**	**24.49%**	**-3.14%**
VA	Danville	GALILEO MAGNET HIGH		**44.11%**	**N/A**
VA	Danville	SCHOOLFIELD ELEM	9.47%	7.10%	-2.37%
VA	Danville	WESTWOOD MIDDLE	3.62%	5.94%	2.32%
VA	Danville	WOODBERRY HILLS ELEM.	11.97%	10.63%	-1.34%
WA	Yakima	BARGE-LINCOLN ELEMENTARY SCHOOL	**29.06%**	**22.94%**	**-6.12%**
WA	Yakima	GARFIELD ELEMENTARY SCHOOL	**25.15%**	**24.20%**	**-0.95%**
WA	Yakima	MARTIN LUTHER KING JR ELEMENTARY	**16.36%**	**19.35%**	**2.99%**
WA	Yakima	WASHINGTON MIDDLE SCHOOL	**19.13%**	**18.85%**	**-0.28%**

Appendix 1b: MSAP Impact on Targeted Magnet Schools: Hyper-Segregation

			Percentage of Minority Students 2000-2001 (A)[1]	Percentage of Minority Students 2003-2004 (B)	Difference in Percentage of Minority Students During Grant Cycle (C)
AL	Selma	SCHOOL OF DISCOVERY GENESIS CENTER	**97.47%**	**98.28%**	**0.81%**
AL	Selma	SELMA MIDDLE CHAT ACADEMY	**99.50%**	**98.83%**	**-0.67%**

Blank spaces in table indicate school was not open in that year. N/A indicates change value not applicable because school was not open in both years. Bolded type indicates school met the definition of hyper-segregation (>90% minority enrollment) in at least one of the years.

[1] On subsequent pages, columns will be headed simply (A), (B), and (C).

* School name was changed prior to 2000. Name in capital letters appears in the Common Core of Data; name in parentheses appears in Department of Education records.

**School name was changed during the grant cycle (i.e. between 2000 and 2003). First name indicates the school's name in 2000, as listed on the Common Core; name following the slash (/) is the 2003 name, again as listed on CC.

			(A)	(B)	(C)
AR	Hot Springs	GARDNER MAGNET SCHOOL	43.61%	44.60%	0.98%
AR	Hot Springs	HOT SPRINGS HIGH SCHOOL	49.25%	51.02%	1.77%
AR	Hot Springs	HOT SPRINGS MIDDLE SCHOOL	46.00%	49.67%	3.67%
AR	Hot Springs	LANGSTON MAGNET SCHOOL	60.81%	66.44%	5.63%
AR	Hot Springs	OAKLAWN MAGNET SCHOOL	49.35%	51.18%	1.83%
AR	Hot Springs	PARK MAGNET SCHOOL	33.33%	32.13%	-1.21%
AR	Little Rock	CLOVERDALE MIDDLE SCHOOL	**93.24%**	**95.45%**	**2.21%**
AR	Little Rock	J.A. FAIR HIGH SCHOOL	82.55%	84.36%	1.81%
AR	Little Rock	MABELVALE MIDDLE SCHOOL	82.12%	77.83%	-4.29%
AR	Little Rock	MCCLELLAN MAGNET HIGH SCHOOL	**92.27%**	**95.23%**	**2.95%**
CA	ABC	ARTESIA HIGH	85.43%	88.96%	3.53%

			(A)	(B)	(C)
CA	ABC	ELLIOTT (WILLIAM F.) ELEMENTARY	71.36%	76.70%	5.34%
CA	Berkeley	LECONTE ELEMENTARY	76.99%	77.58%	0.58%
CA	Berkeley	THOUSAND OAKS ELEMENTARY	80.05%	77.41%	-2.64%
CA	Berkeley	WASHINGTON ELEMENTARY	74.65%	81.46%	6.81%
CA	Desert Sands	EARHART ELMENTARY SCHOOL OF INTERNATIONAL STUDIES		46.91%	N/A
CA	Desert Sands	JOHN GLENN MIDDLE SCHOOL OF INTERNATIONAL STUDIES		51.07%	N/A
CA	Desert Sands	LA QUINTA MIDDLE	50.63%	66.20%	15.57%
CA	Fresno	EDISON HIGH	83.01%	84.15%	1.14%
CA	Fresno	FORT MILLER PREPARATORY MIDDLE	87.07%	87.56%	0.49%
CA	Fresno	HERBERT HOOVER HIGH	58.28%	62.17%	3.90%
CA	Fresno	KING ELEMENTARY	**98.20%**	**97.61%**	**-0.59%**
CA	Fresno	MCLANE HIGH	**88.14%**	**90.04%**	**1.90%**
CA	Fresno	ROOSEVELT HIGH	**91.19%**	**93.06%**	**1.88%**

			(A)	(B)	(C)
CA	Fresno	TERRONEZ (ELIZABETH) MIDDLE	**94.09%**	**93.85%**	**-0.25%**
CA	Long Beach	BARTON ELEMENTARY	**96.73%**	**97.36%**	**0.63%**
CA	Long Beach	HARTE ELEMENTARY	**94.76%**	**94.19%**	**-0.56%**
CA	Long Beach	LINCOLN ELEMENTARY	**98.52%**	**98.73%**	**0.21%**
CA	Long Beach	MUIR ELEMENTARY	**97.28%**	**98.36%**	**1.08%**
CA	Long Beach	SIGNAL HILL ELEMENTARY	**93.28%**	**95.18%**	**1.90%**
CA	Long Beach	WEBSTER ELEMENTARY	**98.02%**	**98.50%**	**0.48%**
CA	Los Angeles	AUDUBON MIDDLE	**99.95%**	**99.86%**	**-0.09%**
CA	Los Angeles	BIRMINGHAM SENIOR HIGH	74.53%	79.04%	4.50%
CA	Los Angeles	FAIRFAX SENIOR HIGH	85.46%	89.01%	3.55%
CA	Los Angeles	GAGE (HENRY T.) MIDDLE	**99.66%**	**99.72%**	**0.06%**
CA	Los Angeles	GARFIELD (JAMES A.) SENIOR HIGH	**99.72%**	**99.73%**	**0.01%**
CA	Los Angeles	PURCHE AVENUE ELEMENTARY	**99.15%**	**99.56%**	**0.42%**
CA	Los Angeles	SEVENTY-FOURTH STREET ELEMENTARY	**99.89%**	**99.89%**	**0.00%**

			(A)	(B)	(C)
CA	Los Angeles	SUNLAND ELEMENTARY	47.69%	53.30%	5.60%
CA	Los Angeles	TAPER AVENUE ELEMENTARY	59.46%	67.21%	7.75%
CA	Los Angeles	VERDUGO HILLS SENIOR HIGH	67.76%	69.73%	1.98%
CA	Los Angeles	WRIGHT (ORVILLE) MIDDLE	86.44%	88.52%	2.07%
CA	Moreno Valley	ARMADA ELEMENTARY	83.68%	88.31%	4.63%
CA	Moreno Valley	BEAR VALLEY ELEMENTARY	83.07%	85.85%	2.78%
CA	Moreno Valley	BUTTERFIELD ELEMENTARY	80.91%	86.24%	5.33%
CA	Moreno Valley	HENDRICK RANCH ELEMENTARY	80.48%	86.72%	6.24%
CA	Moreno Valley	HONEY HOLLOW ELEMENTARY	80.57%	83.61%	3.04%
CA	Pasadena	BLAIR HIGH	**91.25%**	**92.37%**	**1.13%**
CA	Pasadena	WILLARD ELEMENTARY	**89.96%**	**90.16%**	**0.20%**
CA	Pasadena	WILSON MIDDLE	84.65%	84.58%	-0.07%

			(A)	(B)	(C)
CA	Redwood City	ADELANTE SPANISH IMMERSION ELEM.	76.07%	79.73%	3.66%
CA	Redwood City	KENNEDY (JOHN F.) MIDDLE	67.21%	72.72%	5.51%
CA	Redwood City	McKINLEY INST of TECH	70.90%	75.83%	4.93%
CA	Redwood City	NORTH STAR ACADEMY	34.36%	34.15%	-0.21%
CA	Redwood City	ORION ALTERNATIVE	45.57%	58.29%	12.72%
CA	San Diego	CREATIVE PERFORMING AND MEDIA ARTS MAGNET (BVTA Middle)*		61.56%	N/A
CA	San Diego	MISSION BAY SENIOR HIGH	72.63%	73.46%	0.83%
CA	San Diego	OAK PARK ELEMENTARY	78.46%	89.97%	11.52%
CA	San Diego	WEBSTER ELEMENTARY	**92.94%**	**96.43%**	**3.49%**
CA	San Francisco	ENOLA D. MAXWELL MIDDLE OF THE ARTS	**95.64%**	**94.32%**	**-1.32%**
CA	San Francisco	HARTE (BRET) ELEMENTARY	**99.03%**	**99.07%**	**0.04%**
CA	San Jose	BURNETT (PETER) MIDDLE	**85.08%**	**91.44%**	**6.36%**
CA	San Jose	HOOVER (HERBERT) MIDDLE	78.82%	81.65%	2.83%

			(A)	(B)	(C)
CA	San Jose	SAN JOSE HIGH ACADEMY	79.03%	82.95%	3.92%
CA	San Jose	STEINBECK MIDDLE	76.07%	78.86%	2.79%
CA	West Contra Costa	NYSTROM ELEMENTARY	**99.28%**	**99.63%**	**0.35%**
CA	West Contra Costa	WASHINGTON ELEMENTARY	**91.69%**	**93.35%**	**1.66%**
CT	New Haven	DAVIS 21st CENTURY MAGNET ACAD. (Davis Street School)*	**92.79%**	**85.76%**	**-7.03%**
CT	New Haven	METROPOLITAN BUSINESS HIGH SCHOOL		85.71%	N/A
CT	New Haven	MICROSOCIETY MAGNET SCHOOL	**90.65%**	**95.54%**	**4.89%**
CT	New Haven	SHERIDAN COMMUNICATIONS & TECHNOLOGY MAGNET	**93.69%**	**89.31%**	**-4.38%**
CT	New Haven	VINCENT E. MAURO SCHOOL	**99.24%**	**95.36%**	**-3.88%**
FL	Broward County	CRYSTAL LAKE COMMUNITY MIDDLE	73.60%	77.00%	3.40%

			(A)	(B)	(C)
FL	Broward County	DEERFIELD BEACH MS	71.55%	75.22%	3.67%
FL	Broward County	LYONS CREEK MS	37.19%	40.50%	3.31%
FL	Broward County	POMPANO BEACH MS	69.53%	68.01%	-1.53%
FL	Escambia County	BRENTWOOD ELEMENTARY	52.20%	40.00%	-12.20%
FL	Escambia County	BRENTWOOD MS	56.87%	56.31%	-0.56%
FL	Hillsborough County	BLAKE HIGH SCHOOL	61.28%	67.00%	5.73%
FL	Hillsborough County	FRANKLIN MIDDLE SCHOOL	83.22%	84.03%	0.81%
FL	Hillsborough County	LOCKHART ELEMENTARY MAGNET	**95.52%**	**75.28%**	**-20.24%**
FL	Hillsborough County	LOMAX ELEMENTARY SCHOOL	**96.04%**	**59.86%**	**-36.18%**

			(A)	(B)	(C)
FL	Hillsborough County	WILLIAMS MAGNET SCHOOL	68.86%	59.90%	-8.96%
FL	Manatee County	BALLARD ELEMENTARY SCHOOL	51.63%	56.06%	4.43%
FL	Manatee County	BLANCHE H. DAUGHTREY ELEMENTARY	77.81%	86.53%	8.72%
FL	Manatee County	FRANCES WAKELAND ELEMENTARY SCHOOL	84.25%	86.90%	2.64%
FL	Manatee County	JAMES TILLMAN ELEMENTARY SCHOOL	**93.86%**	**95.32%**	**1.46%**
FL	Manatee County	LINCOLN MIDDLE SCHOOL	50.58%	50.36%	-0.22%
FL	Manatee County	LOUISE R. JOHNSON MIDDLE SCHOOL	51.25%	59.88%	8.63%
FL	Manatee County	MANATEE ELEMENTARY SCHOOL	**90.59%**	**91.71%**	**1.12%**
FL	Manatee County	SARA SCOTT HARLLEE MIDDLE SCHOOL	55.73%	58.62%	2.89%

			(A)	(B)	(C)
FL	Miami-Dade	JOHN F. KENNEDY MIDDLE SCHOOL	**93.29%**	**93.75%**	**0.46%**
FL	Miami-Dade	MIAMI SENIOR HIGH	**97.23%**	**96.62%**	**-0.61%**
FL	Miami-Dade	NORTH DADE MIDDLE	**96.81%**	**98.58%**	**1.77%**
FL	Pinellas County	CAMPBELL PARK ELEMENTARY SCHOOL	64.84%	53.35%	-11.49%
FL	Pinellas County	GULFPORT ELEMENTARY SCHOOL	44.89%	53.59%	8.70%
FL	Pinellas County	MAXIMO ELEMENTARY SCHOOL	60.22%	60.72%	0.50%
FL	Seminole County	CROOMS ACADEMY/INFO TECHNOLOGY	64.17%	44.78%	-19.40%
IL	Rockford	DENNIS NATURE SCIENCE MAGNET	57.45%	69.96%	12.51%
IL	Rockford	ELLIS ARTS ACADEMY	58.49%	78.93%	20.44%
IL	Rockford	ROCKFORD SCIENCE & TECH ACADEMY	59.02%	73.21%	14.19%

			(A)	(B)	(C)
IL	Rockford	WASHINGTON COMMUNICATION ACAD	59.37%	78.24%	18.87%
IN	Fort Wayne	WHITNEY M YOUNG EARLY CHILDHOOD		46.33%	N/A
IN	Indianapolis	ARLINGTON HIGH SCHOOL	78.81%	87.77%	8.96%
IN	Indianapolis	CHARLES W FAIRBANKS SCH 105	**86.45%**	**91.14%**	**4.69%**
IN	Indianapolis	COLD SPRING SCHOOL	**86.32%**	**94.30%**	**7.98%**
IN	Indianapolis	EMMERICH MANUAL HIGH SCHOOL	37.96%	40.86%	2.90%
IN	Indianapolis	THEODORE POTTER SCHOOL 74	70.06%	78.38%	8.31%
IN	Indianapolis	THOMAS CARR HOWE ACADEMY	53.11%	53.44%	0.33%
LA	Rapides Parish	ALEXANDRIA MIDDLE MAGNET SCHOOL	74.86%	74.25%	-0.62%
LA	Rapides Parish	ARTHUR F. SMITH MIDDLE MAGNET SCHOOL	**67.31%**	**96.82%**	**29.51%**

			(A)	(B)	(C)
LA	Rapides Parish	PEABODY MAGNET HIGH SCHOOL	**93.81%**	**96.83%**	**3.02%**
LA	Rapides Parish	PEABODY MONTESSORI ELEMENTARY SCHOOL	26.15%	56.61%	30.47%
LA	Rapides Parish	ROSENTHAL MONTESSORI ELEMENTARY SCHOOL	**99.37%**	**71.65%**	**-27.72%**
LA	Rapides Parish	W.O. HALL ELEMENTARY SCHOOL	**100.00%**	**97.96%**	**-2.04%**
MA	Boston	BOSTON HIGH/COMMUNITY LEADERSHIP ACAD.**	82.67%	85.00%	2.33%
MA	Boston	CLARENCE R EDWARDS MIDDLE	78.69%	80.71%	2.02%
MA	Boston	HYDE PARK HIGH SCHOOL	**93.01%**	**94.96%**	**1.95%**
MA	Springfield	ALFRED G ZANETTI	82.25%	81.10%	-1.15%
MA	Springfield	BOLAND SCHOOL (Armory Elementary)*	83.45%	81.07%	-2.38%
MA	Springfield	HIGH SCHOOL OF COMMERCE	83.61%	86.59%	2.98%
MA	Springfield	HOMER STREET	**89.48%**	**95.50%**	**6.02%**
MA	Springfield	KENSINGTON AVENUE	87.86%	87.33%	-0.52%

			(A)	(B)	(C)
MD	Prince George's County	ERNEST EVERETT JUST MIDDLE (East Central)*		97.80%	N/A
MD	Prince George's County	JOHN HANSON MONTESSORI SCHOOL (South Montessori K-8)*	**95.00%**	**94.24%**	**-0.76%**
MD	Prince George's County	ROBERT GODDARD FRENCH IMMERSION-NORTH (Rogers Heights K-8 French Immersion)*		64.24%	N/A
MD	Prince George's County	ROBERT GODDARD MONTESSORI-NORTH (North Montessori PK-8)*		85.93%	N/A
MD	Prince George's County	BERWYN HEIGHTS ELEMENTARY		86.32%	N/A
MD	Prince George's County	HIGHLAND PARK ELEMENTARY	**98.36%**	**99.64%**	**1.27%**

			(A)	(B)	(C)
MD	Prince George's County	HYATTSVILLE MIDDLE SCHOOL	82.97%	88.33%	5.36%
MI	Kalamazoo	MAPLE STREET MAGNET (South MS Center for the Arts)*	57.07%	63.07%	6.00%
MI	Kalamazoo	NORTHGLADE MONTESSORI SCHOOL	72.58%	87.39%	14.82%
MI	Kalamazoo	SPRING VALLEY CENTER FOR EXPLORATION	65.04%	59.44%	-5.60%
MI	Kalamazoo	WOODS LAKE ELEMENTARY:A MAGNET CENTER FOR THE ARTS	65.10%	63.69%	-1.41%
MI	Lansing	CLCCA 6-8		78.62%	N/A
MI	Lansing	GRAND RIVER MAGNET SCHOOL	71.12%	74.24%	3.11%
MI	Lansing	PLEASANT VIEW MAGNET SCHOOL	78.28%	69.60%	-8.68%
MI	Lansing	VIVIAN RIDDLE MAGNET MIDDLE SCHOOL	74.85%	67.66%	-7.19%
MI	Lansing	WOODCREEK MAGNET SCHOOL	89.76%	85.44%	-4.32%

			(A)	(B)	(C)
MN	Minneapolis	FRANKLIN MID.	**90.54%**	**97.56%**	**7.02%**
MN	Minneapolis	NORTH SR.	**90.30%**	**95.17%**	**4.87%**
MN	St. Paul	BATTLE CREEK MAGNET EL.	68.63%	70.31%	1.68%
MN	St. Paul	CLEVELAND QUALITY MID.	85.51%	88.96%	3.45%
MN	St. Paul	COMO PARK SR.	63.87%	58.82%	-5.05%
MN	St. Paul	HARDING SR.	62.65%	73.96%	11.32%
MN	St. Paul	HIGHLAND PARK JR.	67.79%	66.20%	-1.59%
MN	St. Paul	WORLD CULTURES & LANG/MNDS PRK.	**83.48%**	**90.00%**	**6.52%**
MS	Harrison County	NORTH GULFPORT SEVENTH AND EIGHTH	46.05%	51.96%	5.91%
NC	Charlotte-Mecklenburg	COCHRANE MIDDLE	**93.40%**	**92.99%**	**-0.42%**
NC	Charlotte-Mecklenburg	EASTWAY MIDDLE	85.16%	88.03%	2.87%
NC	Charlotte-Mecklenburg	GARINGER HIGH	80.46%	88.91%	8.45%

			(A)	(B)	(C)
NC	Charlotte-Mecklenburg	HARDING UNIVERSITY HIGH	62.76%	81.05%	18.29%
NC	Charlotte-Mecklenburg	OLYMPIC HIGH	66.31%	59.98%	-6.33%
NC	Charlotte-Mecklenburg	ROBERT F KENNEDY MIDDLE	59.88%	82.37%	22.49%
NC	Charlotte-Mecklenburg	SMITH LANGUAGE ACADEMY	63.96%	50.78%	-13.17%
NC	Charlotte-Mecklenburg	WEST MECKLENBURG HIGH	66.31%	74.61%	8.29%
NC	Charlotte-Mecklenburg	COLLINSWOOD LANGUAGE ACDMY	82.41%	84.17%	1.76%
NC	Forsyth	ASHLEY ELEMENTARY	**98.66%**	**96.18%**	**-2.48%**
NC	Forsyth	DIGGS ELEMENTARY	**100.00%**	**95.98%**	**-4.02%**
NC	Forsyth	HILL MIDDLE	**92.70%**	**94.92%**	**2.22%**
NC	Forsyth	PAISLEY MIDDLE	79.30%	63.10%	-16.20%

			(A)	(B)	(C)
NC	Guilford County	ERWIN MONTESSORI	**92.24%**	**62.55%**	**-29.69%**
NC	Guilford County	WALDO C. FALKENER SR ELEMENTARY		96.28%	N/A
NC	Guilford County	W M HAMPTON ELEMENTARY	**96.16%**	**96.83%**	**0.67%**
NC	Guilford County	MONTLIEU AVE. ELEMENTARY	**95.87%**	**90.79%**	**-5.09%**
NC	Guilford County	PEELER OPEN ELEMENTARY	64.83%	62.28%	-2.55%
NC	Wake County	BROOKS ELEMENTARY	54.01%	54.70%	0.69%
NC	Wake County	JOYNER ELEMENTARY	55.60%	59.70%	4.10%
NC	Wake County	MILLBROOK HIGH	40.16%	51.18%	11.01%
NC	Wake County	MOORE SQUARE MUSEUM MAGNET MID		55.69%	N/A
NC	Wake County	POWELL ELEMENTARY	61.89%	70.69%	8.81%

			(A)	(B)	(C)
NE	Omaha	CONESTOGA ELEM SCHOOL	**91.09%**	**85.52%**	**-5.56%**
NE	Omaha	LOTHROP ELEM SCHOOL	**90.63%**	**95.67%**	**5.04%**
NE	Omaha	SPRING LAKE MAGNET CENTER	61.91%	71.66%	9.75%
NM	Albuquerque	ADAMS MIDDLE	85.90%	89.56%	3.66%
NM	Albuquerque	ALBUQUERQUE HIGH	80.44%	78.92%	-1.52%
NM	Albuquerque	BARCELONA ELEMENTARY	**91.46%**	**93.21%**	**1.76%**
NM	Albuquerque	BEL-AIR ELEMENTARY	74.44%	79.48%	5.04%
NM	Albuquerque	DEL NORTE HIGH	60.14%	63.61%	3.47%
NM	Albuquerque	DURANES ELEM	**90.16%**	**89.84%**	**-0.32%**
NM	Albuquerque	E SAN JOSE ELEM	**97.23%**	**96.07%**	**-1.16%**
NM	Albuquerque	EMERSON ELEM	**89.30%**	**92.41%**	**3.11%**
NM	Albuquerque	GARFIELD MIDDLE	**86.80%**	**92.29%**	**5.49%**
NM	Albuquerque	HAYES MIDDLE	74.82%	83.80%	8.98%
NM	Albuquerque	HIGHLAND HIGH	67.32%	73.87%	6.55%
NM	Albuquerque	LA MESA ELEMENTARY	**90.36%**	**95.51%**	**5.14%**
NM	Albuquerque	LAVALAND ELEMENTARY	**89.97%**	**93.19%**	**3.22%**
NM	Albuquerque	MARY ANN BINFORD ELE	**90.68%**	**93.27%**	**2.60%**

			(A)	(B)	(C)
NM	Albuquerque	MC KINLEY MIDDLE	61.60%	71.64%	10.04%
NM	Albuquerque	POLK MIDDLE	**89.43%**	**90.87%**	**1.44%**
NM	Albuquerque	RIO GRANDE HIGH	**91.02%**	**93.42%**	**2.40%**
NM	Albuquerque	TRUMAN MIDDLE	**90.47%**	**93.44%**	**2.97%**
NM	Albuquerque	VALLEY HIGH	74.36%	76.15%	1.79%
NM	Albuquerque	VAN BUREN MIDDLE	77.47%	85.01%	7.54%
NM	Albuquerque	WEST MESA HIGH	88.05%	88.82%	0.77%
NV	Clark County	BRACKEN, WALTER ELEM	89.37%	80.17%	-9.20%
NV	Clark County	BRIDGER MIDSCH	82.67%	85.26%	2.59%
NV	Clark County	DESERT PINES HS	82.79%	85.41%	2.62%
NV	Clark County	MARTIN, ROY MIDSCH	89.11%	89.28%	0.17%
NV	Clark County	MILLER, SANDY SEARLES ELEM		70.19%	N/A
NV	Clark County	RANCHO HS	74.03%	76.53%	2.50%
NY	Freeport	ARCHER STREET SCHOOL	**92.27%**	**94.59%**	**2.33%**
NY	Freeport	BAYVIEW AVE SCHOOL	**86.57%**	**90.26%**	**3.69%**
NY	Freeport	LEO F. GIBLYN SCHOOL	83.54%	86.83%	3.29%
NY	Freeport	NEW VISIONS ES	83.74%	86.61%	2.87%

			(A)	(B)	(C)
NY	NYC	BARUCH COLLEGE CAMPUS HS	65.80%	67.74%	1.94%
NY	NYC	IS 230	**90.47%**	**91.93%**	**1.46%**
NY	NYC	IS 254	**98.80%**	**97.53%**	**-1.27%**
NY	NYC	JHS 104 SIMON BARUCH JHS	61.64%	65.63%	4.00%
NY	NYC	JHS 167 R. F. WAGNER SCHOOL	59.59%	65.20%	5.62%
NY	NYC	JHS 202 R. H. GODDARD JHS	82.18%	76.89%	-5.29%
NY	NYC	JHS 220 J. J PERSHING JHS	89.25%	89.72%	0.46%
NY	NYC	JHS 62 DITMAS JHS	**91.17%**	**91.38%**	**0.21%**
NY	NYC	JHS 80 MOSHOLU PARKWAY JHS	**90.21%**	**92.50%**	**2.29%**
NY	NYC	MS 137 AMERICA'S SCH-HEROES		**93.70%**	**N/A**
NY	NYC	MS 180 GERALD R. DEVER MS	**90.12%**	**93.62%**	**3.50%**
NY	NYC	MS/HS 368-INFO & NETWORK TECH SCHOOL	**94.48%**	**96.72%**	**2.24%**
NY	NYC	PS 10	**94.50%**	**95.80%**	**1.30%**
NY	NYC	PS 107 JOHN W. KIMBALL SCHOOL	69.95%	62.22%	-7.73%

			(A)	(B)	(C)
NY	NYC	PS 116 MARY L. MURRAY SCHOOL	56.03%	58.00%	1.97%
NY	NYC	PS 117 J. KELD BRIARWOOD SCHOOL	81.59%	84.69%	3.10%
NY	NYC	PS 121	**98.68%**	**98.79%**	**0.11%**
NY	NYC	PS 124 OSMOND A. CHURCH SCHOOL	**98.51%**	**98.43%**	**-0.08%**
NY	NYC	PS 131	**88.56%**	**91.50%**	**2.95%**
NY	NYC	PS 146 BROOKLYN NEW SCHOOL	62.82%	70.19%	7.36%
NY	NYC	PS 148 RUBY ALLEN SCHOOL	**97.23%**	**97.22%**	**-0.01%**
NY	NYC	PS 149 CHRISTA MCAULIFFE SCHOOL	**97.82%**	**97.70%**	**-0.12%**
NY	NYC	PS 151 MARY CARTER SCHOOL	83.60%	87.10%	3.49%
NY	NYC	PS 152 GWENDOLINE N. ALLEYNE SCHOOL	**92.87%**	**95.18%**	**2.31%**

			(A)	(B)	(C)
NY	NYC	PS 161 ARTHUR R. ASHE SCHOOL	**97.31%**	**97.45%**	**0.14%**
NY	NYC	PS 164 CAESAR RODNEY	77.54%	78.82%	1.29%
NY	NYC	PS 172 BEACON SCHOOL OF EXCELLENCE	85.17%	84.87%	-0.31%
NY	NYC	PS 174 WILLIAM SIDNEY MT SCHOOL	62.64%	62.72%	0.09%
NY	NYC	PS 179 THE KENSINGTON SCHOOL	70.95%	74.14%	3.19%
NY	NYC	PS 188 MICHAEL E. BERDY SCHOOL	87.93%	84.45%	-3.48%
NY	NYC	PS 206 HORACE HARDING SCHOOL	74.19%	77.79%	3.60%
NY	NYC	PS 212	**92.53%**	**92.27%**	**-0.26%**
NY	NYC	PS 212 LADY DEBORAH MOODY SCHOOL	74.15%	74.04%	-0.11%
NY	NYC	PS 212 MIDTOWN WEST SCHOOL	57.57%	58.24%	0.67%
NY	NYC	PS 222 C.A. SANTORA SCHOOL		**92.79%**	**N/A**

			(A)	(B)	(C)
NY	NYC	PS 225 SEASIDE SCHOOL	86.32%	84.76%	-1.57%
NY	NYC	PS 228		**97.16%**	**N/A**
NY	NYC	PS 238 ANNE SULLIVAN SCHOOL	63.02%	66.13%	3.11%
NY	NYC	PS 280-MOSHOLU PARKWAY	87.98%	87.59%	-0.39%
NY	NYC	PS 288 SHIRLEY TANYHILL SCHOOL	**98.04%**	**96.40%**	**-1.65%**
NY	NYC	PS 295	76.92%	74.66%	-2.26%
NY	NYC	PS 314 LUIS MUNOZ MARIN SCHOOL	**96.27%**	**96.26%**	**-0.01%**
NY	NYC	PS 32 BELMONT SCHOOL	**96.49%**	**97.50%**	**1.01%**
NY	NYC	PS 329 SURFSIDE SCHOOL	**90.75%**	**90.07%**	**-0.68%**
NY	NYC	PS 33 CHELSEA SCHOOL	**95.05%**	**96.28%**	**1.23%**
NY	NYC	PS 360	**96.47%**	**98.14%**	**1.66%**
NY	NYC	PS 40 AUGUSTUS STREET GARDENS	51.59%	42.83%	-8.76%

		—	(A)	(B)	(C)
NY	NYC	PS 41 GREENWICH VILLAGE SCHOOL	38.26%	30.58%	-7.67%
NY	NYC	PS 43 JONAS BRONCK SCHOOL	**100.00%**	**99.32%**	**-0.68%**
NY	NYC	PS 50 SUNNYSIDE SCHOOL	**93.77%**	**95.02%**	**1.25%**
NY	NYC	PS 51 ELIAS HOWE SCHOOL	**90.73%**	**88.54%**	**-2.20%**
NY	NYC	PS 51-BRONX NEW SCHOOL	79.06%	84.55%	5.50%
NY	NYC	PS 63 OLD SOUTH SCHOOL	79.29%	85.84%	6.55%
NY	NYC	PS 69		83.16%	N/A
NY	NYC	PS 69 JACKSON HTS SCHOOL	**90.47%**	**89.93%**	**-0.54%**
NY	NYC	PS 90 EDNA COHEN SCHOOL	78.59%	79.38%	0.79%
NY	NYC	PS 97 HIGHLAWN SCHOOL	51.92%	58.98%	7.06%
NY	Yonkers	CEDAR PLACE ES	**87.95%**	**90.73%**	**2.78%**
NY	Yonkers	EMERSON MS	82.78%	86.53%	3.74%
NY	Yonkers	LINCOLN HS	82.49%	87.48%	4.99%
NY	Yonkers	MARK TWAIN MS	83.79%	84.58%	0.80%
NY	Yonkers	MUSEUM SCHOOL 25	**91.42%**	**94.30%**	**2.88%**

			(A)	(B)	(C)
NY	Yonkers	ROOSEVELT HS	**83.87%**	**90.56%**	**6.69%**
NY	Yonkers	ROSMARIE ANN SIRAGUSA SCHOOL (School 14)	83.30%	81.36%	-1.94%
PA	Philadelphia	EDMUNDS HENRY R SCH	73.80%	88.55%	14.75%
PA	Philadelphia	FRANKFORD HS	60.29%	78.33%	18.04%
PA	Philadelphia	HARDING WARREN G MS	67.26%	76.96%	9.70%
PA	Philadelphia	HOPKINSON FRANCIS SCH	72.81%	85.00%	12.19%
SC	Berkeley County	CAINHOY ELEMENTARY/MIDDLE SCHOOL	**90.04%**	**91.18%**	**1.14%**
SC	Berkeley County	HOWE HALL ELEMEMTARY SCHOOL	49.78%	31.72%	-18.05%
SC	Charleston County	NORTH CHARLESTON HIGH SCHOOL	83.00%	88.15%	5.15%
TX	Aldine	ALDINE ELEMENTARY (Champion)*		**96.64%**	**N/A**
TX	Aldine	HARRIS MAGNET ACADEMY	**90.88%**	**97.20%**	**6.32%**
TX	Aldine	HOUSTON ACADEMY (Carver)*		**93.62%**	**N/A**

			(A)	(B)	(C)
TX	Aldine	NORTHWEST INTERMEDIATE (West Side)*		**95.65%**	**N/A**
TX	Aldine	SMITH MAGNET ACADEMY	**97.47%**	**97.79%**	**0.32%**
TX	Aldine	STOVALL ACADEMY	**92.32%**	**95.10%**	**2.78%**
TX	Ector County	AUSTIN MONTESSORI MAGNET	76.80%	62.39%	-14.41%
TX	Ector County	CAMERON DUAL LANG MAGNET	85.61%	84.01%	-1.60%
TX	Ector County	ECTOR JUNIOR HS	66.22%	72.78%	6.55%
TX	Ector County	EL MAGNET AT TRAVIS	79.68%	67.76%	-11.92%
TX	Ector County	EL MAGNET AT ZAVALA	84.56%	78.72%	-5.84%
TX	Fort Worth	DUNBAR MIDDLE	**88.26%**	**96.98%**	**8.72%**
TX	Fort Worth	ELDER MIDDLE	**96.96%**	**96.33%**	**-0.63%**
TX	Fort Worth	JAMES MIDDLE	86.36%	87.03%	0.67%
TX	Fort Worth	MORNINGSIDE MIDDLE	**97.00%**	**98.43%**	**1.43%**
TX	Midland	PEASE EL	**96.02%**		**N/A**
TX	Midland	WASHINGTON MATH/SCIENCE INSTITUTE		55.53%	N/A

			(A)	(B)	(C)
TX	Victoria	DUDLEY ELEMENTARY MAGNET SCHOOL	80.17%	80.90%	0.73%
TX	Victoria	HOPKINS MAGNET ACADEMY	**87.84%**	**90.39%**	**2.55%**
TX	Victoria	JUAN LINN MATH AND SCIENCE MAGNET	72.71%	73.91%	1.21%
TX	Victoria	O'CONNOR ELEMENTARY MAGNET SCHOOL	84.43%	85.76%	1.34%
TX	Victoria	PATTI WELDER MAGNET MIDDLE SCHOOL	72.09%	73.02%	0.93%
TX	Victoria	SHIELDS ELEMENTARY MAGNET SCHOOL	79.79%	82.15%	2.37%
TX	Wichita Falls	ALAMO EL	57.18%	63.80%	6.62%
TX	Wichita Falls	BURGESS EL	67.94%	75.86%	7.92%
TX	Wichita Falls	HUEY EL	56.62%	69.08%	12.46%
TX	Wichita Falls	LAMAR EL	65.63%	67.71%	2.07%
VA	Danville	GALILEO MAGNET HIGH		27.91%	N/A
VA	Danville	SCHOOLFIELD ELEM	78.09%	79.12%	1.03%

			(A)	(B)	(C)
VA	Danville	WESTWOOD MIDDLE	72.24%	77.96%	5.72%
VA	Danville	WOODBERRY HILLS ELEM.	80.60%	82.65%	2.06%
WA	Yakima	BARGE-LINCOLN ELEMENTARY SCHOOL	85.33%	85.48%	0.15%
WA	Yakima	GARFIELD ELEMENTARY SCHOOL	81.43%	86.73%	5.31%
WA	Yakima	MARTIN LUTHER KING JR ELEMENTARY	72.63%	81.89%	9.25%
WA	Yakima	WASHINGTON MIDDLE SCHOOL	75.40%	81.39%	5.99%

Appendix 2a: Impact of MSAP District-Wide --- Segregation

GRANTEE NAME/STATE	Percentage of Students in Segregated Schools 2000-200: (A)[1]	Percentage of Students in Segregated Schools 2003-2004 (B)	Difference in Percentage of Students in Segregated Schools During Grant Cycle (C)
Selma City, AL	5.48%	6.60%	**1.12%**
Hot Springs, AR	0.00%	18.17%	**18.17%**
Little Rock, AR	59.03%	56.66%	**-2.37%**
ABC, CA	0.00%	0.61%	**0.61%**
Berkeley, CA	1.73%	1.44%	**-0.29%**
Desert Sands, CA	73.49%	73.44%	**-0.05%**
Fresno, CA	39.93%	30.12%	**-9.81%**
Long Beach, CA	30.20%	30.92%	**0.72%**
Los Angeles, CA	9.91%	13.48%	**3.57%**
Moreno Valley, CA	11.92%	2.41%	**-9.51%**
Pasadena, CA	11.14%	8.43%	**-2.71%**

[1] On subsequent pages columns will be headed simply (A), (B) and (C).

	(A)	(B)	(C)
Redwood City, CA	61.08%	69.93%	**8.85%**
San Diego, CA	66.69%	68.79%	**2.10%**
San Francisco, CA	7.93%	5.32%	**-2.61%**
San Jose, CA	35.45%	42.26%	**6.81%**
West Contra Costa, CA	31.01%	14.98%	**-16.03%**
New Haven, CT	14.36%	9.84%	**-4.52%**
Broward, FL	55.13%	53.10%	**-2.03%**
Escambia County, FL	55.42%	48.87%	**-6.55%**
Hillsborough County, FL	57.31%	54.21%	**-3.10%**
Manatee County, FL	59.21%	53.05%	**-6.16%**
Miami-Dade County, FL	12.40%	12.28%	**-0.12%**
Pinellas County, FL	30.71%	44.17%	**13.46%**
Seminole County, FL	19.35%	19.87%	**0.52%**
Rockford, IL	4.92%	25.12%	**20.20%**
Ford Wayne, IN	24.45%	30.93%	**6.48%**
Indianapolis, IN	52.50%	58.16%	**5.66%**
Rapides Parish, LA	68.68%	61.17%	**-7.51%**

	(A)	(B)	(C)
Prince George's County, MD	14.75%	10.95%	**-3.80%**
Boston, MA	11.70%	12.58%	**0.88%**
Springfield, MA	15.63%	12.36%	**-3.27%**
Kalamazoo, MI	24.66%	20.39%	**-4.27%**
Lansing, MI	21.28%	14.49%	**-6.79%**
Minneapolis, MN	51.30%	55.38%	**4.08%**
St. Paul, MN	30.91%	32.47%	**1.56%**
Harrison County, MS	51.62%	62.22%	**10.60%**
Omaha, NE	49.30%	48.66%	**-0.64%**
Clark County, NV	59.11%	57.27%	**-1.84%**
Albuquerque, NM	68.69%	68.72%	**0.03%**
Freeport, NY	0.00%	0.00%	**0.00%**
Greenburgh, NY	0.00%	0.00%	**0.00%**

	(A)	(B)	(C)
**NYC district level data missing from CCD (Districts # 2, 10, 15, 20, 21, 27, 28 and 30)			
Yonkers, NY	5.63%	10.10%	**4.47%**
Charlotte Mecklenberg, NC	48.35%	72.51%	**24.16%**
Guilford, NC	61.66%	63.26%	**1.60%**
Wake County, NC	31.54%	31.93%	**0.39%**
Winston-Salem/Forsyth, NC	62.29%	60.61%	**-1.68%**
Philadelphia, PA	67.84%	20.49%	**-47.35%**
Berkeley County, SC	23.69%	21.40%	**-2.29%**
Charleston County, SC	73.97%	80.94%	**6.97%**
** Hamilton, TN data missing from CCD			
Aldine, TX	3.37%	1.32%	**-2.05%**

	(A)	(B)	(C)
Ector County, TX	22.44%	19.64%	**-2.80%**
Fort Worth, TX	57.46%	38.75%	**-18.71%**
Midland, TX	26.85%	29.41%	**2.56%**
Victoria, TX	36.92%	39.21%	**2.29%**
Wichita Falls, TX	17.67%	52.63%	**34.96%**
Danville, VA	3.54%	18.22%	**14.68%**
Yakima, WA	40.22%	38.91%	**-1.31%**

Appendix 2b: Impact of MSAP District-Wide --- Hyper-Segregation

GRANTEE NAME/STATE	Percentage of Students in Hyper-Segregated Schools 2000-2001 (A)[1]	Percentage of Students in Hyper-Segregated Schools 2003-2004 (B)	Difference in Percentage of Students in Hyper - Segregated Schools During Grant Cycle (C)
Selma City, AL	88.08%	93.40%	**5.32%**
Hot Springs, AR	0.00%	0.00%	**0.00%**
Little Rock, AR	21.51%	26.52%	**5.01%**
ABC, CA	19.03%	41.41%	**22.38%**
Berkeley, CA	1.73%	1.44%	**-0.29%**
Desert Sands, CA	29.11%	41.02%	**11.91%**
Fresno, CA	34.82%	46.58%	**11.76%**
Long Beach, CA	46.62%	48.58%	**1.96%**
Los Angeles, CA	69.91%	71.61%	**1.70%**
Moreno Valley, CA	4.69%	11.94%	**7.25%**
Pasadena, CA	44.24%	42.09%	**-2.15%**

[1] On subsequent pages columns will be headed simply (A),(B) and (C).

	(A)	(B)	(C)
Redwood City, CA	30.32%	41.13%	**10.81%**
San Diego, CA	36.96%	38.11%	**1.15%**
San Francisco, CA	55.93%	56.82%	**0.89%**
San Jose, CA	14.13%	16.63%	**2.50%**
West Contra Costa, CA	46.79%	44.51%	**-2.28%**
New Haven, CT	60.78%	55.07%	**-5.71%**
Broward, FL	16.19%	20.11%	**3.92%**
Escambia County, FL	3.31%	4.46%	**1.15%**
Hillsborough County, FL	3.41%	3.85%	**0.44%**
Manatee County, FL	2.96%	2.73%	**-0.23%**
Miami-Dade County, FL	61.79%	65.61%	**3.82%**
Pinellas County, FL	0.00%	0.00%	**0.00%**
Seminole County, FL	0.01%	0.00%	**-0.01%**
Rockford, IL	0.00%	0.00%	**0.00%**
Ford Wayne, IN	0.00%	0.00%	**0.00%**
Indianapolis, IN	4.98%	18.33%	**13.35%**
Rapides Parish, LA	10.45%	12.66%	**2.21%**

	(A)	(B)	(C)
Prince George's County, MD	63.53%	75.97%	**12.44%**
Boston, MA	48.76%	55.48%	**6.72%**
Springfield, MA	7.06%	11.64%	**4.58%**
Kalamazoo, MI	2.37%	0.00%	**-2.37%**
Lansing, MI	0.00%	0.00%	**0.00%**
Minneapolis PS, MN	25.20%	28.53%	**3.33%**
St. Paul, MN	0.41%	12.06%	**11.65%**
Harrison County, MS	0.00%	0.00%	**0.00%**
Omaha, NE	4.36%	3.64%	**-0.72%**
Clark County, NV	4.84%	6.33%	**1.49%**
Albuquerque, NM	14.44%	18.22%	**4.78%**
Freeport, NY	7.59%	25.22%	**17.63%**
Greenburgh, NY	0.00%	0.00%	**0.00%**

	(A)	(B)	(C)
**NYC district level data missing from CCD (Districts # 2, 10, 15, 20, 21, 27, 28 and 30)			
Yonkers, NY	9.24%	29.78%	**20.54%**
Charlotte Mecklenberg, NC	3.30%	11.46%	**8.16%**
Guilford, NC	9.37%	18.63%	**9.26%**
Wake County, NC	0.00%	0.20%	**0.20%**
Winston-Salem/Forsyth, NC	8.90%	11.88%	**2.98%**
Philadelphia, PA	60.63%	62.08%	**1.45%**
Berkeley County, SC	2.79%	2.44%	**-0.35%**
Charleston County, SC	24.05%	22.71%	**-1.34%**
** Hamilton, TN data missing from CCD			

	(A)	(B)	(C)
Aldine, TX	62.12%	84.23%	**22.11%**
Ector County, TX	1.02%	0.64%	**-0.38%**
Fort Worth, TX	49.65%	53.76%	**4.11%**
Midland, TX	11.13%	7.35%	**-3.78%**
Victoria, TX	0.17%	3.28%	**3.11%**
Wichita Falls, TX	0.00%	0.00%	**0.00%**
Danville, VA	3.25%	3.07%	**-0.18%**
Yakima, WA	0.46%	0.00%	**-0.46%**

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Nos. 05-908 & 05-915

Supreme Court, U.S.
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OCT 10 2006
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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Respondents.

CRYSTAL D. MEREDITH, Custodial Parent
and Next Friend of Joshua Ryan McDonald,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeal for the Ninth and Sixth Circuit, Respectively

BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION AND 20 OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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American Council on Education
American Association of Community Colleges
American Association of State Colleges and Universities
American Association of University Professors
American College Personnel Association
American Dental Education Association
Association of American Colleges and Universities
Association of American Law Schools
Association of American Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
The College Board
Council for Christian Colleges and Universities
Hispanic Association of Colleges and Universities
National Association for College Admission Counseling
National Association of College and University Business Officers
National Association of State Universities and Land Grant Colleges
National Association of Student Personnel Administrators
United Negro College Fund
The Women's College Coalition

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Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 Int'l J. of Intercultural Rel. 1 (1996) 13

INTEREST OF AMICI CURIAE[1]

Amici curiae are associations of colleges, universities, educators, trustees, and other representatives of higher education in the United States. Amici represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. American higher education institutions enroll 15 million students.

Amicus American Council on Education ("ACE") represents all sectors of American higher education. Its approximately 1800 members include a substantial majority of colleges and universities in the United States. Since its founding in 1918, ACE has sought to promote high standards in higher education, in the belief that a strong higher education system is the cornerstone of a democratic society. ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, chaired by former Presidents Ford and Carter, which issued *One-Third of a Nation* (1988), a report on minority matriculation, retention, and graduation. The Addendum contains information on the other amici on this brief.

For decades amici have worked to achieve student body diversity. While there are important differences between higher education and the elementary and secondary school settings at issue in these cases, a broad consensus exists among educators at all levels that diversity is essential to their mission and that government should defer to good-faith efforts to attain its educational benefits. Amici also believe that programs that promote racial and ethnic diversity in K-

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the amici, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

12 education advance their efforts to achieve excellence in higher education.

SUMMARY OF ARGUMENT

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court recognized the substantial educational benefits of student diversity and noted the longstanding tradition of governmental forbearance with respect to the academic judgments of administrators and faculty. For three decades, the nation's colleges and universities have pursued these educational benefits in good faith — and in reliance on the Court's rulings — by including race and ethnic origin as diversity-enhancing factors in their admissions policies.

Similar educational benefits result from the promotion of student diversity in primary and secondary schools. Social science confirms that diversity in the K-12 classroom allows students to develop their minds through exposure to new perspectives, experiences, and the give-and-take that leads to critical thought. It helps students to discovery the falsity of racial stereotypes, including the mistaken assumption that all members of a particular race share the same beliefs. It prepares them for work in integrated environments and the global economy, and it strengthens their desire and ability to participate in public affairs. The efforts of local officials to achieve these educational benefits are entitled to the same kind of deference afforded to the educators' judgments in *Bakke* and *Grutter*.

Diversity in K-12 education also advances excellence in higher education. It increases the overall pool of applicants for colleges and universities, including students with the potential to contribute most to the exchange of ideas at that level. Students who attend diverse K-12 schools are better prepared for the demands of higher education, and are more likely to attend desegregated colleges, thus counteracting the self-perpetuating nature of racial segregation. The promo-

tion of K-12 diversity is critical to the goal of attaining the benefits of diversity in higher education through means that are neutral as to race.

ARGUMENT

I. RACIAL AND ETHNIC DIVERSITY IS CRITICAL TO THE SUCCESS OF AMERICA'S EDUCATIONAL MISSION.

A. This Court Has Recognized the Educational Benefits of Student Diversity.

In upholding the compelling interest of the University of Michigan Law School in promoting student diversity, this Court recognized that substantial educational benefits follow from diversity in higher education. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). It acknowledged the extensive social science research showing that "student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Id.* at 330. The Court thus reaffirmed its earlier holding that universities have "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (Part V-C, opinion of Powell, J.); *see id.* at 272 (Brennan, White, Marshall, Blackmun, J.J., joining Part V-C).

Relying on the constitutional analysis in *Bakke*, *Grutter*, and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the nation's colleges and universities have included race and ethnicity among the traditional range of diversity-enhancing factors used in their admissions policies. *See Grutter*, 539 U.S. at 323. They have done so in the strong belief — shared by leaders of higher educational institutions of every type, faculty and administration — that student diversity, including racial and ethnic diversity, advances goals that are essential to higher education. *See, e.g.*, ACE Bd. of Direc-

tors, *Statement on Affirmative Action and Diversity* (May 25, 1995); American Ass'n of Community Colleges, *Statement on Inclusion* (Apr. 12, 1997); American Ass'n of State Colls. and Univs., *Access, Inclusion and Equity: Imperatives for America's Campuses* 32 (1997); American Ass'n of Univ. Professors, *Affirmative Action*, 83 Academe 38 (July-Aug. 1997); Council of Graduate Schools, *Building an Inclusive Graduate Community: A Statement of Principles*, 30 Communicator 1 (June 1997); Association of Am. Univs., *On the Importance of Diversity in University Admissions*, N.Y. Times, Apr. 24, 1997, at A27 (stating that without diversity "the quality and texture of . . . education . . . will be significantly diminished" and the institutions' role hindered).

B. Educators Who Seek Diversity's Benefits Are Entitled to Deference.

The Court in *Grutter* described its decision as "in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." 539 U.S. at 328 (citations omitted). While invidious racial discrimination is always subject to court intervention, *see, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950), the principle of educational autonomy, grounded in the First Amendment, gives educators broad latitude to make judgments regarding "the selection of its student body," and "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 312, 318-19).

The deference demonstrated in *Grutter* exemplifies the longstanding tradition of governmental forbearance with respect to the academic judgments of college and university administrators and faculty. From the nation's founding to the present, courts have chosen to give the institutions and their faculties more, not less, latitude to make judgments about how to conduct education. *See* Martin Trow, *Federalism in American Higher Education, in Higher Learning in*

America 1980-2000 (Arthur Levine ed., 1993); *see also* Derek Bok, *Higher Learning* 14 (1986) (American universities are accorded "greater freedom from government supervision than higher education enjoys in any major country in the world"). This Court has exercised such forbearance in the understanding that academic judgments — as these are, given diversity's link to outcome and performance — "require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (quoting *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 98-90 (1978)).

This Court has applied similar principles of deference to the complex pedagogical decisions made by local school officials. As the district court observed in *McFarland*, "Educating the community's children is not optional. It is essential to all facets of this community's growth and future." *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 851 n.32 (W.D. Ky. 2004). This Court has thus emphasized that local officials are entitled to substantial latitude in determining what kind of educational policies best suit the needs of the children in their community. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring) (describing autonomy of school districts "a vital national tradition") (citation omitted). The principles of local control and judicial deference foster "experimentation, innovation, and a healthy competition for educational excellence." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973). *See generally* Kevin Brown, *The Constitutionality of Racial Classifications in Public School Assignments*, 29 Hofstra L. Rev. 1, 68-69 (2000) (observing that Court has shown increased deference when applying constitutional rights "in light of the special environment of public education").

It is evident that the assignment plans under review reflect decades of deliberative efforts by the respective school districts to promote academic achievement through student body diversity. These efforts have entailed the collection and evaluation of cumulative information — including observation of classroom dynamics, cognitive processes, and other specialized knowledge — for which educators are best qualified. *See Ewing*, 474 U.S. at 226. It is also undisputed that the officials' efforts to achieve diversity have been made in good faith, with the intent of benefiting students of all races rather than benefiting or burdening one particular group. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1195 (9th Cir. 2005) (Kozinski, J., concurring) ("Not only does a plan that promotes the mixing of races deserve support rather than suspicion and hostility from the judiciary, but there is much to be said for returning primacy on matters of educational policy to local officials.").

Respect for the institutional competence and judgment of educators, along with a recognition of the well-established educational benefits of student diversity, counsels in favor of the same kind of deference this Court afforded the law school in *Grutter*.

C. Student Diversity is a Compelling Governmental Interest at All Levels.

As recognized in *Grutter*, 539 U.S. at 328-33, there is a broad consensus among educators in the United States that student diversity is essential to their mission. Diversity enables students to participate in the global economy. It prepares them for the rights and responsibilities of citizenship. It fosters "the examined life" by which students may define their own values and determine their futures.

While *Bakke*, *Grutter*, and *Gratz* focused on admissions programs at the university level, substantial benefits also follow from the promotion of diversity in primary and

secondary education. Amici urge the Court to recognize diversity as a compelling government interest at all levels of the nation's educational system, including public K-12 schools, so that the 63 percent of Americans who do not obtain a college degree, *see* U.S. Census Bureau, *Educational Attainment in the United States* 3 (June 2004), may realize its benefits too.

1. Diversity Promotes Academic Achievement.

In *Grutter* this Court upheld the university's judgment that "diversity will, in fact, yield educational benefits." 539 U.S. at 329. "In seeking the 'right to select those students who will contribute the most to the "robust exchange of ideas,"'" it wrote, "a university seeks 'to achieve a goal that is of paramount importance in the fulfillment of its mission.'" *Id.* at 324 (quoting *Bakke*, 438 U.S. at 313). Numerous expert reports and studies have documented the educational benefits that result from student body diversity, including the promotion of "cross-racial understanding," dismantling of racial stereotypes, enabling students "to better understand persons of different races," and making classroom discussion "livelier, more spirited, and simply more enlightening and interesting." *Id.* at 330.

It is clear that these same educational benefits result from multiracial diversity in primary and secondary schools. The social science research is extensive. *See* Janet W. Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, *in Handbook of Research on Multicultural Education* 597, 610 (James A. Banks ed., 2001); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 Ohio St. L.J. 733, 741-42 (1998); Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, *in The Consequences of School Desegregation* 103, 111, 113 (Christine H. Rossell & Willis D. Hawley eds., 1983).

Diversity advances academic achievement because it contributes to the process of learning. Education involves far more than transmission of desiccated knowledge from teacher to student. The very word "educate" derives from the Latin "educe," "to draw out." Ideas must be "utilised, or tested, or thrown into fresh combinations." Alfred North Whitehead, *The Organization of Thought, Educational and Scientific* 4 (1974). "There is only one subject-matter for education, and that is Life in all its manifestations." *Id.* at 13. *See also* John Dewey, *Democracy and Education* 5-6 (Free Press 1966) (1916) ("[O]ne has to assimilate, imaginatively, something of another's experience in order to tell him intelligently of one's own experience.").

A classroom occupied by students from diverse backgrounds exposes each to a broader array of vantage points and experiences. A precept of developmental psychology is that we learn by formulating, revising, and refining conceptions of the world. Peter B. Pufall, *The Development of Thought: On Perceiving and Knowing, in* Robert Shaw & John Bransford, *Perceiving Acting, and Knowing: Toward an Ecological Psychology* 173-74 (1977). We learn when shaken by new facts, beliefs, experiences, and viewpoints. The student assimilates the new data so that they fit the existing conception, or revises the conception to accommodate the new data. This "disequilibration," as Jean Piaget called it, and the subsequent restoration of cognitive balance, force learners to refine their thinking. Piaget taught that "disequilibration" experiences have greatest impact when they come from "social interaction." Jean Piaget, *Piaget's Theory, in* 1 *Carmichael's Manual of Child Psychology* (P.H. Mussen ed., 3d ed. Wiley 1970). A student, confronted by a peer who has a new or unexpected way of looking at the world, meets that perspective as an equal, and can explore and absorb it more fully than if merely told about it in, for example, a teacher's lecture. *See, e.g.*, Diane N. Ruble, *A Phase Model of Transitions: Cognitive and Motivational*

Consequences, 26 Advances in Experimental Social Psych. 163, 171 (1994).

These bedrock principles of developmental psychology, to which educators at all levels subscribe, teach that exposing students to a broad array of life experiences and perspectives is essential to learning. Racial and ethnic diversity allows students of all races to develop their minds through exposure to new perspectives, experiences, and the give-and-take that leads to critical thought. *See, e.g.*, Michal Kurlaender & John T. Yun, The Civil Rights Project, Harvard Univ., *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District* 2 (2002) (finding that students in diverse schools "increased their level of understanding of diverse points of view, and enhanced their desire to interact with people of different backgrounds in the future").

The educational value of diversity derives not from a false assumption that all members of one race think alike, or that race is a proxy for viewpoint. *See Grutter*, 539 U.S. at 333. Rather, diversity enables students to discover the falsity of such stereotypes: *i.e.*, that there is in fact a broad range of viewpoints and experiences within minority communities. *See* Jonathan R. Alger, *The Educational Value of Diversity*, 83 Academe 20, 21 (Jan.-Feb. 1997) ("For example, by seeing firsthand that all black or Hispanic students do not think alike, white students can overcome learned prejudices that may have arisen in part from a lack of direct exposure to individuals of other races."). At the same time, because race still affects how students are treated and perceived by others, students of different races and ethnic origins bring a broad range of experiences to the classroom. The interchange of these experiences allows students to learn from each other.

2. Diversity Prepares Students for Work in the Global Economy.

The emerging global economy requires workers who are able to function effectively in highly diverse settings. A 1999 study by the Department of Labor concluded that this skill is essential for primary and secondary school students to succeed in U.S. businesses. Secretary's Comm'n on Achieving Necessary Skills, U.S. Dep't of Labor, *Skills and Tasks for Jobs: A SCANS Report for America 2000*, at 1-3 to 1-4, 2-6 (1999). Congress has similarly found that it is in the nation's best interests to prepare "all students to function well in a technologically oriented and a highly competitive economy comprised of people from many different racial and ethnic backgrounds." No Child Left Behind Act of 2001, 20 U.S.C. § 7231(a)(4)(B) (2006).

In *Grutter* the Court acknowledged the strong preference of employers for workers whose skills have been developed "through exposure to widely diverse people, cultures, ideas, and viewpoints." 539 U.S. at 330-31. A diverse learning environment, it observed, better prepares students "for an increasingly diverse workforce and society." *Id.* at 330.

Because the majority of U.S. workers are not college graduates, the economic need for diversity in K-12 education is also critical. It is well established that public education is a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

Research shows that diversity in the K-12 classroom better prepares students to function in workplaces with diverse customers, clients, co-workers, and business partners. Students educated in integrated schools are more likely to work in integrated work environments as adults. *See* Amy S. Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Educ. Res.

531 (1994); Jomills H. Braddock II & James M. McPartland, *Social-Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. Black Stud. 267, 286 (1989); *see also* Marvin P. Dawkins & Jomills H. Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. of Negro Educ. 394, 403 (1994). "School racial composition has a strong, statistically significant, and positive effect on the likelihood that Blacks will have White coworkers and that Whites will have Black coworkers." William T. Trent, *Outcomes of School Desegregation: Findings From Longitudinal Research*, 66 J. Negro Educ. 255, 256 (1997).

3. Diversity Strengthens Democratic Values and Civic Participation.

This Court has rightly described public education as "the very foundation of good citizenship," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), and the promotion of democratic values has always been a primary objective of education in the United States. The Founders advocated common schools to bring together the nation's young and instill a sense of national community. *See* Noah Webster, *On the Education of Youth in America* (1790), *in Essays on Education in the Early Republic* 66 (Frederick Rudolph ed., 1965); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860*, at 7 (Eric Foner ed. 1983) (quoting Benjamin Rush). "An inclination join'd with an Ability to serve mankind, one's Country, Friends and Family," wrote Franklin, "should be the great Aim and End of all learning." Benjamin Franklin, *Proposals Relating to the Education of Youth in Pennsylvania* 30 (1749, reprint 1931).

In the context of higher education, the Court has "repeatedly acknowledged the overriding importance of preparing

students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter*, 539 U.S. at 331 (quoting *Plyler*, 457 U.S. at 221); *see also id.* at 324 ("Justice Powell emphasized that nothing less than the "'nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.'") (quoting *Bakke*, 438 U.S. at 313).

Like institutions of higher learning, elementary and secondary schools have a critical role in sustaining our political and cultural heritage. They serve as "a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests." *Plyler*, 457 U.S. at 221 (internal quotation marks and citations omitted); *see also Mueller v. Allen*, 463 U.S. 388, 395 (1983) ("An educated populace is essential to the political and economic health of any community . . . .").

Teachers in elementary and secondary schools seek to develop students' ability not only to understand and develop their own views on important public issues, but also to engage in the deliberative aspects of democracy. They teach children to interact with others peacefully, listen with an open mind, and persuade, so as to achieve collective solutions to public problems. Student diversity enhances the teaching of citizenship by broadening classroom discussion and exposing students to perspectives borne of different life experiences. Diversity takes students "out of the narrow circle of personal and family selfishness . . . accustoming them to the comprehension of joint interests, the management of joint concerns — habituating them to act from public or semi-public motives and guide their conduct by aims which unite instead of isolating them from one an-

other." John Stuart Mill, *On Liberty, in Three Essays* 134 (Oxford Univ. Press 1975) (1859).

In particular, this Court has noted, attending diverse schools helps to prepare "minority children for citizenship in our pluralistic society while, we may hope, teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-73 (1982). This observation finds strong support in academic research. Studies show that interpersonal interaction in desegregated schools reduces racial prejudice and stereotypes and improves students' citizenship values and their ability to succeed in a racially diverse society in their adult lives. *See* Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. Rev. 923, 951-52 (2002). Childhood interracial contact in schools encourages toleration, breaks down stereotypes, and decreases racial prejudice — particularly during students' "formative years." Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 Int'l J. of Intercultural Rel. 1, 14-15 (1996). Diverse public schools lead to a greater sense of civic and political engagement and an increased desire to live and work in multiracial settings as adults. *See* Janet W. Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature*, 17 Rev. Educ. Res. 335, 335-409 (1991); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 Soc. Forces 781 (1993); Amy S. Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* 15-18 (1994).

Diversity in the public school classroom, as well as on the college campus, eradicates the barriers that keep students from knowing others and, as a result, learning more about

themselves. It strengthens students' ability to interact with others from different backgrounds, and better prepares them to serve as future voters, jurors, school board members, and engaged participants in public affairs. It is an essential step toward realizing "the dream of one Nation, indivisible." *Grutter*, 539 U.S. at 332.

II. The Promotion of Diversity at the K-12 Level Advances Excellence in Higher Education.

Amici also support efforts to promote student diversity in K-12 education because they advance excellence in higher education.

A. K-12 Diversity Leads to Higher College Attendance.

First, diversity in K-12 schools increases the overall pool of applicants for colleges and universities, including students with the potential to "contribute the most to the 'robust exchange of ideas'" at that level. *See Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313). Research has shown that African American students who attend diverse K-12 schools have a higher college attendance rate than those who do not. Michael A. Boozer et al., *Race and School Quality Since* Brown v. Board of Education, 1992 Brooking Papers Econ. Activity (Microeconomics) 269, 301-06; Robert L. Crain & Rita E. Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performance*, 51 Soc. Educ. 81, 81 (1978). In addition, both black and white students who develop cross-racial friendships tend to have higher educational aspirations than students with only friends of same race. *See* Maureen T. Hallinan & Richard A. Williams, *Students' Characteristics and the Peer Influence Process*, 63 Soc. Educ. 122 (1990).

Studies have further documented that black and white students who attend diverse K-12 schools are more likely to attend desegregated colleges. Jomills H. Braddock II, *The*

Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis, 53 Soc. Educ. 178, 184-85 (1980). Student diversity thus helps to break down "the self-perpetuating cycle of racial segregation in America." *Id.* at 185; *see generally* James E. Ryan, *Schools, Race, & Money*, 109 Yale L.J. 249, 301-08 (1999) (summarizing research showing that "desegregation of schools leads to desegregation in later life — in college, in social situations, and on the job") (citations omitted). Because higher educational achievement correlates with higher socioeconomic status, the children of minorities who have received the educational benefits of diversity "are more apt to begin school at the same starting point as their nonminority classmates." Trent, *supra*, at 257.

B. K-12 Diversity Better Prepares Students for College.

Students who receive the educational benefits of diversity in elementary and secondary schools are also better prepared to handle the demands of higher education. As discussed in Section I, students educated in diverse learning environments are exposed to and assimilate a broader range of viewpoints and experiences. They better understand the falsity of stereotypes and are better equipped to succeed in a racially diverse society. They have a greater sense of civic and political engagement. Each of these attributes strengthens a student's capacity to learn and contribute to the college experience. Not surprisingly, studies show that students who attended diverse K-12 schools are more likely to receive higher grades in college, Crain & Mahard, *supra*, at 98-99, and to graduate, Robert L. Crain et al., *Finding Niches: Desegregated Students Sixteen Years Later* 11-12, 51 (Rand Corp. Report No. R-3243-NIE, Jan. 1985).

Indeed, some long-term benefits of diversity appear to be uniquely potent in elementary and secondary schools. In the recent litigation addressing the constitutionality of a school

assignment plan in Lynn, Massachusetts, the district court noted the benefits of interracial exposure on younger, more impressionable students. One expert in the case described racial stereotyping as "a 'habit of mind' that is difficult to break once it forms" and emphasized the need to inculcate racial tolerance before students become "locked into racialized thinking." *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 356 (D. Mass. 2003). Similarly, Justice Scalia has suggested that such lessons are best taught early in life, "in institutions ranging from Boy Scout troops to public-school kindergartens." *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting).

The effect of K-12 diversity on college performance is similar to the effects that the Court found significant in *Grutter*. Just as employers and military leaders depend on the promotion of diversity in the college setting to achieve their professional and national security objectives, *see id.* at 330-31, colleges and universities rely on lower-level schools to prepare students of all races and ethnic backgrounds for the demands of higher education. The educational benefits of student diversity are integral to that preparatory process.

C. K-12 Diversity Contributes to Realizing the Court's Vision of Full Equality.

At the conclusion of its opinion in *Grutter*, the Court observed that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." 539 U.S. at 341-42 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). Noting that the number of minority law school applicants with high grades and test scores had increased in the 25 years since *Bakke*, the Court expressed its expectation that "25 years from now" colleges and universities will no longer need race-conscious admission programs to further the compelling governmental interest in obtaining the educational benefits that follow from student body diversity. *Id.* at 343.

Amici share the Court's hope that the next generation will bring about conditions that allow diversity in higher education to be achieved through entirely race-neutral means. As Dr. King realized, however, "the arc of the moral universe is long," and there is no guarantee that, absent deliberate efforts at all levels of society, such a state of justice will materialize on its own in the next 22 years.

The reality is that even as our own nation grows increasingly diverse, its public schools are becoming increasingly segregated. In fact, virtually all of the nation's largest school districts have shown lower levels of interracial exposure since 1986, "and in some districts, these declines are sharp." *See* Erica Frankenberg & Chungmei Lee, The Civil Rights Project, Harvard Univ., *Race in American Public Schools: Rapidly Resegregating School Districts* 4 (2002). The resegregation of K-12 schools inhibits the educational benefits that result from student body diversity. Students educated in such schools simply do not stand on a level playing field with those who have learned alongside peers from other racial groups. *See Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring) (noting "current reality" that many minority children attend non-diverse schools and "encounter markedly inadequate and unequal educational opportunities").

If race-conscious admission policies in colleges and universities are to become obsolete, local officials should be granted the latitude to promote student diversity in elementary and secondary schools now. The school assignment plans under review reflect the broad consensus among educators that meaningful interracial contact leads to the dismantling of racial stereotypes, good citizenship, and the development of critical thought, whereas the ill effects of segregation are self-perpetuating. By promoting diversity in primary and secondary education, they also give colleges and universities a broader array of applicants who are equipped

to face the demands of higher education, thus easing pressure on them to attain a diverse student population through race-conscious admissions policies. *See* Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 755 (2004). Finally, the plans advance the nation's sacred commitment, now a half century old, that educational opportunity be made "available to all on equal terms." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). For these reasons, amici urge that the judgments below be affirmed.

CONCLUSION

Government has a compelling interest in attaining the educational benefits that result from student body diversity, and substantial deference is due to the judgment of educators who pursue them.

Respectfully submitted,

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APPENDIX

ADDENDUM: AMICI ON THIS BRIEF

- American Council on Education: See description at page 1 of brief.
- American Association of Community Colleges. Represents 1,100 two-year institutions.
- American Association of State Colleges and Universities. Represents over 400 state colleges and universities.
- American Association of University Professors. Represents some 44,000 faculty members and research scholars; defends academic freedom and the free exchange of ideas in higher education.
- American College Personnel Association. Serves student affairs educators and administrators.
- American Dental Education Association. Represents all of the dental schools in the United States and Canada.
- Association of American Colleges and Universities. Represents more than 1,000 accredited colleges and universities.
- Association of American Law Schools. Represents 164 law schools and shares with the American Bar Association responsibility for accrediting American law schools.
- Association of American Universities. Represents 62 public and private major research universities.
- Association of Community College Trustees. Represents over 6,000 board members who govern community, technical, and junior colleges.
- Association of Governing Boards of Universities and Colleges. Serves some 30,000 trustees, regents, and other senior administrators responsible for 1,700 colleges, universities, and independent schools.

- Association of Jesuit Colleges and Universities. Represents the 28 Jesuit institutions of higher education in the United States.
- The College Board. Represents more than 5,000 schools, colleges, universities, and other educational organizations.
- Council for Christian Colleges and Universities. Represents 129 Christian liberal arts colleges and graduate schools.
- Hispanic Association of Colleges and Universities. Represents more than 270 Hispanic-serving institutions and associate member institutions in the states and Puerto Rico.
- National Association for College Admission Counseling. Represents, and promotes ethics among, admission officers and school counselors.
- National Association of College and University Business Officers. Represents chief administrative and financial officers at more than 2,100 colleges and universities.
- National Association of State Universities and Land Grant Colleges. The nation's oldest higher education association, represents approximately 210 public universities and colleges enrolling 3.1 million students in all 50 states.
- National Association of Student Personnel Administrators. Serves student affairs administrators at all levels.
- United Negro College Fund. Provides financial aid to students and represents 39 private, accredited four-year historically black colleges and universities.
- The Women's College Coalition. Represents women's colleges and universities in the United States and Canada.

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Nos. 05-908 & 05-915

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In The
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth Circuit and the Sixth Circuit

BRIEF OF THE AMERICAN EDUCATIONAL RESEARCH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the American Educational Research Association submits this brief as *amicus curiae* in support of Respondents.[1]

Since its founding in 1916, the American Educational Research Association (AERA) has worked to advance science-based knowledge of educational systems and processes. AERA members center their efforts on ensuring that educational research addresses fundamental problems and informs practice and policy that relate to education across the life span and contexts of learning. Researchers in this field address all aspects of education from the processes of teaching and learning, curriculum development, and the social organization of schools to the effects of education on cognitive and social capacity, human development, and health and at-risk behaviors. As the paramount interdisciplinary research society in education, the AERA has embraced the role of improving the nation's education research capacity by promoting application of scientific standards, and by providing training programs, research and mentoring fellowships, and seminars on advanced statistical techniques. The work of the Association is greatly enhanced by the ongoing efforts of its more than 24,000 individual members to produce and disseminate knowledge, refine methods and measures, and stimulate translations and practical applications of research results.

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[1] All parties have filed with the Court their written consent to the filing of all amicus curiae briefs in this case. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

This Court has often employed relevant research studies in its equal protection decisions involving race,[2] and, in determining whether there are compelling governmental interests in obtaining the benefits of racial diversity and in avoiding the harms of racial isolation, the Court's decisions should be informed by credible and reliable research findings. In addition, relevant research studies directly address whether the Seattle and Jefferson County school district policies have been narrowly tailored to the interests in promoting diversity and avoiding racial isolation. The AERA has a deep-seated interest in the accurate presentation of educational research on these important questions of law. The AERA is also concerned about the possible misapplication of research evidence in these cases, including potentially misleading analyses offered in *amicus curiae* briefs.[3]

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[2] *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing Brief of American Educational Research Association, et al. as *Amici Curiae*); *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

[3] *Amicus curiae* briefs submitted on behalf of the Petitioners propose that the research evidence in this area is largely inconclusive, employs methodologies that are unsound, or shows that racial diversity offers only the slightest of positive effects. *See* Brief of David J. Armor, Abigail Thernstrom, and Stephan Thernstrom as *Amici Curiae* in Support of Petitioners [hereinafter Armor et al. Brief]; Brief of *Amici Curiae* Drs. Murphy, Rossell and Walberg in Support of Petitioners [hereinafter Murphy et al. Brief]. Unanimity is rare in any body of scientific research, but there is substantial agreement that the best available research evidence, which is composed of studies employing sound and reliable methodologies, solidly supports the Respondent school districts in these cases. Weaknesses in the arguments of Petitioners' *amici*, which include incomplete analyses of the literature, critiques of well-established scientific methodologies, and reliance on studies that are outdated or

Accordingly, the AERA provides summaries and citations to pertinent studies in this brief to assist the Court's understanding of the research evidence. The brief highlights some of the major sources of agreement among leading researchers and provides examples of the most recent studies that have direct bearing on the constitutional questions before the Court.

SUMMARY OF ARGUMENT

Since *Brown v. Board of Education,* this Court has recognized the substantial harms caused by racially segregated public schools. The Court has also acknowledged the significant benefits that result from diverse student bodies in higher education, as documented by a well-developed body of scientific knowledge. The research literature focusing on the effects of racial composition in elementary and secondary education is also extensive, and a wide range of studies demonstrate the benefits that accrue from racially diverse schools, as well as the harms associated with racial isolation and the resegregation of previously desegregated school systems.

Research studies have shown that racial diversity in elementary and secondary education leads to important short-term and long-term benefits for students of all racial backgrounds. Among these benefits are improved cross-racial understanding; the reduction of stereotyping and prejudice; gains in student achievement; a strong sense of civic engagement and willingness to live and work in diverse settings; and better preparation for higher education, work, and participation in a diverse society. Not only do diverse schools benefit students as individuals, they also promote so-

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inconsistent with more recent research, are addressed in the appropriate sections and footnotes of this brief.

cial cohesion and reinforce democratic values that this Court has long recognized as foundations for good citizenship.

Educational research conducted since *Brown* underscores the conclusion that racially isolated schools offer students unequal educational opportunities and can cause significant educational harms. Educational inequalities in racially isolated schools continue to arise in a variety of ways, including more limited educational resources, fewer qualified teachers, inadequate access to peers who can help improve achievement, and curricular disadvantages, such as fewer honors or college preparatory courses. Problems of teacher quality and high teacher turnover rates are particularly severe in racially isolated schools; recent research shows that teacher attrition can be driven by the racial composition of schools, and not simply by working conditions or associated poverty in the district.

Educational research also supports holding that the Seattle and Jefferson County school district policies are narrowly tailored to the compelling interests in promoting racial diversity, avoiding racial isolation, and maintaining desegregated schools. There are no undue burdens arising from voluntary race-conscious assignment policies, and research studies show that policies using race-neutral criteria such as socioeconomic class are less effective than race-conscious measures in achieving racial diversity. Evidence from previously desegregated school districts that have undergone resegregation suggests that race-neutral assignment policies can lead to conditions that result in significant harms.

ARGUMENT

I. EDUCATIONAL RESEARCH SUPPORTS THE COMPELLING INTERESTS IN PROMOTING RACIAL DIVERSITY, AVOIDING RACIAL ISOLATION, AND MAINTAINING DESEGREGATED SCHOOLS

Since *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), this Court has recognized the substantial harms caused by racially segregated public schools, and it has sustained the constitutional imperative to eliminate school segregation "root and branch." *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968). In *Grutter v. Bollinger*, the Court further recognized the significant benefits that accrue from student body diversity in higher education and acknowledged that diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" 539 U.S. 306, 330 (2003). Moreover, in upholding the compelling interest in diversity, the *Grutter* Court found that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Id.*

Like the benefits of diversity in higher education, the benefits of diversity in elementary and secondary education are "not theoretical but real." *Grutter*, 539 U.S. at 330. Research studies across a variety of academic disciplines and scientific methodologies have shown that racial diversity leads to important short-term and long-term benefits, including improved cross-racial understanding and the reduction of racial prejudice; positive effects on student achievement; a stronger sense of civic engagement and willingness to

live and work in diverse settings; and better preparation for higher education and employment. Research confirms that the benefits of diversity accrue not only to minority students who attend diverse schools, but to students of all racial backgrounds; moreover, not only do diverse schools benefit students as individuals, they also promote social cohesion and reinforce democratic values that this Court has long recognized as "the very foundation of good citizenship." *Brown*, 347 U.S. at 493. The Seattle and Jefferson County school districts' interests are thus especially compelling because of the broad and powerful impact of public education, for this Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter*, 539 U.S. at 331.

A. Racial Diversity Promotes Cross-Racial Understanding and Reduces Prejudice

Promoting cross-racial understanding among our nation's students is a fundamental educational objective because, as both history and scientific research confirm, racial stereotypes and prejudices are powerful sources of division that can undermine academic success, social cohesion, and community stability. Prejudice reduction in elementary and secondary education is especially important because racial prejudices and implicit biases are developed early in life and can become entrenched over time. *See* Frances E. Aboud, *Children and Prejudice* (1988); Andrew Scott Baron & Mahzarin H. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 Psychol Sci. 53 (2006).

Diverse school settings have been shown to be effective in reducing stereotypes and prejudice by promoting greater levels of contact among different groups and by fostering intergroup friendships. The literature on intergroup contact and prejudice reduction is indeed extensive, and both individual research studies and more comprehensive literature reviews and meta-analyses—statistical analyses that draw overall conclusions based on data compiled from a large number of relevant studies—confirm the positive effects of intergroup contact in reducing prejudice.[4] *See, e.g.*, Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751 (2006); Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 Ann. Rev. Psychol. 65 (1998).

A number of the most recent studies in developmental psychology illustrate that negative stereotypes and prejudice among children are influenced by racial diversity in their schools. Two studies conducted in racially and ethnically diverse schools found minimal evidence of implicit bias in examining first-graders' and fourth graders' interpretations of ambiguous interracial encounters, where subjects can reveal implicit biases by attributing negative or positive characteristics to different racial characters. Heidi McGlothlin et al., *European-American Children's Intergroup Attitudes About Peer Relationships*, 23 Brit. J. Developmental

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[4] *Amici curiae* for Petitioners rely primarily on a small number of studies conducted in the 1970s and 1980s to argue that the research literature does not support the proposition that diversity and greater intergroup contact influence racial attitudes and prejudices. *See* Armor et al. Brief, *supra*, at 26-29; Murphy et al. Brief, *supra*, at 13-14. These conclusions are contradicted by the voluminous findings on intergroup contact and prejudice contained in recent studies, literature reviews, and meta-analyses that cover decades of scientific research.

Psychol. 227 (2005) (examining bias among white students); Nancy Geyelin Margie et al., *Minority Children's Intergroup Attitudes About Peer Relationships,* 23 Brit. J. Developmental Psychol. 251 (2005) (examining bias among minority students). However, a parallel study of white children in racially homogeneous schools found evidence of stronger biases, with the children rating minorities more negatively than whites and indicating that cross-racial friendships between whites and minorities would be much less likely. Heidi McGlothlin & Melanie Killen, *Intergroup Attitudes of European American Children Attending Ethnically Homogeneous Schools,* 77 Child Dev. 1375 (2006). Taken together, the studies show that racial diversity and intergroup contact can play important roles in shaping biases in children's interactions with their peers and their formation of cross-racial friendships.

A recent meta-analysis conducted by Pettigrew and Tropp that analyzed 515 studies—drawing on over 700 samples and over 250,000 individual participants—makes clear that intergroup contact reduces prejudice and that greater intergroup contact is generally associated with lower levels of prejudice. Pettigrew & Tropp, *supra,* at 766. Their analysis also confirms that optimal conditions for intergroup contact—equal status between groups in the situation, common goals, intergroup cooperation, and the support of authorities, law, or custom—generally enhance the positive effects of intergroup contact on prejudice reduction. *Id.* (citing optimal conditions proposed in Gordon Allport, *The Nature of Prejudice* (1954), and also noting that Allport's optimal conditions are not required to produce reductions in prejudice). Pettigrew and Tropp also conclude that institutional support can be "an especially important condition for facilitating positive contact effects," *id.*, which implies that school districts should play an

active role in promoting diversity and intergroup contact in order to attain the strongest effects in reducing prejudice.

Research on the effectiveness of school programs designed to promote cross-racial understanding reinforces the importance of policies that create diverse student bodies with sufficient numbers of students of different racial groups. Programs that indirectly encourage cross-racial understanding but do not rely on the actual presence of students of different races have been found to be less effective than direct measures, such as cooperative team learning strategies, that incorporate students present in the school; research suggests that indirect programs have little impact on changing the actual behavior of students. *See* Willis D. Hawley, *Designing Schools that Use Student Diversity to Enhance Learning of All Students, in Lessons in Integration: Realizing the Promise of Racial Diversity in America's Schools* (Erica Frankenberg & Gary Orfield eds., Univ. of Virginia Press, forthcoming 2006). These findings support the logical notion that in order for the benefits of intergroup contact to accrue, there must be sufficient students of different races present in the schools to interact; they also underscore the importance of racial diversity in developing the teamwork skills that are essential for functioning in a diverse, democratic society.

B. Racial Diversity Promotes Student Achievement

As this Court recognized in *Grutter*, diverse schools promote positive learning outcomes and better prepare students for an increasingly diverse workforce and society. *Grutter*, 539 U.S. at 330. The effects of racial composition on learning outcomes in K-12 education are complicated by many variables, including students'

socioeconomic status, school resources, peer effects, and teacher quality, but both early desegregation research and recent statistical and econometric analyses that isolate the effects of racial composition on student achievement indicate that there are positive effects on minority student achievement scores arising from diverse school settings. *See generally* Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation, in Handbook of Research on Multicultural Education* (James A. Banks & Cherry A. McGee Banks eds., 2d ed. 2004); Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in Handbook of Research on Multicultural Education* 597 (James A. Banks & Cherry A. McGee Banks eds. 1995). Moreover, these gains do not come at the expense of white students, whose achievement has been shown to be unaffected by desegregation.

Early literature on desegregation from the 1970s and 1980s suggests that desegregation has had positive effects on the reading skills of black students. Schofield, *supra*, at 610-11. For instance, in their 1983 meta-analysis of 93 studies, which included over 300 samples, that examined the effects of school desegregation on black student achievement, Crain and Mahard found consistent results involving enhanced black achievement, with some variation in the extent and magnitude of these effects across districts, schools, grade level, and desegregation strategies. Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis*, 88 Am. J. Soc. 839 (1983). Their analysis further found agreement in the literature on achievement benefits at the lower grade levels, suggesting that the age at which black students enter desegregated schools is critically important. And examining a subset of 23

studies that compared the achievement of desegregated black students in kindergarten and first grade with their segregated peers, Mahard and Crain found even stronger effects (0.25 of a standard deviation, the equivalent of approximately one-third of a grade level).[5]

More recent analyses of students' test score data have confirmed positive effects on minority student achievement arising in schools with more diverse racial compositions, with no negative effects on white student achievement. *See, e.g.*, Kathryn M. Borman et al, *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools,"* 41 Am. Educ. Res. J. 601 (2004); Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *New Evidence about* Brown v. Board of Education: *The Complex Effects of School Racial Composition on Achievement* (2004), *available at* http://edpro.stanford.edu/hanushek/admin/pages/files/uploads/race.pdf; Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. Rev. 1513 (2003).

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[5] Schofield's 1995 review of the desegregation literature also found that, even with a much more limited literature on Latinos, the "data are consistent with the more extensive data regarding African American achievement" and that there was some evidence of small gains in achievement for Latinos in desegregated schools versus segregated schools. She concluded at that time, however, that additional research would be needed to draw firm conclusions. Schofield, *supra,* at 602-03. More recent analyses of Latino students in Denver have found negative impacts on average mathematics achievement scores for Latinos who were in racially isolated schools after the end of court-ordered desegregation. *See* Catherine Horn & Michal Kurlaender, *The End of* Keyes*—Resegregation Trends and Achievement in Denver Public Schools* (2006), *available at* http://www.piton.org.

For example, an econometric analysis of longitudinal data in Texas schools by Hanushek et al. tracked the scores of 200,000 students across the state and controlled for several variables, including socioeconomic status, school quality, and peers' achievement. The researchers found strong evidence that the proportion of black students in the school "negatively affects mathematics achievement growth for blacks, particularly those higher up the initial achievement distribution," which means that in racially isolated schools with high proportions of black students, there could be significant increases in achievement over time with greater diversity in the schools. The researchers further indicated that "the effects do not appear to be driven by school quality differences, achievement differences of classmates, or even the specific distribution of ability within the school." Hanushek et al., *supra,* at 23. The Hanushek et al. study also found no significant effects of black concentration on the achievement of white students.

Contrary to what is suggested by Petitioners' *amici curiae,* who rely on older studies[6] and attempt to dis-

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[6] *Amici curiae* for Petitioners rely in part on a series of 1984 studies by the National Institute of Education to minimize the effects of desegregation on achievement. Armor et al. Brief, *supra,* at 15-17; Murphy et al. Brief, *supra,* at 8-10. However, the Murphy et al. Brief omits important language stating "Desegregation increased mean reading levels" from their quotation of an NIE study, and neither brief discusses the methodological limitations that occurred because of the exclusion of a large number of studies, as indicated by the panel chair, Thomas D. Cook. *See* Thomas D. Cook, *What Have Black Children Gained Academically from School Integration?: Examination of the Meta-Analytic Evidence, in School Desegregation and Black Achievement* 39 (1984) (stating that the studies "may have unnecessarily restricted both the sample of studies and the het-

count the most recent findings, the literature on the positive effects of diversity on achievement is sufficiently strong to draw conclusions about the effectiveness of diversity in improving student achievement. *See* Armor et al. Brief, *supra,* at 12-21; Murphy et al., Brief, *supra,* at 8-13. The most recent studies are particularly compelling because of methodological improvements that allow researchers to carefully control for other factors, such as socioeconomic status, school quality, and peer effects, in order to isolate the effects of racial composition on achievement scores. Indeed, Professor Armor's own 2006 analysis of the relationship between racial composition and student achievement, which is based on national test data from the National Assessment of Educational Progress (NAEP), suggests that there is a modest positive relationship on a national level between racial composition and mathematics scores and a somewhat weaker effect for reading scores. David J. Armor & Shanea J. Watkins, School Segregation and Black Achievement: New Evidence from the 2003 NAEP (unpublished manuscript, June 2006); *see also* David J. Armor, *Lessons Learned from School Desegregation, in Generational Change: Closing the Test Score Gap* 115 (Paul Peterson ed., 2006) (finding negative relationship between black percentage in school and both black and white mathematics scores on 1996 NAEP; after adjusting for socioeconomic status, black students in schools that are 80-100 percent black score ten points lower than black students in racially diverse schools).

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erogeneity in assumptions on which the theory behind the use of multiple panelists depends").

C. Racial Diversity Promotes Long-Term Benefits for Students

A related body of desegregation literature indicates that exposure to desegregation and racial diversity in elementary and secondary education can lead to positive racial experiences as adults. *See, e.g.*, Jomills Henry Braddock, Marvin P. Dawkins & William T. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Segregation of African Americans, Whites, and Hispanics*, 31 Int'l J. Contemp. Soc. 271 (1994); Jomills H. Braddock, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 Soc. Educ. 178 (1980); James M. McPartland & Jomills H. Braddock, *Going to College and Getting a Good Job: The Impact of Desegregation, in Effective School Desegregation* (Willis D. Hawley ed. 1981).

For example, one analysis of twenty-one studies examining "perpetuation theory"—a theory proposing that racial segregation tends to repeat itself across an individual's life experiences and across institutions—found that desegregated experiences for black students typically lead to increased interaction with members of other racial groups in subsequent years. Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Educ. Res. 531 (1994). Results from the studies suggested that school desegregation had positive effects on both black and white students in that students who attended desegregated schools were more likely to function effectively in desegregated settings, such as colleges and universities, workplaces, and neighborhoods, later in life. The Wells and Crain analysis concludes that desegregation has the effect of "break[ing] the cycle of segregation and allow[ing] nonwhite students access to high-status institutions and the power-

ful social networks within them." *Id.* at 531. Thus "interracial contact in elementary or secondary school can help blacks overcome perpetual segregation." *Id.* at 552.

As one recent study on the effects of desegregated schools on long-term benefits makes clear, "desegregation made the vast majority of the students who attended these schools less racially prejudiced and more comfortable around people of different backgrounds." Amy Stuart Wells, et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* (Apr. 2004), *available at* http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf. According to Wells' study, which based its conclusions on data drawn from interviews of over 500 high school graduates who graduated from desegregated schools in 1980, educators, advocates, and policy makers who were involved in racially diverse public high schools nearly twenty-five years ago, found that "the vast majority of graduates across racial and ethnic lines greatly valued the daily cross-racial interaction in their high schools. They found it to be one of the most meaningful experiences of their lives, the best—and sometimes the only—opportunity to meet and interact regularly with people of different backgrounds." *Id.* at 6.

Analyses based on interviews of graduates of desegregated schools are reinforced by recent surveys on the attitudes of high school students toward peers who belong to other racial groups, which indicate that students of all racial groups who attend more diverse schools have higher levels of comfort with individuals from racial groups other than their own, have an increased sense of civic engagement, and have a greater desire to live and work in settings with multiple racial

groups.[7] Michal Kurlaender & John T. Yun, *Fifty Years after Brown: New Evidence of the Impact of School Racial Composition on Student Incomes*, 6 Int'l J. Educ. Pol'y Res. & Prac. 51 (2005). In the survey of students in the Jefferson County School District, 85 percent of students reported that they were prepared to work in a diverse job setting and would be prepared to do so in the future, while over 80 percent of African American students and white students reported that their school experience had helped them to work more effectively with and get along with members of other races and ethnic groups. Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville, in Diversity Challenged: Evidence on the Impact of Affirmative Action* 111, 130 (Gary Orfield with Michal Kurlaender eds. 2001).

Labor market research also shows that the benefits of a desegregated education can continue as students enter the workforce. For instance, a study of black students in Hartford, Connecticut concluded that students who attended desegregated schools were more likely to have white-collar jobs and that the men were more likely to have completed more years of education than

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[7] *Amici curiae* for Petitioners criticize the methodology of survey research in the field for lacking control groups containing students in non-diverse schools against which responses by students in diverse schools could be measured. *See* Armor et al. Brief, *supra*, at 29. Employing control groups, while essential in experimental studies that use treatment groups and control groups to measure the effects of a particular treatment, is not mandated in other forms of scientific inquiry such as survey research, which is commonly used in a wide range of social science disciplines; nor does the absence of a control group, in and of itself, make a study invalid or unsound in any field of science. Experimental design is only one among many robust scientific methodologies used in the social sciences, and the research that *amici* themselves cite includes non-experimental studies.

comparable students who had attended segregated schools. Robert L. Crain & Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment* (1985). A more recent analysis on the long-term labor market implications of school resource equalization before *Brown* and school desegregation after *Brown* found that desegregation had significant, positive effects on the incomes of southern blacks (as well as on their high school completion rates) after the implementation of desegregation. Orley Ashenfelter, William J. Collins & Albert Yoon, *Evaluating the Role of Brown vs. Board of Education in School Equalization, Desegregation, and the Income of African Americans* 23-24 (Princeton Law & Public Affairs Working Paper Series, Paper No. 05-001, 2005), *available at* http://ssrn.com/abstract=747485.

D. Racial Isolation is Associated with Unequal Educational Opportunities and a Variety of Harms

In *Brown*, this Court acknowledged the psychological and educational harms caused by public school segregation. 347 U.S. at 494 & n.11. The large volume of research conducted since *Brown* has underscored this conclusion and has shown that segregated, predominantly minority schools offer students unequal and inferior educational opportunities. *See generally School Resegregation: Must the South Turn Back* (John Charles Boger & Gary Orfield eds., 2005); Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation* (2006), *available at* http://www.civilrightsproject.harvard.edu.

Psychological harms continue to be associated with racial isolation. For example, recent survey research focusing on Southern California middle school students (including over 500 black students and over 900 Latino

students) found that black and Latino students in less diverse schools felt less safe in school, were more harassed by peers, felt more lonely, and had lower self-worth than comparable students in more diverse schools, even when controlling for classroom differences in academic engagement. Jaana Juvonen, Adrienne Nishina & Sandra Graham, *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools,* 17 Psychol. Sci. 393 (2006).

Educational inequalities in racially isolated schools arise in several ways, such as limited educational resources (whether measured by class size, facilities, or per-pupil spending), fewer qualified teachers, and inadequate access to peers who can help improve achievement. Curricular disadvantages, such as fewer honors, college preparatory, and Advanced Placement courses, along with within-school tracking and inadequate resources for counseling, only exacerbate the degree of inequality and limit opportunities for higher education. *See* John T. Yun & Jose F. Moreno, *College Access, K-12 Concentrated Disadvantage, and the Next 25 Years of Education Research,* 35 Educ. Researcher, Jan.-Feb. 2006, at 12. Consequently, students in predominantly minority schools are also less likely to graduate from college, even after taking into account prior test scores and socioeconomic status. *See* Eric M. Camburn, *College Completion among Students from High Schools Located in Large Metropolitan Areas,* 98 Am. J. Educ. 551 (1990). *See generally* Douglas S. Massey et al., *The Source of the River* (2003).

Not surprisingly, measures of educational outcomes, such as scores on standardized tests and high school graduation rates, are lower in predominantly minority schools. *See, e.g.,* Roslyn Arlin. Mickelson, *Segregation and the SAT,* 67 Ohio St. L. J. 157 (2006); Christopher B. Swanson, *Who Graduates? Who Doesn't?*

A Statistical Portrait of Public High School Graduation, Class of 2001 (2004), *available at* http://www.urban.org/url.cfm?ID=410934. For example, one recent study of metropolitan Boston found that only 61 percent of tenth-grade students in high-minority/high-poverty schools passed the state-required English/Language Arts examination in the 2002-03 school year, compared to 96 percent of the students attending low-minority/low-poverty schools. Chungmei Lee, *Educational Outcomes in Metropolitan Boston* (2004), *available at* http://www.civilrightsproject.harvard.edu.

Recent research on teacher quality and turnover in predominantly minority schools is particularly revealing because studies indicate that race is a salient factor driving the decisions of teachers—and approximately 85 percent of the nationwide total are white—to leave minority schools, beyond actual working conditions or the presence of concentrated poverty in the school district. *See* Benjamin Scafidi, David L. Sjoquist & Todd Stinebrickner, *Race, Poverty, and Teacher Mobility,* (Andrew Young School of Policy Studies Research Paper Series, Aug. 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902032; *see also* Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *Why Public Schools Lose Teachers,* 39 J. Hum. Resources 326 (2004); Susanna Loeb, Linda Darling-Hammond & John Luczak, *How Teaching Conditions Predict Teacher Turnover in California Schools,* 80 Peabody J. Educ. 44 (2005).

Research further shows that high rates of teacher turnover and the lack of qualified and experienced teachers in predominantly minority schools have clear negative consequences for student learning and achievement. *See* Charles Clotfelter, Helen Ladd &

Jacob Vigdor, *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 Econ. Educ. Rev. 377 (2005); Catherine Freeman, Benjamin Scafidi & David Sjoquist, *Racial Segregation in Georgia Public Schools, 1994-2001: Trends, Causes and Impact on Teacher Quality, in School Resegregation: Must the South Turn Back* 154 (John Charles Boger & Gary Orfield eds., 2005). The multiple harms associated with racial isolation thus make their avoidance especially compelling.

II. EDUCATIONAL RESEARCH SUPPORTS UPHOLDING THE SEATTLE AND JEFFERSON COUNTY POLICIES AS NARROWLY TAILORED

Research studies provide direct support for concluding that the Seattle the Jefferson County school assignment policies are narrowly tailored. The Seattle and Jefferson County policies employ broad and flexible goals—not rigid quotas or fixed numbers—that advance the underlying interest in racial diversity and are measured responses to the documented problems of racial isolation and tokenism. The assignment policies do not harm non-minority students or cause undue burdens—as the previously cited research consistently shows, white student achievement is not negatively affected by desegregation, and no student of any race is ever denied a basic public school education under the race-conscious assignment policies. Research further shows that race-neutral student assignment policies are not as effective as race-conscious policies in securing the benefits of racial diversity. Indeed, recent evidence from previously desegregated school districts that have experienced resegregation shows that there can be significant problems attributable to replacing race-conscious assignment policies with race-neutral ones.

A. The Use of Flexible Goals Promotes the Benefits of Diversity and Avoids the Harms of Tokenism and Negative Stereotyping

The Seattle and Jefferson County policies are flexible measures that employ race as one of several factors in school assignment decisions and do not violate this Court's prohibitions on non-remedial quotas or racial balancing. *See Grutter,* 539 U.S. at 334-35 (distinguishing goals from unlawful quotas or racial balancing). Both school districts pay attention to the percentages of students within their schools by race, but race does not predominate as a factor in assignment, and the districts employ broad numerical goals that constitute "a good-faith effort . . . to come within a range demarcated by the goal itself." *Id.* at 335.

The school districts' race-conscious policies are fully consistent with research evidence demonstrating the benefits of racial diversity. There are no fixed numbers that are recommended by the research, but studies on intergroup contact propose that the benefits of intergroup contact can be optimized when, among other things, there is equal status between groups. *See* Allport, *supra*; Pettigrew & Tropp, *supra.* Research summarizing studies of desegregation is consistent with this proposal, suggesting that "approximately equal proportions are best for maximizing contact and friendship between ingroup and outgroup members. If one or the other groups in a school has a large percentage (over 70%), it has the power to determine the signs and behaviors by which in-school status is ascribed or achieved." John B. McConahay, *Reducing Racial Prejudice in Desegregated Schools, in Effective School Desegregation* 35, 39 (Willis D. Hawley ed. 1981). Moreover, "[m]embers of the racial or ethnic groups in the numerical minority protect themselves by attempting to isolate themselves from the larger

group." *Id.* at 40; *see also* Maureen T. Hallinan & Stevens S. Smith, *The Effects of Classroom Racial Composition on Students' Interracial Friendliness,* 48 Soc. Psychol. Q. 3 (1985) (finding that students of one racial group were friendlier toward students of another racial group as the proportion of the group increased and concluding that equally balanced classrooms maximize the interracial friendliness of blacks and whites).[8]

If securing the benefits of racial diversity were the only goal of their assignment policies, the school districts might employ strategies to optimize the percentages of students in their schools by seeking equal numbers or proportionality, but this is clearly not the case. The Seattle and Jefferson County school districts have chosen to employ race more modestly and use assignment policies that allow non-racial factors, such as sibling enrollments, proximity to neighborhood schools, and distance from non-neighborhood schools, to be considered and to predominate in student assignments.

Research evidence further supports the use of goals and target ranges to prevent the harms associated with extreme segregation and tokenism (also known as "solo effects" within the psychological literature). Isolation, domination, and negative stereotyping are common problems that arise when minority numbers are espe-

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[8] Recent expert witness testimony in voluntary desegregation litigation has confirmed these earlier findings. *See Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 20-21 (1st Cir. 2005) (en banc) (citing expert testimony that "educational benefits of diversity are predicated on the presence of a critical mass of white and nonwhite students, a figure that social science literature approximates at 20%" and "while critical mass is the point at which educational benefits begin to accrue, those benefits increase as a school nears an even balance between white and nonwhite students"), *cert. denied,* 126 S. Ct. 798 (2005).

cially low and the norms and behaviors of majority groups dominate. *See* Mischa Thompson & Denise Sekaquaptewa, *When Being Different is Detrimental: Solo Status and the Performance of Women and Racial Minorities*, 2 Analyses of Soc. Issues & Pub. Pol'y 183 (2002); Rosabeth Moss Kanter, *Men and Women of the Corporation* (1977) (describing tokenism effects for minority groups of 15 percent or less within an institution). Experimental research has also shown that tokenism can cause self-consciousness that results in deficits in cognitive functioning and memory. Charles G. Lord & Delia S. Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 J. Personality & Soc. Psychol. 918 (1985).

The problem of "stereotype threat" can also cause harmful effects similar to tokenism. Research suggests that when people are a minority in a group, particularly women and racial minorities, they may experience stereotype threat, namely being at risk of confirming, as self-characteristics, a negative stereotype about one's group. *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. Personality & Soc. Psychol. 797 (1995). Stereotype threat may cause students not to perform to their full potential or not to express their skills and knowledge on tests. In controlled research studies, Steele and Aronson found that black students' underperformance in relation to whites on standardized tests could be explained through stereotype threat. Similarly, a 2003 study found that black and Latino high school students were at risk of underperformance in college because of stereotype threat. Massey et al., *supra* (finding that on self-esteem and self-efficacy inventories, students reported they were sensitive to the opinions of white students and teachers, and expressed

doubts that they were good students and had fears of poor performance in high school and college).

Employing race-conscious goals in multiple-factor school assignment policies prevents these types of harms and complies with the mandates of narrow tailoring.

B. Race-Neutral Policies are Not as Effective as Race Conscious Policies in Promoting Racial Diversity and Avoiding Racial Isolation

1. Race-Conscious Managed Choice Policies are More Effective than Uncontrolled Choice Policies in Achieving Racial Diversity

This Court has long recognized that school assignment policies which grant "freedom of choice" are often inadequate as substitutes for more direct race-conscious measures that achieve desegregation, *see, e.g., Green v. County Sch. Bd.*, 391 U.S. 430, 440-41 (1968), and recent desegregation research confirms that uncontrolled choice policies often lead to racial homogeneity and even higher levels of segregation, *see, e.g., School Choice and Diversity: What the Evidence Says* (Janelle Scott ed., 2005); Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts* (2002), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf.

Race-conscious school assignment policies that manage and limit choice, however, can help sustain diversity and can create the student bodies necessary to achieve diversity's benefits. For instance, in one recent study of twenty-two major school districts across the country, researchers found that market-based choice systems added to overall school segregation, beyond what was attributable to residential housing patterns.

Salvatore Saporito & Deenesh Sohoni, *Coloring Outside the Lines: Racial Segregation in Public Schools and Their Attendance Boundaries,* 79 Soc. Educ. 81 (2006). The researchers concluded that an expansion of "free market" choice policies would exacerbate racial segregation within large, urban school districts. They reported that school districts with race-conscious policies in the form of controlled choice options achieved substantial success in reducing racial segregation between black and white students; they also suggested that school choice need not be a barrier to racial integration if student mobility is restricted in ways that limit the isolation of white students from non-white students.

2. Policies Based on Socioeconomic Criteria are Not Adequate to Produce Racially Diverse Student Bodies

Recent analyses of school districts that have employed socioeconomic criteria—usually based on eligibility for free or reduced-price lunch programs—have shown that these policies are unlikely to produce the same levels of racial diversity attainable through race-conscious measures. Although race and class can be highly correlated, they are not perfectly correlated, and research shows that residential segregation, which typically fuels school segregation, can be more heavily driven by race than by class. *See* John Logan, *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America* (2002), *available at* http://mumford.albany.edu/census/SepUneq/SUReport/Separate_and_Unequal.pdf. Thus many minority families, despite having higher income levels, are not able to gain access to predominantly white neighborhoods and to enroll their children in the local schools. Given these problems, school assignment policies based solely

on socioeconomic status are unable to address fully the effects of racial segregation.

A recent statistical analysis exploring the possibility of employing income-based school assignment policies in the nation's largest urban school districts concluded that "income-based integration does not guarantee even a modest level of racial desegregation." Sean F. Reardon, John T. Yun & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 Educ. Evaluation & Pol'y Analysis 49, 67 (2006). The Reardon et al. study examined data from eighty-nine of the country's largest school districts and computed various estimates of possible and probable levels of racial segregation that would result from race-neutral, income-based school assignment policies. The study found that even under optimal circumstances—including circumstances that would be highly unlikely in practice, such as obtaining a perfect income distribution among student assignments and employing "continuous income measures" such as exact family income rather than poverty status or free lunch eligibility[9]—income-based policies would still not guarantee racial integration.

Reardon et al. concluded that "income and race cannot stand as proxies for one another in school integration policies. Absent some substantial decline in ra-

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[9] Using either poverty status or free/reduced-price lunch eligibility as a criterion has significant problems because each is a "dichotomous measure" for which a student is either eligible or ineligible and does not take into account variations in income above the eligibility baseline, which can range from just-above the baseline to the very affluent. "Continuous measures," such as actual family income levels, might provide a more accurate distribution of students, but obtaining these data is impracticable for school districts. *See* Reardon et al., *supra*, at 67.

cial residential segregation, race-neutral assignment policies are unlikely to produce significant racial school desegregation." *Id.* at 68. In addition, their review of recent analyses of districts that have employed race-neutral socioeconomic criteria suggests that these attempts have not been as successful as prior race-conscious policies in achieving racial diversity. Preliminary evaluation of the socioeconomic plan in Wake County, North Carolina shows that adoption of the class-based plan in 1999 initially led to an increase in racially identifiable schools (those with either unusually high or unusually low racial minority percentages), with a stabilization of the increases in more recent years; preliminary information on the socioeconomic plan in San Francisco, California indicates that desegregation levels have fallen under the new plan—while 64 percent of San Francisco schools were in compliance with racial desegregation standards during 1998-99, the last year of a consent decree, only 52 percent of schools met the same standard in 2002-03, two years after the start of the race-neutral plan. *Id.* at 52-53.

3. Race-Neutral Policies Can Lead to Resegregation and Its Associated Harms

Research findings focusing on school districts that are no longer bound by court-ordered desegregation policies have revealed significant problems accompanying resegregation when these districts have abandoned race-conscious measures and replaced them with race-neutral plans. Resegregation is typically accompanied by declines in both educational resources and outcomes, including lower scores on student achievement tests.

For instance, a study of the Charlotte-Mecklenburg school district, which until 2002 had been subject to a desegregation plan for more than three decades, found

increasing racial isolation that has led to a variety of negative educational effects. Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools,* 81 N.C. L. Rev. 1513 (2003). After the declaration of unitary status in 2002, the Charlotte-Mecklenburg system implemented a race-neutral, limited-choice policy that focused on neighborhood school assignment; a majority of schools soon began to experience resegregation and in the year following the end of the desegregation plan the percentage of black students in racially isolated schools increased by eleven percent. *Id.* at 1558.

Mickelson's study found that racially identifiable black schools had deficiencies in teacher resources and material resources (up-to-date media centers, ample access to current technology, and newer, safer buildings), fewer Advanced Placement courses, and fewer services for gifted and talented students. *Id.* at 1547-48. In addition, the study found that minority students were disproportionately tracked into lower level placements and into special education classes, and that achievement scores in many racially identifiable schools were markedly lower than in the more racially integrated schools. *Id.* at 1558-59.

Similar patterns of resegregation and declines in student achievement have been documented in studies of Norfolk, Virginia, *see* Vivian Ikpa, *The Effects of Changes in School Characteristics Resulting from the Elimination of the Policy of Mandated Busing for Integration upon the Academic Achievement of African-American Students,* 17 Educ. Res. Q. 19 (1994); several Florida school districts, *see* Kathryn M. Borman et al, *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools,"* 41 Am. Educ. Res. J. 601 (2004); and Denver,

see Catherine Horn & Michal Kurlaender, *The End of* Keyes*—Resegregation Trends and Achievement in Denver Public Schools* (2006), *available at* http://www.piton.org.

CONCLUSION

For the foregoing reasons, the judgments of the Courts of Appeals upholding the constitutionality of the Seattle and Jefferson County school assignment policies should be affirmed.

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Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF FOR AMICI CURIAE THE AMERICAN PSYCHOLOGICAL ASSOCIATION AND THE WASHINGTON STATE PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The American Psychological Association (APA)[1] is a voluntary, nonprofit, scientific and professional organization founded in 1892. It is the major association of psychologists in the United States, with more than 145,000 members and affiliates. The APA has 54 divisions representing the full array of areas of emphasis within the field of psychology. The objects of the APA include advancing psychology as a means of promoting human welfare, diffusing psychological knowledge, and encouraging the application of research findings to the promotion of health and public welfare. The APA places a high priority on the amelioration of stereotypes, prejudice, and discrimination among individuals and institutions. *See* APA Resolution on Prejudice, Stereotypes, and Discrimination (Feb. 2006), *available at* http://www.apa.org/pi/prejudice_discrimination_resolution.pdf.

Members of APA research psychological aspects of important social issues such as the causes and consequences of racial and ethnic prejudice and stereotypes and the development of such prejudice and stereotypes in children. A body of social scientific knowledge provides a substantive scientific context for considering these cases. Pertinent studies are scientifically reliable and peer-reviewed, and, taken together, bear directly on the empirical claims at the heart of this matter.

The Washington State Psychological Association (WSPA) is a statewide nonprofit scientific and professional organization. Founded in 1947, WSPA has approximately 700 members and affiliates. WSPA's mission is to support psychologists and psychologists-in-training and to promote the practice of psychology in order to maintain the vitality of the profession in the public interest. WSPA promotes reli-

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[1] The parties have filed with the Court letters consenting to the filing of all *amicus curiae* briefs in these cases. No counsel for any party had any role in authoring this brief, and no one other than *amici curiae* provided any monetary contribution to its preparation or submission.

ance on scientific evidence in crafting policies that enhance the mental and behavioral health of Washington citizens. WSPA joins the APA in this brief to present compelling evidence supporting the principle that local school districts should be permitted to create school assignment plans to ensure diversity throughout public education.[2]

SUMMARY OF ARGUMENT

I. Extensive psychological research shows that, under certain conditions, interaction among persons of different races can diminish racial stereotypes and promote cross-racial understanding, empathy, and mutual respect. These findings apply with particular force in the context of K-12 education. Adults may find it difficult to abandon racial stereotypes already formed, but children who interact regularly with persons of other races are less likely to fall into patterns of stereotypical thinking about other racial groups. Primary and secondary schools provide an excellent setting for this type of sustained interaction. Children and adolescents in racially diverse schools—particularly schools designed to facilitate cross-racial interaction among students—are more likely to learn to regard others as individuals, rather than simply "the product of their race," *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting).

It is noteworthy that the courts below broadly acknowledged, in the words of one judge, "the importance of teaching children, during their formative years, how to deal respectfully and collegially with peers of different races." *Parents Involved in Community Sch.* v. *Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring). "The idea that children will gain social, civic, and

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[2] APA and WSPA gratefully acknowledge the assistance of Mary Margaret Brabeck, Ph.D., John F. Dovidio, Ph.D., Susan T. Fiske, Ph.D., Sandra Graham, Ph.D., Melanie A. Killen, Ph.D., Clark Atwater McKown, Ph.D., Janet Ward Schofield, Ph.D., and Linda R. Tropp, Ph.D., in the preparation of this brief.

perhaps educational skills by attending schools with a proportion of students of other ethnicities and races, which proportion reflects the world in which they will move, is a notion grounded in common sense." *Id.* at 1196 (Bea, J., dissenting). As this brief explains, a substantial body of psychological research confirms this understanding.

II. The diversity necessary to generate these substantial benefits in public K-12 education is unlikely to result purely as a matter of private parental choice. Fear of the unknown and unfamiliar often leads individuals to shy away from substantial interaction with persons of other races, and instead to gravitate toward homogeneous neighborhoods, communities, and schools. Even those who consciously disclaim racial prejudice often unconsciously harbor, and act in accordance with, racial stereotypes and racial bias. These phenomena help to explain why, all things being equal, many parents are unlikely to choose to send their children to schools predominantly populated by children of other races. Thus, without school district involvement, children are far less likely to reap the benefits of learning, at an early age, to resist the racial stereotypes that so often result in division and discrimination.

ARGUMENT

I. Racial Diversity In Primary And Secondary Education Challenges Racial Stereotypes And Promotes Harmony And Mutual Respect

This Court has long recognized that student body diversity is a compelling governmental interest that "legitimately may be served" by the consideration of race in admissions to selective public universities. *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 320 (1978); *accord Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244, 268 (2003). The Court has explained that the benefits of racial diversity in higher education are both "substantial" and "real": Assembling a racially diverse class "promotes cross-racial understanding, helps to break down racial stereotypes, . . . enables students to better understand persons of different races, promotes learning outcomes, [and] better

prepares students for an increasingly diverse workforce and society[.]" *Grutter*, 539 U.S. at 330 (internal quotation marks and citations omitted).

Peer-reviewed professional literature shows that racial diversity in K-12 education promotes precisely the same goals, and therefore represents an equally compelling interest. Indeed, racial diversity in primary and secondary education is likely to have an even greater effect on inter-race relations than diversity in selective institutions of higher education. As a practical matter, because the majority of children in the United States do not go on to attend selective four-year colleges, the benefits of K-12 racial diversity are likely to have a broader reach.[3] And for many children who do not go on to attend college, primary and secondary school may be the only educational settings in which they have meaningful interaction with persons of different racial backgrounds.

Equally—if not more—important, early interaction with individuals of different racial backgrounds can have profound and lasting effects. Interaction between children and adolescents of different races helps not only "to break down racial stereotypes," but to *prevent* the development of stereotypical thinking. Children begin to classify people by race and develop the capacity for stereotypical thinking in their early years. Childhood and adolescence are important periods for the formation of biases that may be expressed either consciously or unconsciously throughout a person's lifetime. Interaction with others from different racial backgrounds also enables children to develop notions of racial equality and fairness. Early intervention thus can significantly lessen racial prejudices among children and, ultimately, the likelihood that they will engage in discriminatory behavior.

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[3] *Cf.* Andrea Venezia et al., *Betraying the College Dream* 14 (Stanford University Bridge Project 2006) (approximately 20% of first-year postsecondary students attend selective 4-year institutions, while 80% attend non-selective or minimally selective 2- and 4-year institutions).

A. Absent Early Intervention, Normal Cognitive Processes Can Lead To Racial Stereotyping And Racial Bias

1. The nature and consequences of racial stereotypes

As young children become aware of the world around them, they begin to divide individual objects, situations, and people into categories. This categorization is a normal cognitive process that permits children and adults alike to simplify a complex world. Confronted with an overload of individual stimuli, people conserve scarce cognitive energy by identifying the similarities between different stimuli and grouping them together on that basis. When the stimuli are people, this process leads people to group individuals into social categories. *See* generally Diane M. Mackie et al., *Social Psychological Foundations of Stereotype Formation*, in *Stereotypes and Stereotyping* 41, 44-45 (Neil C. Macrae et al. eds., 1996); Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in 2 *The Handbook of Social Psychology* 357, 362, 375 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

This simple act of categorization can have dramatic effects on one's attitude toward group members. Research indicates that individuals tend to assign value to differences between others and the group to which they belong, developing more favorable attitudes toward "ingroup" members. *See* Michael J. Migdal et al., *The Effects of Crossed Categorization on Intergroup Evaluations: A Meta-Analysis*, 37 Brit. J. Soc. Psychol. 303 (1998) (presenting evidence confirming the existence of "ingroup bias"); Brian Mullen et al., *Ingroup Bias as a Function of Salience, Relevance, and Status: An Integration*, 22 Eur. J. Soc. Psychol. 103 (1992); Mia D. Yee & Rupert Brown, *Self-Evaluations and Intergroup Attitudes in Children Aged Three to Nine*, 63 Child Dev. 619 (1992) (finding in-group favoritism among young children). Indeed, "the mere existence of different social groups is sufficient to foster biased behavior." *See* David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, in *Cognitive Processes in Stereotyp-*

ing and Intergroup Behavior 213, 228 (David L. Hamilton ed., 1981) (citing Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. Soc. Issues 79 (1969)).

Categorization does not, however, inevitably lead to stereotyping. Mackie et al., *supra*, at 47. Rather, stereotyping occurs only when a person ascribes certain traits to individuals solely on the basis of their group membership. *Id.* at 44, 47; Melanie Killen et al., *Morality in the Context of Intergroup Relations*, in *Handbook of Moral Development* 155, 163 (Melanie Killen & Judith Smetana eds., 2006). Viewing social groups through the lens of stereotypic assumptions tends to produce at least four kinds of cognitive responses.

First, people perceive greater homogeneity and less differentiation within an outgroup than an ingroup. That is, people tend to assume that members of their own group will possess a *diversity* of attitudes and beliefs, while others will conform to stereotypic expectations. *See* Wilder, *supra*, at 226 ("[I]ngroup members [a]re assumed to have a wider range of beliefs than outgroup members. Relative to the ingroup, the outgroup [is] thought to be more homogeneous . . . ."); *see also* Brian Mullen & Li-tze Hu, *Perceptions of Ingroup and Outgroup Variability: A Meta-Analytic Integration*, 10 Basic & Applied Soc. Psychol. 233-52 (1989) (presenting evidence confirming the outgroup homogeneity effect). People thus tend to see ingroup members as individuals, and members of other groups as "all the same."

Second, people explain the causes of the actions of members of other groups and their own group in different ways. Negative behaviors of members of other groups are attributed to stable, internal factors (*e.g.*, their personality or character) and positive behaviors are dismissed as situationally caused. *See* Fiske, *Stereotyping, Prejudice, and Discrimination*, *supra*, at 370 (citing studies). In contrast, people tend to discount negative actions of their own group and attribute positive behaviors to internal causes. *See id.* In communication, they also talk about negative behaviors of members of other groups and positive behaviors of members of their own group in deeper, more abstract ways. *See id.*

Thus, these processes contribute not only to the formation of personal stereotypes but also to the way members of groups are thought about by others.

Third, stereotypic assumptions affect perception: People often resort to stereotypes to fill in the gaps in short, unfocused, or partial sense impressions. *See id.* at 368. Stereotypic associations between social groups and concepts can guide how people process visual stimuli in their environment. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, J. Personality & Soc. Psychol. 876, 889 (2004) (discussing stereotypic associations between African-Americans and crime). We are also quicker to identify and process information that is consistent with a stereotype. *See* Fiske, *Stereotyping, Prejudice, and Discrimination*, *supra*, at 368 (citing studies).

Fourth, stereotypic assumptions distort memory. Particularly when people are overloaded with information—as is often the case in everyday life—it is easier to recall information that is consistent with a stereotype than information inconsistent with that stereotype. *See* Wilder, *supra*, at 226 ("[T]he categorization of persons into an ingroup and an outgroup is sufficient to bias subjects' recall of information about the groups."). *See generally* Charles Stangor & David McMillan, *Memory for Expectancy-Congruent and Expectancy-Incongruent Information: A Review of the Social and Social Developmental Literatures*, 111 Psychol. Bull. 42 (1992).

Stereotypical thinking often has more tangible negative ramifications. Such thinking is one source of prejudice—that is, negative feelings about other groups. Negative thoughts about other racial groups often contribute unconsciously to prejudiced attitudes. This type of implicit prejudice, in turn, often manifests itself in discriminatory behavior, anxiety when dealing with members of other groups, and in avoidance of substantial interaction with members of other groups. *See generally* Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in *Prejudice, Discrimination, and Racism* 61-89 (John F. Dovidio & Samuel

L. Gaertner eds., 1986); John F. Dovidio et al., *Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust*, 8 Cultural Diversity & Ethnic Minority Psychol. 88, 92 (2002); Walter G. Stephan & Cookie White Stephan, *Intergroup Anxiety*, 41 J. Soc. Issues 157-75 (1985). In short, stereotypical thinking poses real and substantial obstacles to harmonious relations among members of different racial groups.

2. Once formed, racial stereotypes are difficult to abandon

The cognitive processes that lead to the formation of stereotypes begin early in life. Preschool-aged children have been shown to categorize people along such varied dimensions as gender, ethnicity, occupation, and age. *See* Mackie et al., *supra*, at 46-47. Racial categories become salient at a young age. *See* Rebecca S. Bigler & Lynn S. Liben, *A Cognitive-Developmental Approach to Racial Stereotyping and Reconstructive Memory in Euro-American Children*, 64 Child Dev. 1507, 1516 (1993).

This process of categorization has predictable effects. As early as ages 5 and 6, children's "perception of individual differences declines in favor of ethnic differences," a manifestation of the so-called homogeneity effect. Frances E. Aboud & Maria Amato, *Developmental and Socialization Influences on Intergroup Bias*, in *Blackwell Handbook of Social Psychology: Intergroup Processes* 65, 71 (Rupert Brown & Samuel L. Gaertner eds., 2001). At ages 3 through 9, children display demonstrably more favorable attitudes toward members of the group to which they belong than they do to members of other groups. *See, e.g.*, Yee & Brown, *supra*. Researchers have found that, between ages 6 and 9, children attribute characteristics based on race. Killen et al., *Morality in the Context of Intergroup Relationships*, *supra*, at 164-65.

During roughly the same period, children become aware of racial stereotypes and become susceptible to memory effects that lead them to reinforce those stereotypes. These

effects were dramatically illustrated in an experiment examining the role of cognitive skill and racial stereotyping in a sample of white children, ages 4 to 9, who had relatively little contact with African-American children. The children were asked to recall stories involving either African-American or white characters associated with one of three negative traits—meanness, dirtiness, or laziness. *See* Bigler & Liben, *supra*, at 1507-18. The data showed that children's memory for stories that were consistent with racial stereotypes was better than their memory for stories involving counter-stereotypic themes and behaviors. *See id.* at 1515. That is, white children found it easier to remember stories with negative depictions of African-Americans than stories in which whites were portrayed negatively.

Critically, parents are generally not the principal influences on their children's attitudes about race. Children do not learn stereotypes solely from their parents, nor do children necessarily imitate their parents' attitudes toward different racial groups. *See* Aboud & Amato, *supra*, at 74. Indeed, most studies have found only a small correlation between the racial attitudes of children and their parents. *See* Frances E. Aboud & Sheri R. Levy, *Interventions to Reduce Prejudice and Discrimination in Children and Adolescents*, in *Reducing Prejudice and Discrimination* 269, 278 (Stuart Oskamp ed., 2000). Children's racial attitudes largely stem, instead, both from their cognitive development and their own social experience. *See* Aboud & Amato, *supra*, at 74-76.

As children grow older, their thinking about racial categories tends to become more flexible. Around age 10, preference for ingroup members decreases. Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 Psych. Sci. 53, 56 (2006). Their earlier perception of homogeneity within racial groups gradually becomes "more elaborated in structure, . . . allowing children to differentiate within ethnic groups and to use multiple cross-cutting categories" to classify others. Aboud & Amato, *supra*, at 72 (citations omitted). Older children be-

come better able to recognize similarities between different racial groups, as well as to distinguish between societal stereotypes and their own personal beliefs. Killen et al., *Morality in the Context of Intergroup Relationships*, *supra*, at 163-64. This is a time when, in the right circumstances, stereotypical thinking can fall away.

By the time children reach adulthood, however, research shows that it may be difficult for them to abandon the stereotypes they maintain. *See, e.g.*, Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 Personality & Soc. Psychol. Rev. 242, 255-58 (2002) (although stereotyping and prejudice can be moderated, they can also operate automatically and outside an individual's conscious intent). After years of formulating racial attitudes, adults do not easily change their perceptions of racial difference. Even adults who consciously desire to change their own stereotypes, and who are generally able to keep from openly expressing these stereotypes, often nevertheless spontaneously and unintentionally display implicit biases. *See* John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. Experimental Soc. Psychol. 510, 534 (1997); *cf.* Melanie Killen et al., *The Social Developmental Benefits of Heterogeneous School Environments*, in *Lessons in Integration: Realizing the Promise of Racial Diversity in America's Schools* (Erica Frankenberg & Gary Orfield eds., forthcoming 2006). These findings underscore the importance of early intervention to reduce stereotyping and prejudice among children and adolescents, and better to prepare them to live productively in a multiracial society.

B. Racial Diversity In K-12 Education Can Inhibit The Formation Of Racial Stereotypes And Racial Bias

1. The importance of intergroup contact

For the past half-century, psychological research has focused on intergroup contact as a touchstone for strategies to reduce racial bias and conflict. Intergroup contact theory, described in Dr. Gordon Allport's seminal book *The Nature*

of Prejudice (1954), holds that interaction with members of other groups can disarm stereotypes, while promoting understanding and mutual respect. More specifically, intergroup contact theory posits that, where four key conditions are present—equal status between groups, common goals, intergroup cooperation, and the support of authorities, law, or custom—interaction among members of different groups can be expected to reduce intergroup prejudice. *See* Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 Ann. Rev. Psychol. 65, 66-67 (1998) (describing the basic features of Allport's hypothesis).

Intergroup contact theory is supported by voluminous social science research. Field studies, laboratory experiments, surveys, and meta-analytic reviews all confirm that positive contact between people of different races typically reduces racial bias and promotes positive race relations. *See, e.g.*, Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751, 752-53 (2006). A recent meta-analysis—that is, a statistical analysis that pools the results of a number of studies to determine their size and consistency[4]— examined more than 500 individual intergroup contact studies involving more than 250,000 people from 38 countries. More than 90% of these studies showed that greater intergroup contact resulted in lower incidence of prejudiced attitudes among both majority and minority group members. *See* Pettigrew & Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, *supra*, at 757; *cf.* Thomas F. Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings*, in *Reducing Prejudice and Discrimination* 93 (Stuart Oskamp ed., 2000).

Moreover, the research showed that intergroup contact changes perceptions of the *entire* outgroup—not just those

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[4] *See generally* Robert Rosenthal, *Meta-Analytic Procedures for Social Science* (rev. ed. 1991).

outgroup members directly involved in the contact. *See* Pettigrew & Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, *supra*, at 759. Scholars have thus concluded that "[a]ctual intergroup contact, under specified conditions, can be a powerful way of reducing intergroup biases." John F. Dovidio et al., *Reducing Contemporary Prejudice: Combating Explicit and Implicit Bias at the Individual and Intergroup Level*, in *Reducing Prejudice and Discrimination* 137, 147 (Stuart Oskamp ed., 2000).

Some commentators had speculated that the findings of intergroup contact studies might be affected by a potential participant bias, such that intergroup contact would be effective in reducing prejudice only if people had willingly chosen to engage in the contact. Specifically, because prejudiced people are more likely to avoid intergroup contact than tolerant people, it was thought that reduced prejudice may simply be correlated with, rather than the result of, interaction with members of outgroups. Studies have demonstrated, however, that "optimal contact reduces prejudice over time, even when researchers have eliminated the possibility of participant selection." Pettigrew & Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, *supra*, at 753 (citations omitted). In other words, the positive effects of intergroup contact are consistent and significant, whether or not participants had a choice about whether to engage in the contact. *Id.*

Intergroup contact is effective in part because it provides an opportunity for members of different groups to get to know one another and to develop affective bonds—feelings of personal closeness and common connection that transcend race. *See, e.g.*, Thomas F. Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings*, in *Reducing Prejudice and Discrimination* 93, 108 (Stuart Oskamp ed., 2004) (finding that cross-group friendships are strongly associated with reduced prejudice); *see also* Pettigrew & Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, *supra*, at 766-67 (positing that "the process underlying contact's ability to reduce

prejudice involves the tendency for familiarity to breed liking"). But intergroup contact has effects on cognitive, as well as affective, processes. Many scholars have posited that intergroup contact works because interaction with members of other racial groups helps us to deconstruct racial stereotypes and create new social categories that cut across race. As one study explains:

> Negative stereotypes tend to lose their primary potency and to be reduced when interactions reveal enough detail that group members are seen as individuals rather than as members of an ethnic group. All collaborators become "one of us." In other words, cooperation widens the sense of who is in the group, and "they" become "we."

David W. Johnson & Roger T. Johnson, *The Three Cs of Reducing Prejudice and Discrimination*, in Reducing Prejudice and Discrimination 239, 247 (Stuart Oskamp ed., 2000); *see also* Samuel L. Gaertner et al., *The Contact Hypothesis: The Role of a Common Ingroup Identity on Reducing Intergroup Bias Among Majority and Minority Group Members*, in *What's Social About Social Cognition?: Research on Socially Shared Cognition in Small Groups* 230, 232 (Judith L. Nye & Aaron M. Brower eds., 1996); Pettigrew, *Intergroup Contact Theory*, *supra*, at 75; Wilder, *supra*, at 245. This phenomenon is particularly well-documented in dozens of studies of cooperative learning and work environments. *See, e.g.*, B. Ann Bettencourt & Nancy Dorr, *Cooperative Interaction and Intergroup Bias: Effects of Numerical Representation and Cross-Cut Role Assignment*, 24 Personality & Soc. Psychol. Bull. 1276, 1288 (1998); Janet Ward Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature*, 17 Rev. of Res. in Educ. 335, 360 (1991) (citing, *inter alia*, research by Eliot Aronson et al. and Robert E. Slavin); *see generally* Susan T. Fiske, *Interdependence and the Reduction of Prejudice*, in Reducing Prejudice and Discrimination 115 (Stuart Oskamp, ed., 2000) (describing how cooperative environments create the condi-

tions for seeing outgroup members as "individuals" and "all[ies]").

These processes of individuation and recategorization have extremely significant cognitive and behavioral consequences. To begin with, they temper the harmful perceptual distortions triggered by racial categorization. But even more important, once individuals of different racial backgrounds are categorized together on some non-racial basis, powerful ingroup biases cause group members to view one another more favorably. As leading proponents of the recategorization perspective have explained, "[t]ransforming members' representations of the groups to recognize a common ingroup identity can harness the psychological forces that contribute to intergroup bias and redirect them, thus improving attitudes towards people who would otherwise be recognized only as outgroup members." Dovidio et al., *Reducing Contemporary Prejudice*, *supra*, at 158.

2. Short-term effects of intergroup contact in primary and secondary education

Dozens of studies have focused specifically on the application of the intergroup contact theory to K-12 education. Taken as a whole, these studies show that intergroup contact among school-aged children is a vital condition for reducing stereotyping, bias, and prejudice during this important developmental period. A recent meta-analytic review of 198 studies involving intergroup contact among children and adolescents—57% of which examined the effects of contact in school settings—shows that school contact between youth from different racial groups corresponds with more positive intergroup attitudes, and such positive outcomes become even stronger when Allport's optimal conditions are established in the school environment. Linda R. Tropp & Mary Prenōvost, *The Role of Intergroup Contact in Predicting Inter-Ethnic Attitudes: Evidence from Meta-Analytic and Field Studies*, in *Intergroup Relations: An Integrative Developmental and Social Psychological Perspective* (Sheri Levy & Melanie Killen eds., forthcoming 2006).

Individual field studies provide concrete illustrations. One early study, for example, analyzed student behavior in a newly opened, integrated middle school whose student body was drawn largely from segregated schools. *See* Janet W. Schofield & H. Andrew Sagar, *Peer Interactions in an Integrated Middle School*, 40 Sociometry 130-38 (1977). Schofield and Sagar analyzed voluntary seating patterns in the cafeteria during the first year of the school's existence. Their analysis revealed that seating became more and more integrated over time—that is, members of different racial groups sat together more as intergroup contact persisted. *See id.* at 135 (taking note of "increasing interracial interaction" over time). The authors of this study reported, therefore, that "highly integrated interracial schooling . . . does foster increased voluntary association between Blacks and Whites." *Id.* at 137. Researchers also found that contact among school-age children reduces intergroup anxiety and helps them to learn to work together more effectively. *See* Janet W. Schofield, *Black and White in School: Trust, Tension, or Tolerance* 162 (1989).

In more recent studies, researchers have compared the racial attitudes of children who attend non-diverse schools against those who attend racially heterogeneous schools. The results of the comparison have been striking. Presented with an ambiguous situation involving characters of different races, white children who attended racially homogeneous schools displayed implicit racial bias in their interpretation of the characters' behavior, rating African-American characters more negatively than white characters. *See* Heidi McGlothlin & Melanie Killen, *Intergroup Attitudes of European American Children Attending Ethnically Homogeneous Schools*, 77 Child Dev. 1375, 1377, 1382-84 (2006) (examining implicit racial bias among first- and fourth-grade white children who attend schools with white student populations of 91.2% and 86.1%, respectively). By contrast, students who attended racially diverse schools displayed no bias or minimal bias. *See* Heidi McGlothlin et al., *European-American Children's Intergroup Attitudes About Peer Relationships*, 23 British J. Dev. Psychol. 227, 236 (2005) (exam-

ining bias among first- and fourth-grade white children attending racially heterogeneous schools); Nancy Geyelin Margie et al., *Minority Children's Intergroup Attitudes About Peer Relationships*, 23 British J. Dev. Psychol. 251, 264 (2005) (examining bias among first- and fourth-grade minority children).

In a study of middle-school children of a variety of racial backgrounds, the majority of whom were Latino and African-American, children in more diverse schools reported greater feelings of safety and fewer feelings of loneliness than their peers in less diverse schools. Moreover, children in diverse classrooms reported greater feelings of self-worth than children in less diverse classrooms. *See* Jaana Juvonen et al., *Ethnic Diversity and Peer Perceptions of Safety in Urban Middle Schools*, 17 Psych. Sci. 393 (2006).

Studies have also found that, although the relationship between racial diversity and views concerning cross-race friendships are complex, children in non-diverse schools are more likely to assume that they cannot form friendships with children of other races. *Compare* McGlothlin & Killen, *supra*, at 1383-84, *with* McGlothlin et al., *supra*, at 242-43, 245, *and* Margie et al., *supra*, at 264. Meta-analyses of research studies focusing largely on adults have shown that cross-race friendships are strongly correlated with reductions in prejudice. Pettigrew & Tropp, *Does Intergroup Contact Reduce Prejudice?*, *supra*. The same is true among children. *See, e.g.*, Aboud & Levy, *supra*, at 272. Significantly, when people become friends with individuals of other races, they are far more likely "to see that there are similarities between people of different ethnicities and that people of other ethnicities are not all the same." *Killen* et al., *Morality in the Context of Intergroup Relations*, *supra*, at 167. Cross-group friendships can also have positive effects on the intergroup attitudes of other in-group members who become aware of the existence of others' cross-group friendships. *See* Stephen C. Wright et al., *The Extended Contact Effect: Knowledge of Cross-Group Friendships and Prejudice*, 73 J. Personality & Soc. Psychol. 73 (1997). Children in integrated

schools are far more likely to reap these benefits than children in homogeneous schools.

To be sure, some of the studies on the impact of school desegregation on intergroup relations have yielded inconclusive or inconsistent results. *See, e.g.*, Janet Ward Schofield, *School Desegregation and Intergroup Relations*, *supra*. Many of these studies were undertaken in the 1970s and early 1980s, preceding significant changes in intergroup attitudes and behavior, and many focused on schools' experiences during the first few years of desegregation. *See id.* at 343. Although intervening demographic and societal changes do not render the earlier research invalid, they may "limit its usefulness for drawing conclusions about the present." Janet W. Schofield & Rebecca Eurich-Fulcer, *When and How School Desegregation Improves Intergroup Relations*, in *Blackwell Handbook of Social Psychology* 475, 477 (Rupert Brown & Samuel L. Gaertner eds., 2001).[5]

Perhaps more important, the variation in the results of the earlier studies may well reflect the fact that "desegregation can be implemented in very different ways, and . . . these differences may well affect their outcomes." Schofield & Eurich-Fulcer, *supra*, at 477-78. Few of the early studies were conducted in environments providing particularly favorable conditions for intergroup contact. *See* Schofield, *School Desegregation and Intergroup Relations*, *supra*, at 360, 381. Notably, those few early studies that did "tak[e] contact theory seriously" yielded "generally promising results." *Id.* at 360. Studies focused on school conditions found markedly more positive intergroup relations where Allport's

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[5] Pettigrew and Tropp explored the question of timing in their meta-analytic review of intergroup contact studies, noting that more recent studies have tended to find larger effects in terms of prejudice reduction than studies conducted before 1980. Pettigrew and Tropp concluded that much of the differences in findings can be explained by differences in research rigor, but that there is in fact a statistically significant difference between the results of pre-1980 and post-1980 studies. Pettigrew & Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, *supra*, at 765.

conditions were met relative to school environments in which Allport's conditions were not met. *See* Janet Ward Schofield & H. Andrew Sagar, *Desegregation, School Practices, and Student Race Relations*, in *The Consequences of School Desegregation* 58, 67-68 (Christine Rossell & Willis Hawley eds., 1983); *see also supra* page 11 (describing Allport's conditions). Some scholars have concluded that intergroup contact alone typically reduces intergroup prejudice. *See* Pettigrew & Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, *supra*, at 753, 766. But it is widely recognized that positive effects are more likely to be realized when the proper conditions exist for productive contact among members of different racial groups. *See, e.g.*, Schofield & Eurich-Fulcer, *supra*. Scholars are thus generally in agreement that intergroup contact is a necessary—even if not wholly sufficient—condition for producing respectful and positive relations between students of all races. *See, e.g.*, Schofield & Eurich-Fulcer, *supra*, at 478.[6]

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[6] The literature indicates that there are no equally effective substitutes for intergroup contact. Research on the effects of educational programs designed to reduce prejudice among children in the absence of intergroup contact has been for the most part inconclusive. Some studies have shown positive effects from interventions designed to focus children's attention on individuating information about outgroup members, but have also noted that curricular approaches may also have no effect, or, rarely, a negative effect. *See* Walter G. Stephan & Cookie White Stephan, *Intergroup Relations in Multicultural Education Programs*, in *Handbook of Research on Multicultural Education* 782, 793-94 (James Banks and Carrie McGee-Banks eds., 2004); *see also* Schofield & Sagar, *Desegregation*, *supra*, at 87.

As a recent survey of techniques for reducing intergroup prejudice among school-age children explains, "there is too little research available to inform educators about which anti-racist programs successfully reduce prejudice and stereotyping." Aboud & Levy, *supra*, at 282; *see also* Walter G. Stephan & Cookie White Stephan, *Improving Intergroup Relations* 47, 62-63 (2001).

3. Long-term effects of intergroup contact in primary and secondary education

The benefits of early exposure to members of other races reach well into adulthood. As a number of studies have found, school integration has long-term positive effects on relationships between individuals from different backgrounds. *See* Schofield & Eurich-Fulcer, *supra*, at 476; Walter G. Stephan & Cookie White Stephan, *Intergroup Relations* 79-82 (1996).

A recent review of studies on the long-term effects of school desegregation demonstrates that attending a diverse school typically leads to increased interaction with members of other racial groups in adulthood. Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, in *Handbook of Research on Multicultural Education* 828, 834-35 (James A. Banks & Cherry A. McGee Banks eds., 2d ed. 2004); *see also* Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Ed. Res. 531, 552 (1994). Research shows that students who attend integrated schools are more likely than other students to work and live in integrated environments as adults. Jomills Braddock & James M. McPartland, *Social-Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. Black Stud. 267 (1989) (presenting evidence that school desegregation promotes desegregation in work environments).

In one study, white adults who attended racially diverse schools reported their "decreased fear of people of color." Amy Stuart Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* 16, *available at* http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf (last visited Oct. 9, 2006). And African-American adults who attended racially diverse schools cited their greater preparedness "to function in predominantly white environments." *Id.*

Having reviewed the long-term effects of school desegregation, scholars have concluded that racially diverse

schools can effectively "break[] the cycle of segregation." Wells & Crain, *supra*, at 531. Their work shows that the benefits of K-12 diversity extend well beyond graduation: Racially integrated schools have made demonstrable differences in the lives of adults who spent their youth learning alongside children of different races.

C. The Benefits Of Diversity In K-12 Education Are More Likely To Accrue When There Is A Critical Mass Of Students Of Different Racial Backgrounds

Reduction in stereotypical thinking and prejudice depends, at least in part, on the proportion of children of different races in the classroom. To begin with, meaningful intergroup contact is possible only when a significant number of children of different racial backgrounds are present: "When a group is proportionately very small, outgroup members have very little opportunity to interact with members of [that group] even if they are inclined to do so." Schofield & Sagar, *Desegregation*, *supra*, at 71.

There is evidence, moreover, that where a minority racial group lacks critical mass, there are substantial implications for members of that group. Children whose ethnic group is a numerical minority in a school setting may be at greater risk for peer harassment. *See, e.g.*, Sandra Graham & Jaana Juvonen, *Ethnicity, Peer Harassment, and Adjustment in Middle School: An Exploratory Study*, 22 J. Early Adolescence 173, 191 (2002). Children are also more likely to self-segregate by race in order to maintain group identity. *See* Schofield & Sagar, *Desegregation*, *supra*, at 71; *see also* Schofield & Eurich-Fulcer, *supra*, at 483 ("Consistent with the contact hypothesis, when minorities are a very small proportion of the total student body self-segregation seems to be heightened."). Researchers have found, for example, that when African-Americans represent less than 15% of a student body, they are significantly more likely to choose friends on the basis of racial group membership. Schofield & Sagar, *Desegregation*, *supra*, at 71. By its very nature, self-segregation will significantly reduce intergroup

contact and thereby decrease the likelihood of cooperation. Where students have self-segregated, all students are less likely to learn to challenge social stereotypes or to focus on the similarities, rather than the differences, between themselves and members of other racial groups.

Some scholars have theorized that intergroup contact is ineffective at dispelling prejudice absent critical mass because without critical mass, the "equal status" factor identified by Allport is lacking. "[I]f only a small number of students of a given background are present, they are unlikely to enjoy equal status since they form such a small group they will be unlikely to exert much influence in the institution." Schofield & Eurich-Fulcer, *supra*, at 482-83; *see also* Schofield & Sagar, *Desegregation*, supra, at 72 (when there are small numbers of minority students, "traditional status relations may be maintained because the . . . students lack the sheer numbers to become an influential force in the life of the school"). This lack of influence means, among other things, that teachers and administrators may not recognize the significance of diversity among their students and may not see the need to organize classes in such a way as to promote cooperation and understanding among members of different racial groups.

Other scholars emphasize that where members of a racial or ethnic group are reduced to token status, they may be evaluated unfairly. *See* Shelley E. Taylor et al., *Categorical and Contextual Bases of Person Memory and Stereotyping*, 36 J. Personality & Soc. Psychol. 778, 792 (1978) ("[A] situation of token integration . . . would . . . be especially conducive to extreme evaluations and stereotyping of the minority group member."). Minority group representation in token numbers can also negatively affect the performance of minority students even in the absence of active discrimination. In particular, minority students with token status feel that others view them primarily in terms of their race and feel that they are constantly being evaluated on this basis. This feeling of being "under the microscope" may cause emotional stress and cognitive and behavioral deficits. *See* Charles G.

Lord & Delia S. Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 J. Personality & Soc. Psychol. 918, 918, 923-25 (1985).

Minority students present in only token numbers may also face "stereotype threat": that is, the threat that others will reduce them to a negative stereotype about the racial group to which they belong. In the short run, the possibility of confirming a negative stereotype can trigger an emotional response in minority students that interferes with academic performance. In the long run, it can affect minority students' very sense of identity, leading them to disidentify with domains—such as scholastic achievement—in which they face the threat of negative stereotyping. *See generally* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 Am. Psych. 613 (1997); Clark McKown & Rhona S. Weinstein, *The Development and Consequences of Stereotype Consciousness in Middle Childhood*, 74 Child Dev. 498 (2003) (reporting stereotype threat effects among elementary-school students).

Thus, much as in the higher education context, in K-12 schools, a "critical mass" of students from different racial groups is necessary to secure the benefits of intergroup contact. For schools to lay the foundation for productive cross-racial interaction among their students, numbers matter.

II. MEANINGFUL INTERGROUP CONTACT IS UNLIKELY TO OCCUR IN PUBLIC K-12 EDUCATION WITHOUT THE SCHOOL DISTRICTS' INTERVENTION

Research shows that many individuals tend to avoid situations in which they will have substantial interaction with persons they perceive to be significantly different from themselves. Crucially for purposes of the present litigation, this tendency to avoid intergroup contact means that parents often will not make the kinds of choices that will afford their children substantial opportunity to interact with children of other races.

For that reason, to secure the benefits of racial diversity in K-12 schools, there is no practical substitute for consideration of race in school assignments. In particular, alternatives that rely primarily on parental choice to achieve racial diversity are likely to be far less effective than a system in which school districts manage parental choice with the goal of reducing racial concentration and providing opportunities for meaningful intergroup contact in local schools.

A. Because Of Largely Unconscious, Automatic Cognitive And Emotional Responses, Individuals Often Avoid Intergroup Contact

Over the past several years, many have documented a substantial decrease in overt expressions of racial prejudice. *See* Gaertner & Dovidio, *supra*, at 61 (citing studies). Nevertheless, numerous studies show that prejudiced attitudes, like racial stereotyping, remain widespread. As described above in Section I.A.1, ordinary cognitive processes cause us to place people in social categories, and to favor our own category over others. When people are exposed to societal stereotypes about race, even those who maintain a conscious commitment to racial equality often develop, if unconsciously, a variety of negative feelings and thoughts (i.e., prejudices and stereotypes) about other racial and ethnic groups. *See generally* Gaertner & Dovidio, *supra*.

Studies have shown that stereotypes operate automatically, often independent of conscious attitudes, beliefs and perceptions. *See, e.g.*, Steven J. Spencer et al., *Automatic Activation of Stereotypes: The Role of Self-Image Threat*, 24 Personality & Soc. Psychol. Bull. 1139 (1998). The effect of unconscious stereotyping on cognition has been demonstrated through a number of "reaction-time" experiments measuring the speed with which two concepts are associated. The association between racial groups and racial stereotypes is outside the conscious control of the individual. *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (1989); *see also* John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*,

33 J. Experimental Soc. Psychol. 510 (1997). As explained above, such stereotypes have significant cognitive effects. Among other things, stereotypes cause people to minimize the differences among individual members of another racial group and to dismiss or forget information inconsistent with their stereotypes. *See supra* Section I.A.1.

Research also shows that prejudice, like stereotypical thinking, operates implicitly. Studies demonstrate that even those who firmly maintain and articulate explicit attitudes of racial equality and acceptance nevertheless implicitly harbor a variety of negative feelings about members of other racial and ethnic groups. *See generally* Gaertner & Dovidio, *supra*. Studies focusing specifically on "aversive racism"—that is, racist prejudice harbored by those who would find it aversive to acknowledge their racial biases—has demonstrated that these subconscious prejudices can trigger discriminatory behavior. *See id.* It can also trigger avoidance: that is, people who harbor prejudice—even implicit prejudice—will often shy away from contact with persons of other races. *See, e.g.*, Pettigrew & Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, *supra*, at 753.

Some researchers emphasize that people often experience anxiety about interacting with members of other groups. *See generally* Stephan & Stephan, *Intergroup Anxiety*, *supra*. The level of anxiety varies with a number of factors. Among other things, lack of prior contact and the presence of negative stereotypes lead to increased levels of anxiety. *Id.* at 161, 163. Individuals are "unlikely to anticipate positive interaction" with members of groups about whom they harbor negative stereotypes. *Id.* at 163. And as other researchers have noted, those whose implicit prejudice is averse to their conscious beliefs are particularly likely to feel a sense of anxiety and unease, rather than open hostility or clear dislike, about interacting with persons of other racial groups. *See* Dovidio et al., *Why Can't We Just Get Along?*, *supra*, at 90.

Perhaps unsurprisingly, the "dominant response" to intergroup anxiety is avoidance. Stephan & Stephan, *Inter-*

group Anxiety, *supra*, at 165. Individuals forced to interact with one another may cope with their discomfort through various other strategies, including resort to formal and superficial interactions, withdrawal, hesitance, confusion, or even aggression. *See id.* at 165-67. But the easiest way to reduce anxiety is simply to avoid its source. *Id.* at 165. Particularly for those with less experience dealing with members of other racial groups and those who harbor implicit racial stereotypes and prejudice, that means avoiding interactions with members of other racial groups when possible.

B. Because Of Intergroup Avoidance, Private Choice Alone Is Unlikely To Produce Substantial Diversity In Public K-12 Education

The phenomena described above have important implications for the question of how to achieve K-12 diversity. Petitioners and their *amici* suggest that one race-neutral alternative to race-conscious school assignments would be to increase the quality of educational offerings at predominantly minority schools to give the parents of majority white children an incentive to send their children to these schools. *See, e.g.*, Br. for the United States as Amicus Curiae Supporting Petitioner, No. 05-908, at 23-24, 25-26 (suggesting magnet schools and "additional investment in racially concentrated schools" as alternatives to race-conscious assignment plans). The effectiveness of suggested alternatives that depend on additional incentives to attract parents to schools must be assessed in light of the distinct disincentives to integration that are associated with implicit prejudice and intergroup anxiety.

To be sure, incentives in the form of magnet programs are often designed to ameliorate racial concentration in primary and secondary education, and they have led to increased diversity in a number of schools. But magnet schools generally serve a limited number of students. For most students in a given school district, investment in predominantly minority schools to make them "equal" to other schools in terms of resources and educational quality is unlikely to provide their parents a sufficient incentive. Re-

search on the cognitive and emotional processes associated with intergroup interaction predicts that, given the choice between two schools of equal quality, parents may not *perceive* the schools as equal. *See supra* pp. 6-7, 23-25. They are therefore likely to choose the school whose student body appears more familiar to them, and likely to decide against the school where their children will encounter significant numbers of children of other races.

School choice patterns appear to bear out that prediction. Studies of school districts across the country have shown that white parents tend to choose schools with larger percentage populations of white students, suggesting a pattern of "white avoidance of racially mixed schools." Charles T. Clotfelter, *After* Brown: *The Rise and Retreat of School Desegregation* 92-93 (2004). One study documented a similar phenomenon among parents of minority children in his study of the school transfer choices made by parents in the Montgomery County, Maryland school system in 1985. Minority parents tended to choose schools with larger percentages of minority students, leading the researcher to conclude: "'Both whites and minorities seem to direct their choices toward schools in which their children will be less likely to be racially or socioeconomically isolated. Cultural familiarity is a strong point of attraction.'" *Id.* at 92, 94 (quoting Jeffrey R. Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses*, in *Who Chooses? Who Loses?: Culture, Institutions, and the Effects of School Choice* 95, 105 (Bruce Fuller et al. eds., 1996)).

Some studies have shown that some minority parents, perhaps conscious of the practical problems associated with racial isolation, also choose schools with predominantly white student bodies. *See* Clotfelter, *supra*, at 93. Even in these studies, however, parents' choices have proved less effective than other strategies in producing student body diversity. One such study, a recent examination of San Diego schools, compared a pure-choice open-enrollment program against other school choice programs employed in the school district. The study found that the open-enrollment

plan "increases the exposure of whites to Asians but decreases the exposure of whites to blacks and Hispanics." Julian R. Betts et al., *Does School Choice Work? Effects on Student Integration and Achievement* 44 (2006). By contrast, other school-choice plans specifically designed to promote racial diversity "unambiguously increase the exposure of whites to nonwhites, and vice versa." *Id.* at xvii. These findings led the authors to conclude that "built-in mechanisms aimed at promoting integration" may well be necessary to achieve racial diversity. *See id.* at xvii; *see also id.* at 47.

The principle of intergroup avoidance described in the psychological research on implicit prejudice and intergroup anxiety helps to explain these and other similar findings regarding the effects of school choice plans. These studies indicate that private choice alone is unlikely to produce schools in which children of different races have the opportunity to engage in meaningful intergroup interaction. Experience thus suggests that school districts have an important role to play in providing schools that help students overcome the implicit biases and prejudices that have historically resulted in *de facto* segregation.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decisions below.

Respectfully submitted.

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PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of JOSHUA RYAN McDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

The Anti-Defamation League ("ADL") is one of this Nation's leading civil rights organizations. Its mission, first enunciated in 1913, is "to stop . . . the defamation of the Jewish people[,] . . . to secure justice and fair treatment to all citizens alike[,] and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens." ANTI-DEFAMATION LEAGUE CHARTER (1913). Consistent with this mission, ADL has long concerned itself with cases arising under the Equal Protection Clause of the Fourteenth Amendment, extending back to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and *Shelley v. Kraemer*, 334 U.S. 1 (1948), and has frequently participated as *amicus* in such cases before this Court. The cases before the Court today also compel ADL to file as *amicus*. But in these cases, unlike the unbroken line of cases in which ADL has *opposed* race-conscious government action,[2] ADL here finds no constitutional harm to any affected individual and no violation of the Equal Protection Clause. It accordingly supports the respondent school districts, and urges this Court to reject petitioners' challenges to their school assignment plans.

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[1] The parties have lodged letters with the Clerk of the Court consenting to the filing of *amicus* briefs. *Amicus* affirms that no party's counsel authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, contributed monetarily to its preparation or submission. SUP. CT. R. 37.3(a) and 37.6.

[2] *See* ADL briefs *amicus curiae* in *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

STATEMENT

The Seattle, Washington and Louisville, Kentucky school districts use race as a limited factor in assigning students among their elementary and secondary public schools. They do so in a manner wholly consistent with this Court's precedents permitting race-conscious government action. The Districts have each identified clearly compelling governmental interests to justify their assignment plans, and have narrowly tailored those plans to meet those legitimate interests.

A. Seattle School District No. 1. The Seattle District adopted a new plan for secondary school assignments in 1998. Its adoption of this plan followed lengthy efforts to remedy *de facto* segregation in Seattle's schools, efforts that had failed because school assignments were based on domicile and reflected segregated housing patterns. The new plan was designed in part to eliminate such segregation. Seattle justified the new plan by pointing to (1) the educational benefits that flow from racial diversity in the educational setting, (2) increased racial, cultural, and ethnic understanding, and (3) the desire to avoid racially isolated schools. *Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 426 F.3d 1162, 1166-71 (9th Cir. 2005).

Under the plan, entering ninth grade students choose one of the ten high schools in the District, and are assigned to their first-choice school if possible. "Oversubscription" occurs when more students wish to attend a school than space permits, and in that case, the District assigns students based on a series of "tiebreakers." The first and second tiebreakers are most relevant here. As the first, students with siblings at their "choice" school are admitted. As the second, if the racial composition of the student body at the oversubscribed school would differ (plus or minus) by more than 15% from the racial composition of the District's public schools, then admission is

denied to a student whose race will place the school out of that broad range; the racial tiebreaker applies with equal force to minority students and to white students. *Id.*

In the 2001-2002 school year at issue, students assigned by sibling preference amounted to 15-20% of assignments, while students assigned by the racial tiebreaker accounted for about 10% of assignments. Seattle's racial composition was 40% minority and 60% white in 2001. The racial composition of the Seattle District was the inverse, with minorities constituting 60% of students. If assigning a non-minority student to an oversubscribed school resulted in the racial composition of that school exceeding 75% white, the racial tiebreaker was activated. If assigning a minority student to an oversubscribed school resulted in the racial composition failing to reach at least 45% white, the racial tiebreaker was activated as well.[3] *Id.*

B. Jefferson County Public Schools. The public schools of Jefferson County, Kentucky (Louisville) were officially segregated until a federal court decree issued in 1975. That decree was dissolved in 2000, and the district court ordered Louisville to cease using racial quotas at one of its high schools and complete the redesign of its school assignment plan before the 2002-2003 school year. In 2001, Louisville adopted a new

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[3] The Seattle District also employs a "thermostat" to assure that its use of the racial tiebreaker is limited to its goals. The thermostat thus permits such use only until the entering ninth grade class comes within the 15% variance; at that point race is no longer taken into account in assignment decisions. In 2001, the year at issue, the District used the racial tiebreaker in oversubscribed schools that were predominantly white only when the white student population exceeded 50%, and in oversubscribed schools where the minority population was predominant only when that population exceeded 70%. *Id.*

assignment plan for both its elementary and its secondary schools. The plan has "three basic organizing principles." These are "(1) management of broad racial guidelines, (2) creation of school boundaries or 'resides' areas and elementary school clusters, and (3) maximization of student choice through magnet schools, magnet traditional schools, magnet and optional programs, open enrollment and transfers." *McFarland v. Jefferson Co. Pub. Schools*, 330 F. Supp.2d 834, 842-48 (W.D. Ky. 2004), *affirmed*, 416 F.3d 513 (6th Cir. 2005) (*per curiam*). Stated goals of the plan are to provide "substantially uniform educational resources to all students," and to teach basic and critical thinking skills "in a racially integrated environment." Louisville articulated the following interests underlying these goals: "(1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all [Louisville] schools." *Id.*

To accomplish these ends, the Louisville plan requires that each school seek a black student enrollment of at least 15% and no more than 50%. The percentages reflect "a broad range equally above and below Black student enrollment systemwide." *Id.* Race, however, is not the only or even a predominant factor in assignments. For most school assignments a student's race is considered only after other factors, "such as place of residence, school capacity, program popularity, random draw and the nature of the student's choices" are taken into account. In most cases such other factors will have "a more significant effect on school assignment" than race. The guidelines of the plan provide school administrators with the authority to work together with principals and staff to maintain schools within the stated range. *Id.*

SUMMARY OF ARGUMENT

1. The Court reviews these race-conscious school assignment plans under its "strict scrutiny" equal protection jurisprudence. In order to pass constitutional muster, therefore, the plans must be motivated and supported by a "compelling governmental interest," and they must be "narrowly tailored" to achieve that interest. The Districts' plans meet both such requirements.

2. The Districts' plans are supported in the first instance by the compelling governmental interest in desegregation of the Nation's public elementary and secondary schools, and in the cross-racial and inter-ethnic appreciation that stems from integrated schooling. This compelling governmental interest derives directly from, and is congruent with, the Equal Protection Clause of the Fourteenth Amendment. It was enunciated as a constitutional imperative by this Court over fifty years ago in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). It is difficult to conceive today of a governmental interest that is of greater legitimacy. Our world is pervaded by racial and ethnic strife; the differences among us spur hatred, violence, and conflict and pose one of the major challenges of our time. Teaching children in their formative years to respect persons of other races and ethnic backgrounds, and to respect the differences among them, may in the long run prove the only means we have to overcome that serious challenge.

3. The Districts' plans are also justified by the compelling governmental interest in racial diversity in the educational setting. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court rejected the contention that only a remedial interest could serve as a compelling governmental interest, and embraced diversity as such a compelling governmental interest sufficient to justify race-conscious law school admissions policies. The interest in diversity in elementary and secondary schools, while not on all

fours with the interest in diversity in universities or graduate schools, is equally, if not more, important, and plainly qualifies as a compelling interest. The Court did not limit the *Grutter* diversity rationale to "viewpoint diversity." The effort to create a racially diverse student body, and to reduce or eliminate racial isolation, is easily encompassed by *Grutter*, whose holding extends to the consideration of race alone as a factor conducive to other types of diversity. *Grutter* approves of the use of race as a factor to assemble a diverse class of students, and that is precisely what the plans at issue here do.

4. The Districts' programs are narrowly tailored to accomplish their ends. The Constitution does not require that government use only color-blind means to achieve integration in schools. This Court has never held that there is such a principle. The factors that this Court typically considers in assessing whether a means are narrowly tailored justify sustaining the techniques used by the school systems here – there are no less restrictive or intrusive alternatives in desegregating schools than the use of race; these programs mandate the responsible school officials to consider many factors in assigning their students among schools, and thus race is only one factor among many in the programs; the programs are self-limiting, their use of race triggered only when racial concentration, whether majority or minority, reaches a point at which it becomes of concern. Finally, the use of race as a factor in assigning students within school systems does not violate the Constitution's requirement of "individualized assessment" for the reason that the race-conscious plans here perform no "assessment" function at all, and do not look to personal characteristics in a way such that race serves as a mere proxy for merit.

5. ADL does not arrive lightly at these positions. ADL has for years maintained a commitment to fighting both *de jure* and *de*

facto segregation, and strongly believes that the promise of *Brown v. Board of Education* remains unfulfilled. At the same time, ADL has for years staunchly opposed government racial preferences and quotas, and has frequently appeared as an *amicus* before this Court in opposition to such programs. The cases before the Court today, however, demonstrate that not all race-consciousness is equally problematic.

6. Race-conscious programs that *discriminate* by substituting race for relevant personal characteristics plainly raise issues of fairness and personal harm, but where race-conscious government action does not incur the risk of compromising individualized assessment and is otherwise necessary to fulfill compelling governmental interests such as the interests in desegregation and in racial diversity, it passes constitutional muster. These cases are not about the allocation of governmental benefits or political power by race, or the use of race as a proxy for relevant personal characteristics in selecting persons in an applications process. Instead, and in the last analysis, these cases are about the continuing, unfulfilled, and still critically important, duty to eliminate segregation in our Nation's public schools. Because the Districts' race-conscious plans are designed specifically to carry out that duty, and to further diversity and cross-racial understanding, and because they do not otherwise raise issues of unfairness or discrimination, they survive strict scrutiny and should be sustained.

* * *

ARGUMENT

I. The Governmental Interests Asserted By The Respondent School Districts Are Compelling

It is axiomatic that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Thus, at its core, the Clause seeks "to 'do away with all governmentally imposed discriminations based on race.'" *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986), quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). The Court follows a familiar set of precepts in assessing the Districts' assignment plans for compliance with the Clause.

First, "[r]acial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial examination." *Miller v. Johnson*, 515 U.S. 900, 904 (1995), quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (Opinion of Powell, J.). Hence, "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis added). *See Johnson v. California*, 543 U.S. 499, 505 (2005). Analyzed under strict scrutiny, a racial classification will not pass constitutional muster unless it is motivated by a compelling governmental interest. *Adarand*, 515 U.S. at 227 ("government may treat people differently because of their race only for the most compelling reasons").

Moreover, government is "constrained in how it may pursue [such an] end: the means chosen to accomplish the . . . asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal quotation marks and citation omitted). The

Court's cases teach that "[t]he purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003), quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)(plurality opinion).

Nevertheless, strict scrutiny is not "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237 (internal quotation marks and citation omitted). "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter*, 539 U.S. at 326-27. At bottom, "[w]hen race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Grutter*, 539 U.S. at 327.

Finally, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Ibid.* This is because "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Ibid.* Thus, the Court takes "'relevant differences' into account." *Adarand*, 515 U.S. at 228.

A. School Districts Have A Compelling Governmental Interest In Achieving Desegregation.

In identifying the governmental interest at stake here, we start with this Court's seminal holding, its clear and unequivocal command that "in the field of public education the doctrine of 'separate but equal' has no place." *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). *Brown*, of course, is universally

understood to enunciate a core value of the Equal Protection Clause; it is difficult to imagine any value as congruent with the purposes of the Clause and as resonant with the history of its adoption. Thus, as this Court has described them, the *Brown* cases imposed the "affirmative duty on local school boards to see that 'racial discrimination would be eliminated root and branch.'" *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 305 (Marshall, J., dissenting), quoting *Green v. New-Kent County Sch. Bd.*, 391 U.S. 430, 437-38 (1968), citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955).

The promise of the *Brown* cases, however, stands unfulfilled. Full, even significant, racial integration in public schooling remains elusive. Indeed, the problem of school segregation grows. A recent study by Harvard Professor Gary Orfield found that "[f]rom 1988 to 1998, most of the progress of the previous two decades in increasing integration in the region was lost. The South is still more integrated than it was before the civil rights revolution, but it is moving backward at an accelerating rate." Gary Orfield, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2 (2001). Across the country, American public schools are increasingly racially segregated. *See* SCHOOL RESEGREGATION (John Charles Boger & Gary Orfield, eds.,) (University of North Carolina Press 2005); Charles J. Clotfelter, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION (Princeton University Press 2004). Thus, despite the duty imposed by *Brown*, segregation persists, and its effects continue to pervade our lives. While the goal may well be a color-blind society, our present society is one "in which race unfortunately still matters," *Grutter v. Bollinger*, 539 U.S. at 333 (O'Connor, J.), and that is largely because we have not succeeded in eliminating the last vestiges of slavery and segregation. *Brown* has been honored in its letter, but its spirit has been ignored and its core lesson often goes unheeded.

When government acts pursuant to an unfulfilled duty of this constitutional magnitude, it invokes a compelling interest. It is an individual interest of great importance, to be sure, but it is also a central societal interest. Judge Alex Kozinski, concurring in the judgment below in the Ninth Circuit, made this point cogently when he explained:

> It is difficult to deny the importance of teaching children, during their formative years, how to deal respectfully and collegially with peers of different races. Whether one would call this a compelling interest or merely a highly rational one strikes me as little more than semantics. The reality is that the attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact successfully with individuals who are very different from oneself. *It is important for the individual student, to be sure, but it is also vitally important for us as a society.*

Parents Involved in Community Schools v. Seattle School Dist., No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring in result) (emphasis added).

In short, the duty to eliminate segregation "root and branch," to eliminate all vestiges of a pervasive unlawful system, implies a duty exceeding the obligation to eliminate *de jure* segregation, and permits, if not requires, government to take appropriate action to eliminate *all* forms of segregation. This is a duty that serves to correct a great historical wrong, one that seeks to implement the Fourteenth Amendment's key directives, and one that should eradicate forever the legacy that has burdened this Nation with decades of injustice, struggle, and violence. In the final analysis, it is a duty that provides the school authorities here with a compelling governmental interest and satisfies the first requirement of strict scrutiny.

B. The Governmental Interest In Racial Diversity, As This Court Recognized In *Grutter*, Is Compelling.

A mere three years ago, this Court reaffirmed the principle that race is not always an illegitimate concern of government. In *Grutter*, the Court reached beyond mere sloganeering and rhetoric to recognize that government may have interests beyond remedial ones that justify the use of race in limited ways. *Grutter* signaled an equal protection jurisprudence that, while not discarding the Court's carefully constructed tests for screening out illegitimate uses of race, nonetheless properly allowed government to advance compelling interests grounded in the real experience of what is necessary to advance our Nation's goals. Its embrace of diversity extends to this case.

1. *Grutter* Holds That Diversity In Education Is A Compelling Governmental Interest.

In *Grutter*, the Court held that the University of Michigan Law School had "a compelling interest in attaining a diverse student body." *Grutter*, 539 U.S. at 328. At the same time, the Court rejected the contention that only a remedial purpose may serve as a "compelling" interest. *Ibid.* ("we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination"). Under *Gr utter*, then, school authorities may make limited use of race, with the goal of creating a diverse learning environment. *Grutter*, 539 U.S. at 325. "Diversity" therefore, in the now-familiar *Grutter* formulation, is a compelling governmental interest. Furthermore, because the Court there rejected the contention that it had limited such interests to those that were "remedial," it is also clear that governmental interests fairly encompassed by the articulated "diversity" interest of *Grutter* may serve as compelling governmental interests. *Ibid.* The question here is whether the *Grutter* rationale applies to these cases.

In the first instance, to be sure, universities or law schools are not elementary or secondary schools and the "diversity" that was invoked in the university and law school context in *Grutter* is not on all fours with "diversity" in the context of elementary and secondary schools. In the former, the keystone of diversity is the diverse viewpoints that people of different racial and ethnic backgrounds bring to the educational experience. In the latter, in contrast, it is not necessarily diversity of viewpoint that matters, but rather racial diversity – exposure in the educational setting to persons of different races in order to prepare students to encounter a society (and a world) composed of persons of different race and ethnicity.

But for constitutional purposes, there is scant difference between the purposes approved of in *Grutter* and those underlying the Districts' plans here. Can any reasonable person doubt that the furtherance of cross-racial understanding, an interest that the Court approved as a compelling governmental interest in *Grutter*, applies with at least equal force in elementary and secondary schools? Or that it is not of critical importance, in a society and a world that are deeply troubled, often divided, by race and ethnicity, to teach our children how to empathize with and understand those of different races and ethnic backgrounds? Can it be any less important to educate schoolchildren about a diverse world by exposing them to persons of different race and ethnicity than it is to expose university or law students to those of diverse viewpoint arising from the experience of race and ethnicity? *See Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 426 F.3d at 1194 (Kozinski, J., concurring in result). If anything, diversity may be more compelling in lower education as it may eradicate incipient bias before it hardens into habit, and may form the foundation for a lifelong appreciation for and understanding of those of other races and ethnicities. For students who never advance to college or graduate school,

moreover, diversity must exist in schools at lower levels of education if its benefits are to be available at all. For all these reasons, the *Grutter* diversity rationale applies here.

Notwithstanding the close fit between the *Grutter* diversity rationale and the rationale advanced in these cases, however, petitioners and their *amici* argue that the Districts' plans are "not designed to assemble a *genuinely* diverse student body." *E.g.*, Brief for the United States as *Amicus Curiae* Supporting Petitioner in No. 05-908 at 6 ("U.S. Br.") (emphasis added). They contend, in short, that the *Grutter* diversity rationale is limited to "viewpoint" diversity. But this contention will not withstand scrutiny.

While the "educational benefits that flow from student body diversity," *Grutter*, 539 U.S. at 330, surely ranked high in the considerations that underlie the *Grutter* Court's approval of race-consciousness, the Court did not limit government, in its effort to assemble that diverse student body, to seeking individuals with diverse viewpoints alone – its holding is not limited to "viewpoint diversity." Rather, *Grutter* made plain that government may consider race standing alone as a factor *in* diversity. *Grutter* approves in this context of the use of *race* as a factor contributing to the assembly of a diverse class of students, and that is precisely what the Districts do here.

This reading of *Grutter* is demonstrated by the fact that the admissions policy approved in that case, while seeking to identify those who "may help achieve that diversity which has the potential to enrich everyone's education and thus make a . . . class stronger than the sum of its parts," *id.* at 315, nonetheless described a "longstanding commitment to 'one particular type of diversity,' that is, 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this

commitment might not be represented in our student body in meaningful numbers.'" *Id.* at 316. The Law School's policy in *Grutter*, therefore, viewed race and ethnicity as a factor conducive to diversity in viewpoint.

Moreover, this reading is confirmed by the Court's reliance on the arguments of retired officers and civilian leaders of the United States military. Those military leaders advised the Court that a "'highly qualified, *racially diverse* officer corps . . . is essential to the military's ability to fulfill its principle (sic) mission to provide national security,'" 539 U.S. at 331 (emphasis added), and they asserted that "'the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting admissions policies.'" *Ibid.* (emphasis in original). Thus, it is clear that *Grutter* did not exclude the use of racial diversity in any way, and that its ruling extends to the use of race here.[4]

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[4] Likewise, the use of race to promote diversity is not invalidated by the argument, frequently advanced by opponents of racial preferences, that consideration of race assumes race controls a person's point of view and thus reinforces odious stereotypes. The argument simply misses the mark. The contention "is not that a person's race controls his . . . viewpoint, but rather that a person's race may affect his . . . background and life experience and, in turn, his. . . perspective on certain issues." Scott R. Palmer, *A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education*, in DIVERSITY CHALLENGED, Ch. 2 at 54 (Gary Orfield & Michael Kurlaender, eds.) (2001).

2. The *Grutter* Diversity Rationale Is Well Suited To, And Especially Important In, The Context Of Elementary And Secondary Schools.

The Districts' opponents cannot credibly contend that the holding of *Grutter* should be limited to its factual setting in public professional or graduate schools. In this respect, the governmental interest in public education that underlies the *Grutter* diversity rationale carries identical weight here. The long-recognized special role of education in our Nation's constitutional history is the linchpin. For example, in *Grutter*, the Court said, "[w]e have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." 539 U.S. at 331, citing *Plyer v. Doe*, 457 U.S. 202, 221 (1982).[5]

The central importance of education, and the essential role of local school authorities in formulating and implementing educational policy, are interests that form a critical part of the "context" to be considered in assessing the assignment plans here. While "[d]eference is antithetical to strict scrutiny, not consistent with it," *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting), we do not suggest deference but sober assessment

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[5] The cases to this effect are legion. *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) ("Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic"); *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) ("[P]ublic schools are vitally important . . . as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system'").

of these interests in the context in which they arise. It is one thing to demand that a school administrator's judgments resulting in a racial classification be subjected to searching scrutiny; it is quite another to start with the premise, as would petitioners and their *amici*, that those judgments are illegitimate or lacking in the importance that the Districts ascribe to them.

In short, in view of the core holding of *Grutter* recognizing diversity as a compelling interest, the fundamental importance both of public education and our society's commitment to its local control, and the Districts' determinations here that the prevention of racial isolation in their school systems is an important goal, it follows that the educational benefits of diversity are both concrete and necessary in the lower, middle, and high school context. Justice O'Connor's ultimate observation in *Grutter* is no less forceful in the context of these cases: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. If that is the goal, and surely it is, then diversity in education is a pervasive compelling governmental interest at all its levels, and policies, such as those here, that promote such diversity are necessary and proper for the accomplishment of that goal.

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Amicus ADL has long opposed both *de jure* and *de facto* segregation in our schools – its history of *amicus* activity in this Court's school desegregation cases extends back to *Brown*, and its governing body has condemned *de facto* discrimination in the nation's schools repeatedly.[6] As a leading civil rights

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[6] *See* Brief on Behalf of Anti-Defamation League, *et al.*, as *Amicus Curiae* in

(Continued...)

organization, ADL has vigorously supported enactment and enforcement of the Nation's major anti-discrimination laws. It is a pioneer in the promulgation of hate crime statutes; variations of its model hate crime statute have been adopted as law in over 45 states. ADL has fought to eradicate racial, ethnic, and religious bias in our Nation and to promote understanding among its disparate peoples for more than 90 years. It is a leader in educational materials and programs designed to fight hate, bias, and prejudice; its premiere educational program, the A WORLD OF DIFFERENCE® Institute (the "Institute"), brings children of all races together to learn the values of tolerance and diversity, bridging racial, ethnic, and religious differences, and striving to reduce the tensions that spring from them. The Institute has reached literally hundreds of thousands of teachers and peer trainers and, through them, millions of students, in an effort both to eradicate bias and hate before it hardens, as well as to promote diversity and pluralism.

ADL's real-world, front-line experience demonstrates that efforts to further diversity bear educational fruit. In 2004, for example, working with parents' groups and the New York City Schools Chancellor, ADL's New York Regional Office was responsible for the formation of an innovative New York City public school, part of Mayor Bloomberg's efforts to address the crisis in the city schools. This school was founded on the

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Brown v. Bd. of Educ., 347 U.S. 483 (1954). It was in February 1966 that ADL's National Commission first adopted a resolution declaring that "[t]he Anti-Defamation League is opposed to *de facto* segregation in the public schools, and believes that public school authorities have the duty to end *de facto* segregation in their schools by whatever lawful means are appropriate."

Institute's principles of diversity, bias-reduction, and prejudice elimination. The resulting *Peace and Diversity Academy* has yielded impressive, concrete results. In three school years, its enrollment has tripled, from 100 to 300 students, its students have consistently exceeded average New York City attendance and promotion rates, and students' educational testing scores have far exceeded original goals. In short, ADL's experience is that diversity and prejudice reduction improves education, bearing out ADL's long-held belief that the embrace of diversity and the promotion of a fully integrated society is crucial not only to the struggle to defeat discrimination but also to the continued vitality of our Nation and our society.

ADL's staunch commitment to pluralism, however, has not diminished its belief in the centrality of the precept that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. For this reason, despite its commitment to diversity, ADL has *opposed* virtually all of the racial classifications that have been challenged in this Court, including racial preferences and quotas in affirmative action programs, arguing that they *discriminate* on the basis of impermissible characteristics and thus violate this core value of equal protection. *See* ADL *amicus* filings cited in fn. 2, *supra*. *See also* ADL brief *amicus curiae* in *Miller v. Johnson*, 515 U.S. 900 (1995). ADL has long maintained that when government uses race as a decisive factor in allocating opportunity or benefits, it ignores merit and improperly classifies citizens on the basis of immutable characteristics that are, or should be, irrelevant in a free and democratic society.

Yet as the cases before this Court today demonstrate, not all race-consciousness is equally problematic. ADL agrees with Justice Stevens that, "in our present society, race is not always irrelevant to sound government decision-making." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 314 (Stevens, J., dissenting). Of

course, programs that "risk[] compromising individual assessment," *Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting), strike at a core value of equal protection, and will not withstand strict scrutiny, but there are instances where race-conscious government action does not incur this risk, and is otherwise necessary to fulfill a compelling governmental interest. These cases, in which the Districts have identified just such an interest, fall into the latter category.

II. The School Districts' Plans Satisfy The Narrow Tailoring Requirement

Identifying a compelling governmental interest is, of course, only the first step in the inquiry; under strict scrutiny; government is constrained not only in *why* it seeks to accomplish its purpose, but also in *how*. Thus, once the purpose of a race-conscious classification is identified, the Court must still inquire whether "the means chosen to accomplish the State's asserted purpose [are] specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986). We must accordingly analyze whether the "narrow tailoring" requirement of the Equal Protection Clause is satisfied here.

The starting point in this analysis is that school desegregation simply cannot be achieved without taking race into account. For example, in one of its most important desegregation cases, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), this Court identified a variety of techniques that can be used, consistent with the Equal Protection Clause, to achieve school desegregation and compliance with the *Brown* cases. The list includes racial balances or quotas (*id.* at 22-26), redrawing student attendance zones (*id.* at 27-29), shutting one-race schools and constructing new, attractive schools facilities to attract desegregated student bodies (*id.* at 25-27), the use of busing (*id.* at 29-31), and majority to minority transfer (*id.* at 26-

27). All of these, of course, look to students' race to achieve desegregation. In short, when the problem to be dealt with is *racial segregation* of students - whether *de jure* or *de facto* - the solution obviously must include consideration of the race of the students.

This Court's decision in *Grutter* is equally instructive as to the important interests that must be weighed and considered in the narrow tailoring analysis. There, the Court found that the University of Michigan's use of race as a factor in assessing and admitting students to its law school was constitutional because "the Law School's admissions program bears the hallmarks of a narrowly tailored plan." *Id.* at 334. The Court stressed that its conclusion was based on "complex educational judgments in an area that lies primarily within the expertise of the university," and noted that "[o]ur holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Id.* at 328.

Respect for local school districts' acknowledged expertise, "within constitutionally prescribed limits" of course, is particularly important as to the means to be used for achieving school desegregation. The design and implementation of policies to assign students among their public schools is necessarily and naturally entrusted to local authorities. Local government units know their local populations and their local public schools best and of course have the greatest feel for what techniques can successfully achieve or maintain desegregation in those schools. They are the most sensitive to the varying concerns of all of their constituents, from students, to teachers, to parents, and best able to gauge not only the effectiveness of their policies but also whether and to what degree their policies may burden some of those constituents. Our very government structures, and the Federalism concerns attendant to them,

therefore dictate a degree of respect for decisions of local governments in determining what means to use to achieve desegregation of their schools. As this Court has explained: "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy long has been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974).

Based on the foregoing, therefore, in evaluating the means used by the Districts in these cases, we make three key points. *First*, the Constitution does not require that the government use only color-blind means. *Second*, the factors this Court considers in assessing whether a means are narrowly tailored all justify sustaining the techniques used by the school systems here. *Third*, the use of race as a factor in assigning students within a school system does not even implicate, much less violate, the Constitution's requirement of "individualized assessment."

A. The Constitution Does Not Require That Government Be Color-Blind When Achieving Desegregation.

Petitioners' and their *amici* contend that this Court's desegregation cases impose an absolute prohibition on the use of race in the Nation's schools. For example, the United States argues that in *Brown I* (*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)) the Court held that "intentionally classifying students on the basis of race violates the Equal Protection Clause," and it asserts that the core holding of *Brown II* (*Brown v. Bd. of Educ.*, 349 U.S. 294, 300-310 (1955)) was the directive to "'achiev[e] a system of determining admission to the public schools on a nonracial basis.'" U.S. Br. at 6, quoting *Brown II*, *id.* The *Brown* cases, however, established no such principle of color-blindness.

For starters, the *Brown* cases arose in the context of *de jure* segregation that had persisted in this Nation since its founding despite the bloody conflict of the Civil War and despite the adoption of the Fourteenth Amendment. *See Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court acted in *Brown I* to abolish systems of official segregation that had continued to perpetuate the legacy of slavery and that had ineradicably undermined the dignity of millions of citizens. As the Court there observed, the separation of children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 691.

Wholly unlike the instant cases and their limited use of race as a factor to promote integration, *de jure* segregation meant that people of one skin color were excluded from *facilities* open to those of another skin color. The system *discriminated* against those excluded because, even assuming equal facilities, it relegated them to a status as strangers in the contemplation of the law. Unequal, discriminatory treatment was and is the touchstone. But it is one thing to prohibit a system that "intentionally classif[ies] students on the basis of race," and thus excludes them from full participation in society, as did official segregation, and quite another to argue that the Court thereby barred race-conscious government action in all circumstances.

Indeed, had the Court in fact established such a principle in the *Brown* cases, neither its *Bakke* nor *Grutter* holdings, nor virtually every other case in which it has considered race-conscious government action since 1954, would have been possible. For if the *Brown* cases require absolute color-blindness, then there is never any reason to assess whether race-conscious action passes strict scrutiny. Simply stated, if

the United States' contentions were accepted, then all race-conscious action is forbidden (except perhaps its remedial forms), and of course this is not the case. In short, the abolition of official segregation by the *Brown* cases did not establish, and has never been recognized as establishing, a principle that government may never act with consciousness of the race of its citizens. Rather, the question always has been, and remains today, to what extent government may use race.[7]

B. The Means Chosen By The Districts Here Are Narrowly Tailored.

In assessing whether a means are sufficiently narrowly tailored to meet strict scrutiny, the Court has looked to a number of factors. In past cases, the Court has focused on whether less restrictive alternatives are available; whether race is one factor among many or the only factor to be considered; whether the use of race prevents individualized consideration based on merit; and whether the use of race is limited in time. Applying these factors here shows why the means chosen by the Districts in these cases are sufficiently narrowly tailored to meet the requirements of equal protection.

For example, the Court has considered whether other less restrictive alternatives are capable of achieving the same governmental goal. In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), for example, the Court invalidated a board of education's effort to increase teacher diversity in its schools by

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[7] Nor, following *Grutter*, can petitioners successfully argue that race-conscious action is justifiable only in the context of *de jure* segregation. In rejecting the limitation of compelling governmental interests to those that are remedial in nature, the Court necessarily broadened the voluntary uses of race that may be sustained under strict scrutiny. *See* Pt. I.B., *supra*.

laying off white faculty with greater seniority than African-American teachers who were retained. Writing for a plurality of the Court, Justice Powell stressed that "[a]s a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes . . . are available." *Id.* at 283-84.

But there are no less restrictive or intrusive alternatives when it comes to desegregating schools than the use of race. A simple example is powerfully illustrative. Imagine an elementary school with 40 first grade students divided between two equally sized classrooms. If there are 10 girls among the 40 students, surely the school could look to gender in assigning students, rather than a random draw, so that it did not turn out that one class had nine girls, while the other had only one. Likewise, if there were 10 African-Americans among the 40 students, the school could look to race in assigning the students between classrooms. There would be no gender-blind or race-blind way of achieving the goals. The same is true in assigning students among schools within a school district. It is hard to conceive of any effective gender- or race- neutral less restrictive or less intrusive alternative.

The Court also has emphasized that a race-conscious plan is more likely to be deemed narrowly tailored when it mandates that the responsible governmental unit consider race only as one factor among many in its decision-making. "To be narrowly tailored, a race-conscious admissions program cannot use a quota system – it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 539 U.S. at 334.

The programs here are designed to take into account many factors, including race, in assigning students to schools within the respective districts. For example, under the Seattle plan

geographic residence of students, whether they have siblings in the school, and whether the schools are under- or over-subscribed, all play an explicit role in student assignments. *Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 426 F.3d 1162, 1166-71 (9th Cir. 2005). Under the Louisville plan, the factors are even more varied. There, a student's place of residence, school capacity, program popularity, random draw, and the nature of the student's choices" are taken into account, and in most cases these other factors will have "a more significant effect on school assignment" than race. *McFarland v. Jefferson County Public Schools*, 330 F. Supp.2d 834, 842-48 (W.D. Ky. 2004), *affirmed*, 416 F.3d 513 (6th Cir. 2005) (*per curiam*). Neither of the systems examines race in isolation, nor in any manner "insulates" one racial category from the effect of factors applied to other categories.

Finally, while this Court has condemned race-conscious programs that are unlimited in temporal scope, that is not the case here. The Districts' programs are self-limiting; their use of race is triggered only when racial concentration, whether majority or minority, reaches a point at which it may become of concern, and ceases when racial concentration falls outside those delineations.

C. No "Individualized, Holistic" Assessment Is Required In The Context Of Public School Assignment Plans.

Additionally, in evaluating whether means are sufficiently narrowly tailored the Court has considered the extent to which the use of race undermines government decisions based on individual merit. Thus, a crucial concern in cases such as *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), was that the use of race prevented individualized merits assessment of applicants for admission to selective graduate schools and universities. *See, e.g., Grutter*, 539 U.S. at

391 (Kennedy, J., dissenting) (stressing the importance of not "compromising individual assessment"). Similarly, in cases concerning government contracting, a crucial concern was that the use of race might prevent otherwise best suited bidders from receiving a contract. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating city program setting aside public works monies for minority-owned businesses). Because more meritorious applicants were excluded from the selection process, the use of race worked real and concrete harm to the fundamental requirement that government treat individuals equally. But this factor is not present in these cases. Even if race played *no* role in the assignment of students under the Districts' plans, there still would be no consideration of merit.

Yet *amicus* United States nonetheless contends that the Districts' plans "provide[] for no individualized, holistic consideration of students," and are thus invalid because *Grutter* purportedly requires such assessment. U.S. Br. at 6. This contention not only makes no sense in view of the origin of the rule requiring such "individual assessment," but is also flatly rebutted by Justice O'Connor's clear admonition in *Grutter* that "context matters." *Grutter* required "individualized, holistic" assessment in the context of selective graduate school and university admissions. It plainly did not require this in a context to which the requirement is unsuited, in elementary or secondary school assignment plans that do not assess individuals for relevant differences in order to decide who among them is best qualified for admission. In short, to apply that requirement to the context of these cases is to strain it beyond recognition.

CONCLUSION

It is well to recall that the Districts were under a duty to harmonize "two interrelated constitutional duties." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). The public schools

"are under a clear command . . ., starting with *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), to eliminate every vestige of racial segregation and discrimination in the schools," but, "[o]n the other hand . . . also must act in accordance with a 'core purpose of the Fourteenth Amendment' which is to 'do away with all governmentally imposed discriminations based on race.'" *Ibid.*, quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). As the Court noted in *Wygant*, "[t]hese related constitutional duties are not always harmonious; reconciling them requires [a school system] to act with extraordinary care." *Ibid.* The Districts here acted with just such care.

Both Seattle and Louisville had compelling reason to conclude that absent preventive steps their schools would revert to segregated assignment patterns, increasing racial isolation and leading to the harms that they had eliminated or reduced in the last decades. While they had made progress, in their own view they had not succeeded in "eliminat[ing] every vestige of racial segregation and discrimination in [their] schools." *Ibid.* These plans were intended to carry out that mandate. The Districts' judgments rest on the conviction that both fully desegregated schooling and diversity are necessary to further the educational missions of their schools. And they rest on the belief that community support for public schools is undermined unless full integration and diversity is maintained. They have thus honored the first of these *Wygant* duties.

Even more critically for purposes of these cases, they have equally honored their second duty - "to 'do away with all governmentally imposed discriminations based on race.'" *Ibid.* Contrary to the arguments of petitioners and their *amici*, this case presents no instance of "governmentally imposed discriminations based on race." The schools of the Seattle and Louisville districts are concededly equal in terms of funding and resources. Denial of a student's choice of school in no

manner results in "discrimination." What little burden is created by these assignment plans is of no constitutional import. No child is treated differently because of his or her race or ethnicity. No child receives a worse (or better) education because of a racial classification. No child is harmed by the Districts' plans, but all students collectively, the school systems themselves, and our society, are aided immeasurably. In short, full school integration, racial and ethnic diversity, decreased racial isolation, and community support for schools preserve our schools and improve our society.

The judgments of the respective courts of appeals should be affirmed.

Respectfully submitted,

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Nos. 05-908 & 05-915

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeal for the Ninth and Sixth Circuits

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BRIEF OF DAVID J. ARMOR, ABIGAIL THERNSTROM, AND STEPHAN THERNSTROM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are David J. Armor,[2] Abigail Thernstrom,[3] and Stephan Thernstrom,[4] social scientists who have conducted

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[1] This amicus brief is filed with the consent of the parties. Counsel for the Petitioners and Respondents have granted blanket consent for the filing of amicus briefs in these cases, in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to these cases nor their counsel authored this brief in whole or in part, and that no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

[2] Dr. David J. Armor is a Professor of Public Policy at George Mason University, where he served as Director of the PhD Program from 2002 to 2005. He has conducted research and written widely in the fields of education and education reform, school desegregation and related civil rights issues, and military manpower. He has consulted on and testified as an expert witness in more than 40 school desegregation and educational adequacy cases, and he has testified on school desegregation issues before the U.S. Senate, the U.S. House of Representatives, and the U.S. Commission on Civil Rights. In 1999 he was appointed to the National Academy of Science Committee on Military Recruiting. He is currently studying the effects school racial composition on academic achievement, as well as the effects of family vs. school factors on the achievement gap, supported by grants from various organizations.

[3] Abigail Thernstrom is Senior Fellow at the Manhattan Institute and the Vice-Chair of the United States Commission on Civil Rights. With her husband Stephan, she is the author of *America in Black and White: One Nation, Indivisible* and of *No Excuses: Closing the Racial Gap in Learning,* and editor of *Beyond the Color Line: New Perspectives on Race and Ethnicity in America*, and is currently working on another joint volume on the concept of *de facto* segregation, particularly in K-12 education and in housing. Her other books include the prize-winning *Whose Votes Count? Affirmative Action and Minority Voting Rights* and *School Choice in Massachusetts*. Dr. Thernstrom has been a member of the Massachusetts State Board of Education since 1995.

[4] Stephan Thernstrom is Winthrop Professor of History at Harvard University and Senior Fellow at the Manhattan Institute. In recent years he has worked collaboratively with his wife Abigail on the volumes mentioned above. His other books include the *Harvard Encyclopedia of*

research and written widely in the fields of race, education, school desegregation, and related civil rights issues.

In this brief, *amici curiae* present a critical examination of the social science research relevant to the Court's evaluation of whether these two student assignment plans survive the strict scrutiny analysis required when government actors engage in race-based decision making.[5]

STATEMENT OF THE CASE

The Jefferson County Plan. The 2001 student assignment plan imposed by the Jefferson County Public Schools classifies students by race for the express purpose of achieving a preferred range of racial balance at every school in the district (the "Jefferson County Plan"). *See McFarland v. Jefferson County Pub. Schs.*, 330 F.Supp. 2d 834, 842 (W.D.Ky. 2004). Although students are allowed to apply to their preferred school for enrollment, each school is required to attempt to manage its enrollment to achieve specific targets: the minimum number of black students is fixed at 15% of a school's enrollment and the maximum number of black students is fixed at 50% of a school's enrollment. *Id.* at 842, 844-48.

American Ethnic Groups; A History of the American People; *Poverty and Progress: Social Mobility in a 19th-Century City*; and *The Other Bostonians: Poverty and Progress in the American Metropolis, 1880-1970*, winner of the Bancroft Prize in American History.

[5] In *Grutter v. Bollinger*, the Court relied upon social science and other evidence of the benefits of diversity presented by *Amici Curiae*. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing to briefs submitted by the American Educational Research Association et al.; 3M et al.; General Motors Corp.; Julius W. Becton, Jr., et al.) The Court also cited studies that were not introduced into evidence at trial, *Id.* at 330 ("In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning out-comes, and better prepares students for an increasingly diverse workplace and society, and better prepares them as professionals") (internal citations omitted).

The District Court below (affirmed without substantive discussion by the Sixth Circuit)[6] found that the Jefferson County School Board "met its burden of establishing a compelling interest in maintaining racially integrated schools." *Id.* at 855. The District Court supported this conclusion by relying on: (1) The discussion in *Grutter* of the benefits of diversity in the higher-education context in promoting "cross-racial understanding and racial tolerance, preparation for a diverse workplace and training of the nation's future leaders," which the District Court found equally applicable to elementary and secondary schools; *Id.* at 852-53; and (2) the Jefferson County School Board's belief that educational benefits flow to the students and the system as a whole when specific levels of racial balance are achieved. *Id.* at 853 ("the Board believes that integration has produced educational benefits for students of all races."). The District Court acknowledged that the connection between racial balance and student achievement had not in fact been established by the evidence before it. ("The Court cannot be certain to what extent the policy of an integrated school system has contributed to these successes. Opinions surely vary on this issue.") *Id.* The Court went on to indicate that the Board had "valid reasons for believing" that its policies "may aid student performance," but never concluded that any relationship between diversity and student achievement had in fact been established. *Id.* at 854.

The Seattle Plan. The Seattle School District also uses a race-based student assignment plan, which is used to achieve a predetermined racial balance in the Seattle high schools (the "Seattle Plan"). *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005). Similar to the Jefferson County Plan, students in Seattle may request their preferred school. *Id.* at 1169-70. If the requested school

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[6] *McFarland ex rel. McFarland v. Jefferson County Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005).

is oversubscribed, students are admitted to schools according to a series of "tiebreakers." *Id.* at 1169-71. Siblings of students currently attending the school are given first preference. *Id.* at 1169. After that, if the requested school is "racially imbalanced"—meaning that the racial composition of the school differs by more than 15% from the racial composition of the school district as a whole—and if the sibling preference does not bring the oversubscribed high school within plus or minus 15% of the District's overall demographics, the race-based tiebreaker is triggered, and thus the race of the applicant student is considered. *Id.* at 1169-70. In the 2000-01 school year, approximately 10% of the incoming students entering Seattle high schools were assigned to their schools based upon the race-based tiebreaker. *Id.* at 1170.

Parents Involved in Community Schools ("PICS") filed a lawsuit claiming that the racial tiebreaker violates their children's equal protection rights. *Id.* at 1171. After several levels of court review, the Ninth Circuit ultimately affirmed the District Court's ruling, which concluded that the Seattle School District has a compelling interest in securing the educational and social benefits of racial diversity, and in ameliorating racial isolation or concentration in its high schools by ensuring that its assignments do not simply replicate Seattle's segregated housing patterns. *Id.* at 1172.

SUMMARY OF ARGUMENT

Amici, as social scientists who have studied and written extensively on issues relating to race, integration, and student achievement, respectfully submit that the scholarship discussing the relationship between attendance at racially diverse or integrated schools and student achievement is not uniform, consistent, or sufficiently conclusive to support a finding that achieving a particular level of racial balance constitutes a "compelling" state interest.

In particular, as discussed below, a comprehensive review of the literature reveals that:

- There is no evidence of a clear and consistent relationship between desegregation and academic achievement, which is the primary purpose of universal public education. Instead, the effects of desegregation are highly variable, depending on any number of conditions—grade, location, test content, and even race or ethnicity. When averaged over large numbers of studies, the effects are generally weak or nonexistent.
- In addition, there is no evidence of a clear and consistent relationship between desegregation and such long-term outcomes as college attendance, occupational status, and wages, a fact that should not be surprising given the weak and inconsistent effect of desegregation on achievement.
- Finally, there is no evidence of a clear and consistent relationship between racial balance in K-12 schools and such social outcomes as racial attitudes, prejudice, race relations, and inter-racial contact. Indeed, among the better-designed studies, more show negative effects on white attitudes than positive effects.

Amici urge the Court, after a review of the relevant scholarship and the record below, to reverse the lower courts' decisions that maintaining racial balance in primary and secondary schools constitutes a compelling state interest.

ARGUMENT

I. THE JEFFERSON COUNTY AND SEATTLE STUDENT ASSIGNMENT PLANS ARE CONSTITUTIONAL ONLY IF THEY SERVE A COMPELLING STATE INTEREST.

The question before the Court is whether the explicit use of race-based student assignment systems, outside of the context of a remedial court-ordered desegregation plan designed to

eliminate the vestiges of prior *de jure* segregation, is consistent with the Court's prior statements that racial balancing violates the Equal Protection Clause. *See Grutter*, 539 U.S. at 330 ("outright racial balancing . . . is patently unconstitutional"); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.) (discussing attempts to assure within a student body a specified percentage of a particular group "merely because of its race or ethnic origin" and describing such a plan as "facially invalid").

A. Strict Scrutiny is the Proper Standard of Review.

There can be no question that strict scrutiny applies to the analysis of the Jefferson County and Seattle student assignment plans, which are predominantly based on race. *See Johnson v. California*, 543 U.S. 499, 506 (2005) ("We . . . apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." (emphasis in original)).

B. The Court has Properly Found Very Few Asserted State Interests to be Compelling.

Strict scrutiny review owes its roots to *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court upheld a military Exclusion Order (issued pursuant to an Executive Order) that excluded Japanese-Americans from certain West Coast areas. *Id.* at 216-17. In its justification, the Court found that "pressing public necessity may sometimes justify the existence of [racial discrimination]." *Id.* at 216. The phrase "pressing public necessity" has since developed into "compelling governmental interest." *Grutter*, 539 U.S. at 351 (Thomas, J., dissenting). *Korematsu* presented one of the few circumstances in which the Supreme

Court has upheld a law that permitted Government-sponsored racial discrimination.

Racial classification rarely survives strict scrutiny review. A review of the Court's jurisprudence reveals a host of race-based government actions that have been rejected. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Loving v. Virginia*, 388 U.S. 1, 8 (1967); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Palmore v. Sidoti*, 466 U.S. 429 (1984).

C. *Grutter* Does Not Resolve the Issues in these Cases.

More recently, the Court recognized as a compelling interest the benefits flowing from a diverse student body in the context of higher education. *Grutter*, 539 U.S. at 330.

However, *Grutter* does not address the issues raised in these cases. First, the Court in *Grutter* in part relied upon First Amendment protections recognized in the university context that do not necessarily apply to primary or secondary education. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) ("The First Amendment guarantees wide freedom in matters of adult public discourse. . . . It does not follow, however, that . . . the same latitude must be permitted to children in a public school.").

Second, the Court in *Grutter* was clear that the compelling state interest was not the racial diversity itself, but rather was the broader concept of student diversity, in which race might be one of many types of diversity considered. *Grutter*, 539 U.S. at 329-330. Thus, in *Grutter*, the Court relied on the fact that the law school was not seeking any specific level of racial diversity other than that sufficient to constitute a critical mass. *Id.* In fact, the Court distinguished the University of Michigan Law School's use of race as part of individualized evaluation of applicants from the University

of Michigan undergraduate school's inflexible, mechanistic policy of assigning bonus points to applicants from certain preferred minority groups. *Id.* at 337.

Clearly, the plans at issue in these cases do not involve a flexible use of race in the context of individualized evaluation, but instead set firm numerical goals and use race as the predominant means of deciding whether schools are properly constituted. Thus, the asserted interest of the school districts in these cases is in racial balance itself, rather than in the broader diversity that the Court found permissible in *Grutter*. *Compare Loving*, 388 U.S. at 11 ("racial classifications . . . . must be shown to be necessary to the accomplishment of some permissible state objective, *independent of the racial discrimination* which it was the object of the Fourteenth Amendment to eliminate.") (emphasis added).

Finally, and most important in this case, the purported benefits of racial diversity were not disputed in *Grutter;* rather, the majority presumed the validity of the benefits of diversity asserted by the University of Michigan. *Grutter*, 539 U.S. at 347-48 (Scalia, J., dissenting). Even assuming the validity of the benefits cited in *Grutter*, such benefits were of a different kind than those at issue in these cases, because they derived from *general* diversity rather than only racial diversity, and they involved benefits that were meaningful in the context of higher education.

These cases explicitly raise the issue of whether educational and social benefits flow from racial diversity in public elementary and secondary schools, where that diversity is defined by fixed racial percentages. If the Court is to agree with the lower courts in these cases, it must find that this type of racial diversity creates significant educational and social benefits in public elementary and secondary schools. A great deal of social science research has been carried out on this question, and such evidence is simply lacking.

II. SOCIAL SCIENCE RESEARCH DOES NOT SUPPORT A CONCLUSION THAT RACIAL DIVERSITY IN PRIMARY OR SECONDARY EDUCATION CONSTITUTES A COMPELLING STATE INTEREST.

A. Use of Social Science in the Cases Below.

In affirming the constitutionality of Seattle's racial balance plan, the specific benefits cited by the Ninth Circuit include improved academic outcomes (e.g., critical thinking skills), improved race relations and reduced prejudice, and better long-term opportunities in education and employment.[7] The court's conclusions were based primarily on testimony offered by Seattle School District's expert.[8] That testimony also listed the harms of excessive racial concentration in the classroom, which included lower test scores, lower academic achievement, less qualified teachers, and fewer advanced courses.[9]

In the Jefferson County case, the District Court came to similar conclusions, stating that ". . . the Board has met its burden of establishing a compelling interest in maintaining racially integrated schools."[10] It found that racially balanced schools fostered racial tolerance, cross-racial relationships, reduction of racial stereotypes, and increased black student achievement.[11] Regarding academic achievement, the Court said an expert for the Jefferson County School Board "testified that racial integration benefits black students substantially," but it also noted that it was not certain "to what extent

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[7] *Id.* at 1174.

[8] *Id.*

[9] *Id.* at 1177.

[10] *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 855 (W.D.Ky. 2004).

[11] *Id.* at 853.

the policy of an integrated school system contributed to these successes."[12]

Given the gravity of the issue and the enormous ramifications of the use of race for student assignment to schools, the limited social science evidence reviewed in these cases is very surprising. In the Seattle case, a single expert testified for the District. Dr. William T. Trent and his report drew from a relatively small number of studies on educational and social benefits.[13] He cited none of the many studies that find no or only limited benefits from racial balance polices. Indeed, some of the studies he cites are equivocal on the issue of benefits—a point he did not mention.

The Ninth Circuit cited a few additional studies to support the educational benefit thesis, but again it cited no study critical of the evidence.[14] Plaintiff parents submitted expert testimony only in the form of rebuttal to the Trent report, and that testimony was limited to a brief affidavit and a telephone deposition.[15]

In the Jefferson County case, the major testimony about the benefits of racial diversity (other than testimony from School District employees) came from the Jefferson County School Board's expert, Dr. Gary Orfield. He heads the Harvard Civil Rights Project, a self-described advocacy organization for

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[12] *Id.* at 853. The expert was Gary Orfield, head of the Civil Rights Project at Harvard University.

[13] William T. Trent, Ph.D., Expert Report, *Parents Involved in Community Schools v. Seattle School District No. 1*, February 13, 2001.

[14] Two of the studies were law review articles, and the one social science study cited (Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream*? The Civil Rights Project Harvard University 2003) is published by the Harvard Civil Rights Project.

[15] The Plaintiff's expert was one of the co-authors of this brief, David J. Armor.

school desegregation and racial balance plans. The Project's numerous publications rarely cite studies that do not find significant academic gains from desegregation. The Plaintiff parents did not call any social science expert to testify, and the Court made note of the fact that Plaintiffs did not attempt to rebut the educational benefit thesis.[16]

As such, the evidence introduced in these cases gave the lower courts a very limited and biased record on which to decide whether racial balancing is a compelling government interest. A sound and informed judgment on the question of compelling purpose requires a broader review of the social science literature.

B. Overview of Social Science Studies about the Potential Benefits of School Desegregation.

This review of research on the potential benefits of school desegregation will be divided into three major subject categories[17]: (1) academic achievement, which is conventionally measured by standardized achievement tests; (2) the long-term educational and occupational effects, including college attendance, years of schooling completed, and occupational success including wages and income; and (3) social outcomes which include racial attitudes, race relations, and knowledge about racial and ethnic cultural differences.

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[16] *McFarland*, 330 F. Supp. 2d at 853.

[17] An explanatory note is in order about this research review. Simply stating a finding or a conclusion with a footnote reference is not adequate. As many researchers have noted, there are significant methodological problems in most desegregation research, much of which consists of non-experimental observational studies. (Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (J.A. Banks & C.A. McGee Banks eds., McMillan 1995). Accordingly, this review will comment on methodological issues when they are germane to inferences being made from a particular study.

A fourth issue mentioned in the Seattle appellate decision concerns the potential harms of racially isolated schools. Since most studies compare outcomes between racially balanced and racially isolated schools, the three categories above also incorporate findings for the consequences of racial isolation.

1. *Academic Achievement*

Academic achievement has been studied more than any outcome in the desegregation research literature, which is understandable. Imparting knowledge and teaching cognitive skills is arguably the central mission of elementary and secondary schools.

One might assume, then, that there would be broad consensus about the effects of desegregation on the achievement of minority students, but this is not the case. On only one point is there any agreement: the impact of desegregation often varies according to grade level, test content, or location (which might mean school, school district, or state). Whether one relies on studies using simple counting methods or, alternatively, on formal meta analyses, results can differ depending on which particular investigations are included in a literature review.[18]

Given the large number of studies of achievement, the following analysis groups them according to whether they were done during the early years of desegregation (1970s and earlier), the middle years (1980s), or more recent years (1990 and later).

Early studies. The most important published studies of achievement during the early years of school desegregation

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[18] By meta analysis, we mean a formal analysis whereby effects from individual studies are quantified and combined to produce an overall quantitative effect estimate with a statistical test of significance.

were those by Armor, St. John, and Gerard and Miller.[19] Each study has a unique reason for its historic significance in the social science debate.

Large-scale school desegregation plans did not become commonplace until the late 1960s, influenced by the passage of the 1964 Civil Rights Act and the Supreme Court's 1968 decision in *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430 (1968). The Armor study was the first to review five evaluations of intentionally "generated" desegregation plans (vs. "natural" desegregation from housing patterns) using quasi-experimental designs. Finding few significant black achievement gains in these five programs, it was also the first social science study to conclude that desegregation would not produce major improvements in black achievement and thus close the achievement gap.[20]

St. John's review in 1975 advanced the research on desegregation in several ways.[21] First, she was able to assemble thirty-seven quasi-experimental studies of the effect of desegregation on black achievement, which made hers the largest research review of the more rigorous studies at that time. Second, she classified studies according to certain methodological features and by the effects on achievement they found. St. John concludes,

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[19] A study by Robert L. Crain and Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 Law & Contemp. Probs. 17-56 (1978) was revised into a formal meta-analysis and falls under studies in the 1980s.

[20] David J. Armor, *The Evidence on Busing*, 28 Public Interest 90 (1972). The five programs were the Boston METCO voluntary busing program between Boston and its suburbs; Project Concern, a similar program in Hartford; a major desegregation program in Riverside, California; and desegregation programs in White Plains, New York, and Evanston, Illinois.

[21] Nancy St. John, School Desegregation: Outcomes for Children (Wiley & Sons 1975).

> "Taken together, however, [the studies] suggest that the achievement of black children is rarely harmed thereby, but they provide no strong or clear evidence that such desegregation boosts their achievement. A countdown by grade level and achievement tests, rather than by cities, reveals that a report of no difference is more common than a report of significant gain."

The next significant work was a comprehensive evaluation of desegregation in Riverside, California by Gerard and Miller. Although the study involves only a single school district, it was unique for its large sample of students (1700), its duration of six years, and the number of outcomes assessed.[22] Unlike most studies of desegregation, it included large numbers of Hispanic students as well as black students, and as such it remains one of the largest studies of desegregation's impact on Hispanic students. The authors conclude:

> "Analysis of standardized reading achievement data offers a picture that provides little encouragement for those who see desegregation as a panacea for reducing the achievement gap that so ubiquitously characterizes minority academic performance. While the achievement of Anglo children did not suffer, minority students showed no overall benefit."[23]

Studies in the 1980s. There were only two major studies of desegregation and achievement during the 1980s, but two features make them the most important of the historical studies. First, a larger number of studies of desegregation had become available, making generalization more viable. Second, they used formal meta-analysis, a technique developed during the 1970s. This technique has the advantage of quantifying the effects of desegregation (called "effect" sizes) across many studies. These effect sizes can then be described

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[22] Harold B. Gerard and Norman Miller, School Desegregation: A Long Term Study (Plenum 1975).

[23] Gerard et al., *supra* at 297-298.

by summary statistics instead of simply counting the number of positive, negative, or neutral studies.

An effect size is calculated in standard deviation units, so that an effect of .1 is equivalent to an increase in one-tenth of a standard deviation, or about one month of a school year. The achievement gap between black and white elementary children during the 1970s was approximately one standard deviation, which is equivalent to about one year of growth during the elementary years.

The first formal meta-analysis was published by Crain and Mahard in 1983 using 93 separate studies of the effects of desegregation on black achievement.[24] Studies were classified according to research design (randomized longitudinal, quasi-experimental, etc.), and effect sizes were computed separately for each grade level tested. Effect sizes could be calculated for a total of 268 separate grade samples in the studies.

Over all studies and grade levels, Crain and Mahard found a small effect size of about .08, but the effect size for kindergarten and first grade students averaged about .30, which is quite large. The authors concluded that desegregation had a significant impact on achievement, but only if it started at the very beginning of schooling.

Given the wide variation in conclusions about desegregation's effect on black achievement, the National Institute of Education (NIE) sought to clarify the issue by convening a panel of experts to carry out further meta-analyses.[25] All but one panelist had done prior research on this topic. Thomas

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[24] Robert L. Crain and Rita E. Mahard, *The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis*, 88 Am. J. Soc. 839-854 (1983).

[25] Thomas Cook et al., School Desegregation and Black Achievement, (National Institute of Education 1984).

Cook, a noted specialist in methodology, chaired the panel and wrote a summary chapter. The panel established criteria for selecting studies that were most suitable for making causal inferences, which led it to select a total of nineteen.

Each panelist wrote a separate chapter in the report; four of those chapters were separate meta-analyses because each author rejected one or two studies on methodological grounds. One author did not compute effect estimates for 11 of the 19 studies (for technical reasons), and therefore that analysis was considered problematic in Cook's summary. Of the three remaining meta-analyses, the effect of desegregation on reading ranged from .06 to .16 with a mean of .12; the average median was .04. For math, the range was .01 to .08 with a mean of .04 and an average median of -.01. Based on these results, Cook came to the following conclusions:

> "On the average, desegregation did not cause an increase in achievement in mathematics. Desegregation increased mean reading levels. The gain reliably differed from zero and was estimated to be between two to six weeks [of a school year] across the studies examined. . . . The *median* gains were almost always greater than zero but were lower than the means and did not reliably differ from zero. . . . I find the variability in effect sizes more striking and less well understood than any measure of central tendency."[26]

Cook also discussed the difference between the NIE panel's results and those of Crain and Mahard. He noted that their overall mean effect size found by Crain and Mahard was similar to that found by the NIE panel.[27] The difference was

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[26] Thomas D. Cook, *What Have Children Learned Academically from School Integration? An Examination of the Meta-Analytic Evidence*, in SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT 40 (Thomas Cook et al., eds., National Institute of Education 1984).

[27] Cook also notes that a meta-analysis done in a doctoral dissertation also came up with a similar mean effect size of .10 (for studies that had a

due to kindergarten and first grade studies that were included in the Crain and Mahard analysis but not in the panel's studies due to methodological problems. The problem was that most studies of these early grades did not have comparable pre-tests and post-tests, an omission that can lead to inflated effects because children in desegregated schools usually have higher initial ability. Thus Cook says that that Crain and Mahard's estimates "probably result in overestimating the effects of desegregation . . .," but he also said that the issue is not fully resolved and would require further research.[28]

Recent Studies. There were few published studies on the relationship between desegregation and achievement between 1984 and 1994. Between 1995 and 2005, a number of important studies appeared, and some of these studies introduced new types of data and new analytic techniques. By 1995, many school districts had operated desegregation plans for a long time, which allowed case studies that could assess the long-term effects of desegregation in a particular school district.

The first of these recent studies was a more traditional research review by Schofield in 1995.[29] Although it is not a formal meta-analysis, it is one of the most comprehensive literature reviews ever undertaken on all of the educational and social outcomes of desegregation. It reviews more than 250 studies of academic achievement, suspensions and drop-

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control group); Ronald Krol, A Meta Analysis of Comparative Research on the Effects of Desegregation on Academic Achievement, (December 1978) (unpublished Ph.D. dissertation, Western Michigan University) (on file with author).

[28] Cook *supra* at 31.

[29] Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (J.A. Banks & C.A. McGee Banks eds., McMillan 1995).

outs, long-term outcomes, self-esteem, racial attitudes, and inter-group behaviors.

Schofield reviews all of the work mentioned in this brief as well as some not cited here, but she devotes the most space to a discussion the 1984 NIE study. She found that Cook's "conclusions seem to be a fair summary of the projects outcome . . ." and describes all of the points mentioned above.

> ". . . research suggests that desegregation has had some positive impact on the reading skills of African American youngsters. The effect is not large, nor does it occur in all situations, but a modest measurable effect does seem apparent. Such is not the case with mathematics skills, which seem generally unaffected by desegregation."[30]

Schofield notes that there is very little empirical evidence on Hispanic achievement, concluding that the Gerard and Miller study of Riverside is still the most important source of information about the effect of desegregation on Hispanic students. She repeats their conclusion that ". . . desegregation did not significantly influence the achievement level of any of the groups, including the Mexican American children."[31]

Armor also published reviews of the achievement research literature in 1995 and 2002, all of which have been discussed earlier. But these two works also include a total of seven case studies of long-term achievement trends in large school districts that have undergone extensive desegregation, as discussed below.[32]

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[30] Scholfield *supra* at 610.

[31] Scholfield *supra* at 602.

[32] The first two case studies appear in David J. Armor, *Forced Justice: School Desegregation and the Law* (Oxford 1995); the next five are described in David J. Armor, Desegregation and Academic Achievement, in SCHOOL DESEGREGATION IN THE 21ST CENTURY (C.H. Rossell et al., eds., Greenwood Publishing Group 2002).

After a total racial balance plan was ordered for Pasadena, California, in 1970, there was no change in achievement or the gap over the next four years.[33] Norfolk, Virginia, adopted a complete racial balance plan in 1970, and yet there was no net improvement in achievement or the gap as late as 1977.[34] After Dallas, Texas, adopted a partial desegregation plan in 1976, black achievement did rise significantly over the next ten years and the gap was reduced accordingly; but the black gains in predominantly minority schools were just as large as those in desegregated schools.[35] In Kansas City, Missouri, following implementation of the most expensive desegregation remedy ever ordered by a court, achievement and the gap remained flat over the next ten years (the district was majority black at the start of the plan).[36] After Minneapolis, Minnesota, attained substantial racial balance in 1982, black achievement and the achievement gap remained also relatively unchanged over the next twelve years.[37]

The last two case studies, Wilmington-New Castle County, Delaware, and Charlotte-Mecklenberg, North Carolina, are particularly important because their desegregation plans were county-wide, encompassing both city and county suburban schools. Not only were minority children exposed to middle-class white environments, but the predominant white enrollments in the counties enabled high levels of racial balance for many years despite significant white flight. The Wilmington-New Castle County plan was adopted in 1976 and modified in 1982; achievement scores were available from 1982 to 1993. Despite these relatively ideal conditions, the achievement gap

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[33] Armor, *Forced Justice*, *supra* at 77-78 (Oxford 1995).

[34] *Id.* at 79-81.

[35] Armor, Desegregation and Academic Achievement, *supra* at 161-62.

[36] *Id.* at 167-69.

[37] *Id.* at 173, 175.

remained flat and, between 1989 and 1993, the reading gap was slightly larger than the national reading gap.[38]

By virtue of the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), Charlotte-Mecklenburg implemented a comprehensive racial balance plan in 1971, and it maintained highly integrated schools for the next twenty years. Black and white achievement rose significantly between 1978 and 1985, but black achievement rose somewhat faster and the achievement gap declined from 40 to 30 percentile points. A new achievement battery was introduced in 1986, at which time both black and white achievement declined. At this time, the achievement gap returned to 40 percentile points where it remained until 1992. The case study also showed that, in 1998, there was no significant relationship between school racial composition and either reading or math achievement for black elementary students. Thus Charlotte-Mecklenburg, often described as the best example of desegregation in the nation, shows no net reduction in the achievement gap over a 15 year period.[39]

Finally, a new study by Armor examines the national relationship between school racial and ethnic composition and achievement using the 2003 National Assessment of Educational Progress (NAEP).[40] After controlling for student socioeconomic status, the study found no relationship between Hispanic concentration and Hispanic achievement, and this lack of relationship was also observed for both California and

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[38] *Id.* at 162-67.

[39] *Id.* at 169-72; 174.

[40] David J. Armor, Statement to the U.S. Commission on Civil Rights: *The Outcomes of School Desegregation in the Public Schools* (July 28, 2006).

Texas which have the largest number of Hispanic students in predominantly Hispanic schools.[41]

2. *Long Term Outcomes*

Some research reviews have concluded that the long-term benefits of desegregation are greater than short-term benefits such as test scores.[42] The available research does not justify this conclusion. With regard to the long-term impact on levels of educational attainment (college attendance, for instance), wages, and occupational status, the research fails to indicate clear benefits of desegregation. With respect to one long-term outcome—more desegregated adult environments —*amici* do not dispute the relationship but disagree with the interpretation that it is a benefit that can be traced to school desegregation.

Desegregated Adult Environments. There are two major reviews of school desegregation and the degree to which

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[41] There are some recent studies by economists, including a study by Hanushek and others using Texas data, that employ very complex econometric models. The Hanushek study suggests a very large negative effect of black concentration, which is not consistent with the case studies above and may reflect a problem with the model or the data. Eric A. Hanushek, et al., *New Evidence about Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* (Nat'l. Bur. of Econ. Research, Working Paper No. 8741, 2002; revised manuscript, February 2004). Other econometric studies also controlling for peer ability do not find significant racial composition effects. See, for example, Caroline M. Hoxby and Gretchen Weingarth, *Taking Race Out of the Equation: School Reassignment and the Structure of Peer Effects,* (Department of Economics, Harvard University, 2005). Much more research is needed before any policy implications can be drawn from this work.

[42] *See, i.e.*, Amy Stuart Wells and Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. of Educ. Res 531-556 (1994), and Jomills H. Braddock II and Tamela M. Eitle, *The Effects of School Desegregation*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 828 (Banks and Banks eds., McMillan 2d. ed. 2004).

adults choose racially integrated settings later in life.[43] Rather than discuss these studies in detail, it can be acknowledged that there is significant relationship between black students attending a desegregated high school and attending a predominantly white college, and a somewhat weaker relationship with working in predominantly white employment settings.

Amici disagree that these relationships can be characterized as benefits of desegregation, however. Although the self-selection problem plagues all long-term outcome studies, it is a greater problem here. Since African American parents differ in their preference for integrated environments—especially with respect to their place of residence or the schools their children attend—students who attend integrated high schools are more likely be from families who prefer such environments, and thus their children also tend to prefer integrated environments when they become adults. That is, family preference for integrated environments is the most likely causal variable here, not school desegregation per se. Since both the cause and the effect are desegregated environments, the only way to disentangle this relationship is by means of a controlled experiment.

Educational Attainment. The fact that black students from desegregated high schools prefer predominantly white colleges doesn't tell us whether they are more likely to seek post-secondary education. In fact, that question has been studied, and the results suggest no or a very small relationship between school desegregation and college attendance.

One of earliest national studies found that the relationship between desegregation and attending college differed be-

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[43] *See* Wells et al. supra, and also Marvin P. Dawkins and Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 Journal of Negro Educ. (3) 394 (1994).

tween black students in the North and the South.[44] Controlling for family socioeconomic status, Crain and Mahard found that attending desegregated high schools raised college attendance slightly in the North (standardized effect of +.11) but lowered it in the South (standardized effect of -.07). However, neither relationship was statistically significant.

Using the same data but a different analytic model, Eckard controlled for test scores, family socioeconomic status, high school grades, and being in a college prep curriculum, and found that the relationship between high school desegregation and college attendance was virtually zero.[45] In a later study using the same data, Braddock and McPartland came to similar conclusions as Crain and Mahard: No relationship in the South and a small positive relationship in the North that was not statistically significant.[46]

One of the better studies of this question was by Crain and others using data from Project Concern, a long-running desegregation program involving voluntary transfers of black students from Hartford, Connecticut, schools to desegregated suburban schools.[47] The advantage of this study is that it used a quasi-experimental design, so that Project Concern students could be compared to a control group of students who remained in predominantly black Hartford schools.

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[44] Robert L Crain and Rita Mahard, *School Racial Compositions and Black College Attendance and Achievement Test Performance*, 51 Soc. of Educ. 81-101 (1978).

[45] Bruce K. Eckland, *School Racial Composition and College Attendance Revisited*, 52 Soc. of Educ. 122-125 (1979).

[46] Jomills H. Braddock II and James M. McPartland, 3 *Assessing School Desegregation Effects: New Directions in Research*, Research in Soc. of Educ. and Socialization 259-282 (1982).

[47] Robert L. Crain et al., *Finding Niches: Desegregated Students Sixteen Years Later*, Columbia University: Teachers College, January 1989.

After controlling for gender, family background, and test scores, there was no difference in college attendance between all Project Concern students and the Hartford control group. Moreover, some students spent a substantial number of years in desegregated suburban schools, but then returned to the Hartford schools, and they were no more likely to attend college than those who had remained in the city all along.[48]

Finally, a study by Boozer, Krueger, and Wolkon used data from the National Survey of black Americans to estimate the relationship between the percent of black students in a high school and total years of education. After controlling for self-selection effects, the relationship was not statistically significant.[49]

Occupations and Wages. There is very little research on the link between desegregation and occupation or wage attainment. Because of the weak relationship between desegregation and college attendance, we would not expect much of a connection between desegregation and the rate of white collar (vs. blue collar) jobs, since college is the primary determinant of this distinction.

An unpublished study by Dawkins in 1991 finds some relationship between desegregation and higher occupational relationship for younger adults, but the relationships are "weak and inconsistent for respondents from the South . . ."[50]

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[48] *See* Armor, *Forced Justice*, *supra* at 108-111 for more detailed discussion of the Project Concern study.

[49] The effect associated with attending a 90% vs. 30% black high school would be a reduction of about ¼ year in total years of education. Michael A. Boozer et al., *Race and School Quality since Brown v. Board of Education*, Brookings Institution Papers on Economic Activity, Microeconomics, 269-338 (1992).

[50] Marvin P. Dawkins, *Long-term Effects of School Desegregation on African Americans*, (unpublished paper, University of Miami, 1991); the quote is from Wells et al. *supra* at 551.

Another study of occupational attainment by Crain and Strauss using the Project Concern data find that "when self-selection bias is removed, it appears as though school desegregation does not have much effect on the occupational attainment of black men with no college education. . . ."[51]

The Boozer study also estimated the relationship between high school black composition and wages. As for educational attainment, they found a small negative impact on wages but it was not statistically significant after controlling for self-selection bias.[52]

3. *Social Outcomes*

Studies of desegregation have evaluated several categories of non-educational "social" outcomes. Social outcomes include self-esteem or self-concept, racial attitudes, and race relations. There are also survey studies that ask students about their desegregation experiences and their opinions about personal benefits.

At the outset it should be noted that studies on the social outcomes of desegregation differ in several ways from the literature on academic achievement. First, most of the studies focus on the impact of desegregation on both white and minority students. Second, the lack of standardized measures of social impact hampers generalization. Finally, reviewers have expressed dissatisfaction with the methodological adequacy of these studies.[53]

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[51] Robert L. Crain and J. Strauss, *School Desegregation and Black Occupational Attainment: Results from a Long-term Experiment*, The Social Organization of Schools, Report No. 359 (1985); the quote is from Wells et al., *supra* at 548.

[52] Boozer *supra* Table 8, at 304.

[53] Schofield *supra* at 609. *See also* Armor, *Forced Justice*, *supra at* 99-101.

Self-esteem. Since neither of the lower courts in Seattle or Jefferson County mentioned black self-esteem as a benefit of desegregation, only a brief comment is necessary here. There is substantial consensus that "[t]he major reviews of school desegregation and African American self-concept or self-esteem generally conclude that desegregation has no clear-cut impact."[54]

Racial Attitudes and Race Relations. The first of these reviews was done by St. John in 1975.[55] She looked at 27 studies that compared the prejudicial attitudes of students in segregated v. desegregated schools and presented the results separately for blacks and whites. For blacks, she found negative effects in six studies (desegregation worsened prejudice), positive effects in five studies (prejudice was reduced), and no or mixed effects in three studies. For whites the breakdown was eight, eight, and three, respectively.

St. John also examined a separate group of 17 studies that used friendship choices as the outcome measure. For black students she classified one study as positive (desegregation produced more cross-race friendships), four studies as negative (fewer friendships), and nine with mixed or no effects. For whites, three found more friendships, three found fewer, and ten showed mixed or no results. So the evidence draws a mixed picture, but there is some indication that desegregation may worsen white prejudice, since only one suggested a positive impact, while four found a negative impact. St. John explained these results by suggesting that the conditions for reducing prejudice and improving race relations may not be present in many school settings where there are large differences in levels of academic attainment between racial groups.

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[54] Schofield *supra* at 607.

[55] St. John *supra* at 72.

A second major review was published by Stephan in 1986; some of the studies overlap those of St. John, but there were several newer studies in this review.[56] The results were similar for whites but slightly different for blacks. He found prejudice worsened for blacks in four studies, lessened in eight, and showed no change in another eight. For whites the comparable figures were eleven, four, and nine. Thus, while Stephan found that positive studies outnumbered negative studies for blacks, like St. John he also found that the reverse was true for whites. This is of special concern since white prejudice gave rise to state-sponsored segregation in the first place.

Two other studies looking at social outcomes have some unique features which deserve special emphasis. One is the study of desegregation by Gerard and Miller in Riverside, California. It tracked friendship measures for six years, giving students ample time to recover from some of the short-term disruptions which characterize many desegregation plans, and it is one of the few studies of Hispanic desegregation. Some theoretical perspectives would predict that interracial friendships should increase over time, but the Riverside study found just the opposite: the number of black and Hispanic students chosen as friends decreased.[57]

The other study was done by Patchen using a large survey of students in Indianapolis high schools.[58] He studied the relationship between racial attitudes and the black percentage in classrooms. He found that both blacks and whites had the

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[56] Walter G. Stephan, *The Effects of School Desegregation: An Evaluation 30 Years after Brown*, in ADVANCES IN APPLIED SOCIAL PSYCHOLOGY 181 (M. Saks and L. Saxe, eds., Erlbaum Assoc., 1986).

[57] Whites chose 1.5 blacks and Hispanics as friends after one year of desegregation; after 6 years, the rates fell to 1.1 for hispanics and 1.0 for blacks.

[58] Martin Patchen, *Black-White Contact in Schools: Its Social and Academic Effects*, 145 at Fig. 7.4 (Purdue University Press 1982).

most positive attitudes towards the opposite race in those classrooms that averaged more than 70 percent black. The most negative attitudes were found for those in integrated classes averaging between 20 and 40 percent black, although the attitudes became somewhat more positive when the percent black dropped below 20 percent. The author concluded that the "ideally" integrated classrooms had the highest levels of friction, in part due to academic competition.

There have not been many new studies comparing attitudes among segregated and desegregated students since the Patchen study, and thus the most recent comprehensive reviews of racial attitudes do not alter the conclusions first reached by St. John. The review by Schofield in 1995 concludes: "There is no guarantee that desegregation will promote positive intergroup behavior," and also "The evidence on the impact of desegregation on intergroup relations is generally held to be inconclusive and inconsistent."[59] Schofield came to much the same conclusion in a 1991 review of research on the same question.[60]

Surveys of Personal Benefits. Another possible social outcome of desegregation is what might be called perceived "personal" benefits. These personal benefits are determined through surveys of students from desegregated schools, and some of these studies report generally positive reactions to the desegregation experience. According to these surveys, students mention such personal benefits as cross-racial friendships, learning how to work and get along with students of different races and ethnicities, and increasing their knowledge about racial and cultural differences.

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[59] Schofield *supra* at 610-611.

[60] Janet Ward Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature*, 17 Review of Res. in Educ. 335-412 (American Educational Research Association 1991).

A student survey of this type was conducted on Jefferson County 11th graders and introduced as evidence by Defendants.[61] Wells conducted a national survey of students who graduated from racially mixed high schools in six cities, and similar findings emerged.[62]

One can presume that many students in desegregated schools will perceive personal benefits from a desegregation experience. However, most of these surveys do not have a comparable control group of students from racially isolated schools, and therefore these studies are not designed to detect how much of particular attitudes can be attributed specifically to experiences in the desegregated school versus experiences in the larger society.

CONCLUSION

In deciding that the use of race is a compelling government purpose in the Jefferson County and Seattle racial balance plans, the lower courts relied on an incomplete record of research on the educational and social benefits of desegregation. Given the national implications of the use of race in school assignments, a conclusion that racial balance is a compelling state interest should be based on clear and consistent evidence of benefits. In fact, a fair and comprehensive analysis of the research shows that there is no clear and consistent evidence of benefits for any of the educational and social outcomes cited by the lower courts.

For the reasons cited herein, the Court should reverse the rulings of the Sixth and Ninth Circuits, and find that there is no compelling state interest in racial balancing.

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[61] *See* Brief of the Civil Rights Project at Harvard University as Amicus Curia, 2004.

[62] Amy Stuart Wells et al., *How Desegregation Changed Us: The effects of Racially Mixed Schools on Students and Society*, Teachers College, Columbia University (April 2004).

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioners,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents,

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND
NEXT FRIEND OF JOSHUA RYAN MCDONALD
Petitioners,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents,

On Writs of Certiorari to the United States Courts of Appeal for the Sixth and Ninth Circuits

---

BRIEF OF THE ASIAN AMERICAN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Asian American Legal Foundation ("AALF"), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans.[1] Americans of Asian origin have a particular interest in use of race in K-12 school admissions. They have historically been, and continue to be, denied access to public schools due to overt racial and ethnic prejudice as well as ostensibly well-intentioned "diversity" programs. Despite the advances our society has made with respect to racial equality, discriminatory treatment of Asian Americans finds resurgence in the racial balancing schemes at issue here which, even if inadvertently, are used to exclude Asian Americans from public schools.

Students of Asian American descent living in Seattle, Washington and Jefferson County, Kentucky are subject to Respondent school districts' racial balancing plans. *See Parents Involved In Community Schools v. Seattle School District, No. 1,* 426 F.3d 1162, 1166 (9th Cir. 2005); *McFarland v. Jefferson County Public Schools*, 330 F. Supp.2d 834, 840 note 6 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005).[2]

AALF's constituents have also suffered from similar racial classification in the San Francisco, California public school system. In *Ho v. San Francisco Unified Sch. Dist.,* 147 F.3d 854, 864 (9th Cir. 1998), San Francisco's schoolchildren of Chinese descent sued to end a consent decree that mandated racial and ethnic admissions quotas in the San Francisco public school system. After five years of litigation, and after the court found the defendants had almost no chance of

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[1] Letters of consent by all parties to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than Amicus Curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Petitioner Crystal D. Meredith, custodial parent and next friend of Joshua Ryan McDonald, is a named plaintiff in *McFarland v. Jefferson County Public Schools*, 330 F. Supp.2d 834.

prevailing, the San Francisco Unified School District and the San Francisco chapter of the NAACP, rather than face a trial, agreed to modify the consent decree and to cease the use of race. *See Ho v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999).

AALF members organized and supported the *Ho* litigation from the outset. Many of the same issues are presently before this Court in *Parents Involved in Community Schools v. Seattle School District No. 1, et al.*, No. 05-908, and *Meredith v. Jefferson County Board of Education*, No. 05-915. As in *Ho*, the Seattle and Jefferson County school districts are engaged in racial balancing to prevent "racial isolation." They are similarly denying schoolchildren access to public schools and programs solely because of their race.

Significantly, in the courts below, Petitioners relied on the Ninth Circuit Court of Appeals' rulings in *Ho* to argue that the racial assignment schemes at issue here are illegal. A decision by this Court upholding the use of race in the Seattle and Jefferson County school districts would have implications for schoolchildren in all of the nation's public schools. It would endanger the relief secured in *Ho* and could erase the judicial benchmark against K-12 racial balancing schemes established by the *Ho* litigation.[3]

Amicus curiae AALF submits that the long and tragic history of discrimination against Chinese Americans in this country, the Chinese American experience in the *Ho* case, and present, ongoing discrimination faced by members of this historically oppressed group, provide this Court with compelling reasons why it should not allow the equal protection rights of individuals, especially innocent schoolchildren, to be eroded in the name of diversity or social engineering.

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[3] San Francisco school officials have already announced their belief that a victory for Respondents in the Seattle and Jefferson County cases before this Court would allow them to again use race in admitting students to San Francisco's public schools. *See SCHOOLS, Justices Take Cases On Race-Based Enrollment*, San Francisco Chronicle, at B-1 (June 6, 2006).

Accordingly, AALF and its constituents respectfully ask this Court to hear their arguments in favor of Petitioners.

SUMMARY OF ARGUMENT

The Asian American Legal Foundation and its constituents reject and find offensive the notion that Asian Americans, or anyone else, must be classified by race in order to be protected against "racial isolation." As this Court has long held, government use of race is always suspect and should be upheld only where narrowly tailored to a compelling government interest. That limitation is mandated by the personal nature of the right in question—a right that vests solely in the individual, not in a group. *See Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

Unbounded by any remedial purpose, the Seattle and Jefferson County school districts' racial balancing schemes will continue in perpetuity based solely upon the arbitrary judgment of the school districts' administrators. Such use of race violates the Fourteenth Amendment right of all Americans, including schoolchildren of Asian descent, to the equal protection of the laws.

There is nothing in this Court's jurisprudence to sanction diversity alone as a compelling government interest allowing the use of race in K-12 schools. Unlike the situation allowing the limited use of race as one of many factors in the context of voluntary graduate education, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), here, attendance is not optional; children are forced by law to attend K-12 schools. Moreover, the burden of the racial classification falls heaviest on students from poorer and disadvantaged families, who do not have the option of moving or sending their children to private schools.

Furthermore, even if the Court were to accept the notion that racial diversity in K-12 public schools could be a compelling state interest, in violation of the rule articulated in *Grutter*, the Seattle and Jefferson County admissions plans consider only race, and not the many other measures of diver-

sity considered by the University of Michigan Law School. Thus, these plans cannot be narrowly tailored.

Respondents' recitation of a noble purpose should be given no weight. State officials have *always* argued that *their* classification of individuals by race was justified by an important government purpose; yet, our country's history has consistently shown that the express use of race or ethnicity was wrong or misguided. The long history of Chinese Americans in this country, and more specifically, in San Francisco, California, amply illustrates this phenomenon.

Viewed historically as faceless members of a "yellow horde," in years past, individuals of Chinese descent were often the victims of state action directed at "race" that was meant to serve the greater public good. The onus extended to Chinese American children who sought to attend public schools. *See, e.g.*, Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 Asian L.J. 181, 207-208 (May 1998). San Francisco and other cities flatly denied "Chinese" children the right to attend public schools. When courts ordered their admission, the State of California established separate "Chinese" schools, to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864.

In case after case, the single historical truth that emerges is that the rights of people of Chinese descent—and of all Americans—have been vindicated only by strict application of the Fourteenth Amendment's protection of individual, rather than group, rights. That same rule is no less valid today, and it directly applies to the situations in Seattle and Jefferson County.

In the recent *Ho* case, the San Francisco school district, similar to Respondent school districts, sought to prevent "racial isolation" and promote "educational excellence" through a consent decree that classified children by race for purposes of admission. Members of "overrepresented" races were "capped out" at their chosen schools, with the result that Chinese

American children, who were the largest of the defined groups, faced formidable obstacles in gaining admission to neighborhood schools. *See Ho*, 147 F.3d. at 856-59; David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 Harv. BlackLetter J. 39, 54 (Spring 2000).

The main effect of San Francisco's racial balancing scheme was not to improve the educational experience of students, but to make schoolchildren, in particular, Chinese American schoolchildren, feel racially stigmatized and inferior. *See Richmond v. Croson*, 488 U.S. 469, 493 (1989) (use of race promotes feelings of "racial inferiority" and "racial hostility"). The results in Seattle and Jefferson County have been and can be no different.

For these and other reasons set forth herein, the school districts' racial balancing programs should be stopped before they harm more individuals and deprive more schoolchildren of their Constitutionally guaranteed rights.

ARGUMENT

I. USE OF RACE IS "ODIOUS" AND SHOULD BE RESERVED FOR SITUATIONS WHERE IT WILL VINDICATE, NOT TRAMMEL RIGHTS.

A. A Decision Allowing School Officials To Classify Students By Race Would Encourage Renewed Discrimination Against San Francisco's Chinese American Schoolchildren.

This Court has repeatedly warned that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (*quoting Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Use of race "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw* at 643. Accordingly, the Fourteenth Amendment provides that, "No State [actor] shall . . . deny to

any person within its jurisdiction the equal protection of the laws." *See Croson*, 488 U.S. at 493.

The Seattle and Jefferson County school districts' use of race in admissions is dangerously unbounded by any remedial purpose, instead resting on the school officials' notion of proper racial balance. Respondents argue the racial mix they seek will provide benefits that justify the sacrifices of those injured by their use of race. Whatever the benefits of this skin-deep diversity, it comes at too heavy a price. Any decision allowing K-12 school officials to classify students by race at their whim would have a far-reaching and chilling effect on individual rights in schools across the nation.

In particular, in a relevant case that AALF respectfully brings to the Court's attention, such a decision would likely result in San Francisco's schoolchildren of Chinese descent again facing race-based discrimination in the city's public school system.

In *Ho v. San Francisco Unified School District*, which began in 1994, San Francisco's Chinese American schoolchildren were forced to turn to the courts for redress of their Fourteenth Amendment rights, in order to halt the school district's policy of classifying and assigning them to the city's K-12 schools on the basis of their race. *See Ho*, 147 F.3d 854; *Ho*, 59 F. Supp. 2d 1021 (on remand); *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (1997) (decision giving rise to appeal in 147 F.3d 854).

In *Ho*, the plaintiff class collaterally challenged a consent-decree-mandated racial balancing scheme imposed in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34 (N.D. Cal. 1983). Without any finding of a constitutional violation to remedy, the consent decree set up a racial balancing scheme with the stated goal of preventing "racial isolation" in the city's schools. *See Ho*, 965 F. Supp. at 1322; *see also Ho*, 147 F.3d at 859. Similar to the objectives of the Seattle and Jefferson County plans, the San Francisco school district's plan sought "to eliminate racial/ethnic segregation or identifiability in any school, classroom, or

program, and to achieve throughout the system the broadest practicable distribution of students from all the racial/ethnic groups comprising the general student population." *San Francisco NAACP*, 576 F. Supp. at 40. This was supposed to produce "academic excellence." *See id. at 42, 58.*

Under the admissions program, nine ethnic groups were arbitrarily defined, including "Chinese." Members of at least four of the groups were required to be present at each school; and no one group could represent more than 45 percent of the student body at any regular school or 40 percent at any alternative school. *See id.; see also Ho*, 147 F.3d at 856. The promotion of racial diversity, and not the remediation of past racial discrimination, was the only real purpose. As described by the district court, "This plan is designed to provide relief for all San Francisco school children; it does not address the needs of any particular racial or ethnic group." *San Francisco NAACP*, 576 F. Supp. at 49.

By the time of the *Ho* challenge, the school district had enlarged the original nine arbitrary racial categories to thirteen equally arbitrary categories to take into account the growing prominence of additional racial groups in the district. *See Ho*, 147 F.3d at 858. Nevertheless, despite the numerous racial categories, no provision was made for the growing number of children of mixed race or for those children who preferred not to declare their race. *See id.* at 862 ("They were not given the option of refusal.").

B. The Experiences Of The Named Plaintiffs And Class In *Ho* Demonstrate That Mandated Diversity Harms Individuals, Even Members Of Groups That Have Historically Suffered Discrimination.

In *Ho*, as in the instant cases, the school district's racial balancing plan affected students of different races in different ways. However, as previously stated, in San Francisco, the burden fell heaviest on students identified as "Chinese." With a long history in San Francisco, over the years, Chinese

Americans had come to constitute the city's largest identifiable ethnic group. *See* Levine, *supra*, at 55-56. Accordingly, in the San Francisco school district's student assignment process, a child identified as Chinese was most likely to be "capped out"—that is, barred because the child's racial quota was exceeded—at desired schools and forced to attend a non-chosen school, often far from his or her neighborhood. *See id.*

At Lowell High School, an academic "alternative" high school that admitted students from middle and junior high schools based on a numerical index derived from a combination of grades and standardized test results, the school district's mandated diversity was maintained by requiring Chinese applicants to achieve numerically higher index scores compared to applicants of all other racial or ethnic groups, including White, Japanese, and Korean, in order to gain admission. *See id.*; Lawrence Siskind, *Racial Quotas Didn't Work in SF Schools,* op-ed, San Francisco Examiner (July 6, 1994). Also, even where preferences were not required to maintain the district's racial caps, the district nevertheless adopted a policy of granting preferences to applicants classified as "Hispanic" or "African American," *See Ho*, 147 F.3d at 858.

The parents of affected children and other concerned Chinese Americans, including officials of the Chinese American Democratic Club, sought relief from the school district, but the unlawful discrimination continued. *See Levine, supra*, at 56-58. Chinese American parents' frustration mounted as their children were turned away from schools for no other reason than that "there were 'too many Chinese.'" *Id.* at 61.

On July 11, 1994, the *Ho* class action was filed by three Chinese American schoolchildren denied admission to city schools because of their race, suing on behalf of themselves and "all children of Chinese descent of school age who were current residents of San Francisco and who were eligible to attend public schools of the school district." Levine, *supra*, at 62-63.

The named plaintiffs' situations amply illustrate the discrimination meted out to Chinese American schoolchildren by school officials:

- Brian Ho was five years old at the time the suit started. In 1994, he was turned away from his two neighborhood kindergartens because the schools had accepted the maximum allowed percentage of "Chinese" schoolchildren. He was assigned to a school in another neighborhood.
- Patrick Wong, then fourteen years old, applied for admission to Lowell High School in 1994. He was rejected because his index score was below the minimum required for Chinese American applicants. However, his score was high enough that he would have been admitted to Lowell had he been a member of *any other* racial or ethnic group recognized in the consent decree. He was rejected at two other high schools because such schools had also accepted the maximum number of schoolchildren of Chinese descent. When he tried to apply to a fourth high school, a newly established academic high school, his mother was told that all spaces for Chinese Americans were "filled" even though spaces for applicants of other racial or ethnic groups were still available.
- The family of Hillary Chen, then eight years old, moved from north of Golden Gate Park to a neighborhood south of the park in December 1993. Hilary was not allowed to transfer into any of three elementary schools near her new home because all three schools had accepted the maximum number of Chinese American schoolchildren.

Id. at 61.

C. A Settlement Ending Racial Balancing Was Reached In *Ho* Only Because The Law Was Clear That The School District's Goal Of Diversity Could Not Justify Its Use Of Race.

After five years of vigorous litigation, the *Ho* case settled on the first day of trial with the defendants agreeing to (i) cease using race to assign students to the city's schools and (ii) end the mandatory requirement of self-classification by race on student enrollment forms. *See Ho*, 59 F. Supp 2d at 1025 (approving settlement).

Beyond question, settlement in *Ho* would never have been reached if the district court and the Ninth Circuit (on an interlocutory appeal from the district court's denial of plaintiffs' request for dissolution of the consent decree) had not emphasized to defendants that (i) under this Court's decisions in cases such as *Croson* and *Adarand*, the school district's goal of diversity did not justify its use of race in accepting students to K-12 schools, and (ii) at trial the school district would have to prove a past constitutional violation tied to its present use of race—a burden defendants were extremely unlikely to carry. *See Ho*, 147 F.3d at 864-65 ("[T]he temporary expedient of using race is to compensate individual persons themselves injured by the malevolent use of race."); *Ho*, 59 F. Supp. 2d at 1024-25 (noting burdens placed by Ninth Circuit's ruling and district court's prior finding that "defendants had shown little likelihood of prevailing at trial").

Thus, key to the *Ho* plaintiffs' vindication of their constitutional rights was the recognition by the district court, and ultimately the school district, that, under the strict scrutiny required by this Court's precedents, racial balancing could not be used to justify the district's use of race, no matter how well-intentioned the district's goals.

If this Court, in deciding the instant cases, allows Respondents to continue to classify K-12 students by race, there is a very real danger that the San Francisco Unified School District will again try to implement a race-based student assignment program, in spite of the *Ho* settlement and in spite

of a new state law prohibiting use of race. Indeed, San Francisco school officials have already announced they will "move ahead with plans to reintroduce race as a factor in enrollments." *See* Bob Egelko, Heather Knight, *SCHOOLS, Justices Take Cases On Race-Based Enrollment,* San Francisco Chronicle, at B-1 (June 6, 2006). "'If the Supreme Court upholds the Seattle system . . . Prop. 209 is a moot point. . . Federal laws would override a state initiative.'" (quoting board member Mark Sanchez). *Id.*

If the Seattle and Jefferson County racial balancing schemes are upheld, it is likely that other school districts around the country will similarly subject millions of other schoolchildren to race-balancing programs. While racial balancing plans would victimize schoolchildren of all races, their impact on the members of ethnic groups historically victimized by state-mandated discrimination would be a dark stain on American jurisprudence. If Respondents' policies are upheld, amicus curiae AALF respectfully submits that the doctrine of "different but equal" at the heart of Respondents' arguments will not be viewed by future generations any more favorably than is today the notion of "separate but equal" finally rejected by this Court in *Brown v. Board of Education.*

II. HISTORICALLY, THE STATE'S DISCRETIONARY USE OF RACE HAS *NEVER* BEEN JUSTIFIED BY A COMPELLING GOVERNMENT PURPOSE.

A. The Experience Of Chinese Americans Amply Illustrates That, Whatever The Excuse Of The Times, History Will Find That It Was Wrong To Treat Individuals As Faceless Members Of A "Race"

The experience of Chinese Americans in this country illustrates that, whatever the justification given by state officials at the time, history will in the end find that group identity should never be elevated above individual rights. The struggle by Chinese American schoolchildren in *Ho* against

race-based treatment was particularly ironic in that, for much of the preceding century and a half, Americans of Chinese descent had struggled against racial discrimination, particularly in San Francisco.

Throughout their history in this country, individuals of Chinese descent have sought to participate in and contribute to American society but have often faced significant barriers solely because of their race. *See, e.g.*, Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982). Their treatment gave rise to the expression "a Chinaman's Chance," a term meaning "having little or no chance of succeeding." News Watch Diversity Style Guide, *at* http://www.ciij.org/publications_media/20050321-133409.pdf.

Time and again, Chinese Americans received equal treatment only after appealing to the federal judiciary for the protections guaranteed individuals by the United States Constitution.

For example, in *Ho Ah Kow v. Nunan*, 12 F. Cal. 252 (C.C.D. Cal. 1879) (No. 6,546), a district court invalidated San Francisco's infamous "Queue Ordinance" on equal protection grounds. In *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880), the court found unconstitutional an act forbidding Chinese Americans from fishing in California waters. In *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880), the court declared unconstitutional a provision of California's 1879 constitution that forbade corporations and municipalities from hiring Chinese.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court ruled that Chinese were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance. In *In re Lee Sing*, 43 F. 359 (C.C.D. Cal. 1890), the court found unconstitutional the "Bingham Ordinance," which mandated residential segregation of Chinese Americans. In *United*

States v. Wong Kim Ark, 169 U.S. 649 (1898), this Court ruled that a Chinese American boy, born in San Francisco, could not be prevented by San Francisco officials from returning to the city after a trip abroad.

Chinese American schoolchildren were long denied access to the public schools. In *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco public schools to admit a Chinese American girl who was denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to "Mongolian" children. *See* McClain, *supra*, at 137. In response, the California legislature authorized separate "Chinese" schools to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864; *see also* Kuo, *supra*, at 207-208 (noting that "Chinese" were segregated even when "Japanese" were not).

Even though it is not widely known, Chinese American schoolchildren were some of the earliest victims of "separate but equal" jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the "Chinese" school in Chinatown was "separate but equal." 119 F. at 382. In *Gong Lum v. Rice*, 275 U.S. 78 (1927), this Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl residing in Mississippi could be denied entry to a "white" school because she was a member of the "yellow" race. *Id.* at 87.

Thus, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry . . . was the classic case of *de jure* segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]. . . ." *Id.* at 1216. "*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the

Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. *See Yick Wo v. Hopkins*, 118 U.S. 356." *Lee,* 404 U.S. at 1216.

In all the historical instances in which the state used race to classify Chinese Americans, the state officials articulated reasons—exactly as they do here—why such use of race was necessary or advanced legitimate societal goals. In every instance, the racial classification scheme was later acknowledged to have been wrong and an impermissible infringement of individual rights.

B. Respondents' Classification Of Schoolchildren By Race Is Unlikely To Produce Benefits But Is Certain To Cause Harm.

The school districts' classification of children by race teaches them precisely the wrong lessons, and can only cause harm. As this Court has explained, "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities." *Rice v. Cayetano,* 528 U.S. 495, 517 (2000).

In *Ho,* as here, the school officials claimed that classifying students by race saved them from "racial isolation," and would bring them educational benefits. "The decree's two goals were to 'eliminate racial or ethnic segregation . . .' and to 'achieve academic excellence' throughout the school district, by which it meant raising the academic performance of black and Hispanic students." Michael W. Lynch, *San Francisco's Chinese Wall,* Policy Review (May/June 1997).

After the filing of the *Ho* case, however, even proponents of San Francisco's racial balancing scheme were forced to admit that no discernable benefits had been produced. One of the more telling indictments was issued by a Grand Jury convened to investigate the success of the program. *See* Grand Jury Report, *The San Francisco Unified School District, at* http://www.sfgov.org/site/courts_page.asp?id=3953 (San Francisco Civil Grand Jury Report, 1996-97). After extensive investigation, including analysis of collected data

and reports by Professor Gary Orfield, a court-appointed education expert, the Grand Jury concluded that racial balancing had achieved nothing but racial balancing:

"Fourteen years of experience with the Consent Decree have established that while it has met its goal of *de facto* desegregation, it has been a failure at accomplishing its primary purpose of achieving academic excellence for all ethnic groups." *Id.* at VI (Conclusion). The Grand Jury in particular found that racial balancing had not worked for Hispanic and African American students, whose academic scores were "lower than those of comparable students around the country . . . . The Grand Jury concludes that the Consent Decree is not working, at least for the substantial African-American and Hispanic groups." *Id.* at IV.

The Grand Jury found that what was needed was, not more racial diversity, but rather more family involvement: "The support, encouragement, example (and occasional prodding) of parents lies behind every successful student. . . . Parental involvement in education should become a prime goal of the District." *Id.* at VI (Findings). The Grand Jury's findings are consistent with the long-standing consensus of experts on the subject: "The legendary Coleman Report of the 1960s found that *after the influence of the family,* the socioeconomic status of a school is the single most important determinant of a student's academic success." *See* Richard D. Kahlenberg, *One Pasadena: Tapping the Community's Resources to Strengthen the Public Schools,* Report to the Pasadena Educational Foundation, p. 20 (May 24, 2006), *at* www.pusd.us/filemgmt_data/files/Kahlenberg %20ReportPDF.pdf (emphasis added).[4]

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[4] Ironically, it was San Francisco's enforced busing of students that had destroyed the neighborhood character of schools and discouraged parental involvement. In just one example, at the hearing approving the consent decree's racial balancing plan, the court rejected the appeals of black parents from the Bayview/Hunter's Point neighborhoods that the plan would destroy neighborhood schools where they took "pride in the academic achievements" of their children. *See San Francisco NAACP,* 576 F.Supp. at 49. The court acknowledged "that the children at Drew School

While mandated racial balancing in San Francisco's schools did not produce discernable benefits, it caused obvious harm. As this Court warned in *Croson*, San Francisco schoolchildren were stigmatized by the school district's use of race. *See Croson*, 488 U.S. at 493. Evidence of the stigmatization was found even in the Grand Jury's report: "We have the anecdotal evidence of one principal, that although her school is desegregated, she cannot get Asian and black children to hold hands in a simple playground game of 'Ring Around the Rosie.' . . . In short, the Decree has resulted in physical desegregation. Social desegregation remains a distant goal." Grand Jury Report, *supra*, at IV.

After the *Ho* case was filed, newspapers widely reported the stigmatization felt by children targeted by the racial quotas. As stated by the parent of one "Chinese" youth turned away because of his ethnicity, "He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?" Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, at C-2 (Feb. 14, 1999).

As Lee Cheng, Secretary of AALF, testified in a written statement for hearings held by the U.S. House of Representatives, Sub-Committee on the Constitution:

> Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

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and Pelton School to some extent are being asked to make sacrifices," but explained that pedagogical experts had concluded the "desegregation" benefits would ultimately make their sacrifices worthwhile. *Id.* The result was that, fourteen years later, only one of San Francisco's schools, the magnet Lowell high school, still had an affiliated parental organization. *See* Grand Jury Report, *supra*, fn. 12.

Lee Cheng, *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), *at* http://judiciary.house.gov/legacy/274.htm.

Another insidious byproduct of the school district's racial balancing plan was "rampant dishonesty," as parents of all races attempted to misreport children's racial identity to gain admission to desired schools. *See* Michael Dorgan, *Desegregation or Racial Bias?*, San Jose Mercury, at 1A (June 5, 1995). "[S]ome black families in Bayview-Hunter's Point have gone so far as to take Hispanic surnames to protect their children from busing." *Id.* at 10A. "People know if they want to go to a particular school that has a lot of Caucasians, they should put down something other than Caucasian, and they do." *Id.* at 10A (quoting School Board President Dan Kelly).[5]

Thus, in San Francisco, mandated diversity in K-12 schools produced no educational benefits. Instead, it taught schoolchildren that they were categorized and limited by their race. There is no reason to suppose that in Seattle and Jefferson County the result could be any less damaging.

C. Particularly Suspect Are Declarations By Experts And Other Luminaries That Social Agendas Or National Necessity Require Classifying Citizens By Race.

The Court should be wary of Respondents' attempt to do an end run around their need for a compelling state interest to justify their use of race by proffering statements by government officials, experts and other luminaries that classification by race is necessary to advance societal and other goals. Where such self-serving statements have in the past been accepted by courts, they have consistently failed to pass the test of time.

In *Plessy v. Ferguson,* 163 U.S. 537, the Court accepted the view of society that, even though all persons were equal before the law, the public good allowed the use of "distinc-

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[5] On the school enrollment forms, parents were threatened with "perjury" if they misreported the race of their child. *See Ho,* 147 F.3d at 862.

tions based upon color." The lone dissenter, Justice John Harlan, wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case . . ." *Id.* at 558. History proved Justice Harlan to be right.

In *Brown v. Board of Education,* 347 U.S. 483, this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia and South Carolina that black and white children learned better in a single-race environment, and for societal purposes could be kept separate by state mandate. Expressly rejecting any contrary findings regarding "psychological knowledge" made in *Plessy v. Ferguson,* the Court found that use of race produces a "sense of inferiority." "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place." *Brown,* at 494-495.

Today, it is universally acknowledged that the Roosevelt administration and military authorities infringed the constitutional rights of Japanese Americans when, during World War II, the government placed them under curfew, then removed them from their West Coast homes and placed them in internment camps.[6] Yet, at the time, when the affected citizens pled with the courts to uphold their constitutional rights, the courts passively accepted statements by administration and military officials that such use of race was necessary in the national interest.

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[6] Executive Order No. 9066 was issued on February 19, 1942. It authorized the Secretary of War and certain military commanders "to prescribe military areas from which any persons may be excluded as protection against espionage and sabotage." Congress enacted § 97a of Title 18 of the United States Code, making it a crime for anyone to remain in restricted zones in violation of such orders. Military commanders then, under color of Executive Order No. 9066, issued proclamations excluding Japanese Americans from West Coast areas, and sending them to internment camps. *See Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984)

In *Hirabayashi v. United States*, 320 U.S. 81, this Court affirmed the conviction of an American citizen found guilty of violating the curfews imposed on Japanese Americans. In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court upheld the conviction of an American citizen of Japanese descent, who had violated an exclusion order by remaining in his San Leandro, California home, rather than go to an internment camp. The courts at all levels deferred to declarations by military authorities that such discrimination by race was necessary to advance compelling government interests. *Id.* 217-219.[7] Amicus briefs submitted by the states of Oregon, Washington and California, urged and supported the decisions. *See Korematsu v. United States*, 584 F. Supp 1406, 1423 (N.D. Cal. 1984).

Much later, of course, it was discovered that government and military figures had misled the courts; and that the government had known that there was no national necessity requiring the use of race. *See Korematsu*, 584 F. Supp. at 1420; *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). The 1980 Commission on Wartime Relocation and Internment of Civilians found that the curfew and exclusion orders had been motivated by "racism" and "hysteria" and not "military necessity," and stated:

> [A]t the time of the issuance of Executive Order 9066 and implementing military orders, there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry . . .

See Korematsu, 584 F. Supp at 1416. "[T]he government deliberately omitted relevant information and provided mis-

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[7] "It was uncontroverted at the time of conviction that [Fred Korematsu] was loyal to the United States and had no dual allegiance to Japan. He had never left the United States. He was registered for the draft and willing to bear arms for the United States." *Korematsu*, 584 F. Supp. at 1409.

leading information in papers before the court. The information was critical to the court's determination. . ." *Id.* at 1420.[8]

Here, also, this Court should be wary of the attempts by Respondents' declarants and *amici curiae*—no matter how illustrious their credentials or purportedly noble their goals—to manufacture a compelling state interest to excuse the use of race. If history teaches any lessons, it is that generally, proffered justifications for the state's use of race will, in the end, be found to be hollow.

III. THE DISTRICTS' RACIAL BALANCING PLANS MERIT "HOSTILE" REVIEW AND NOT THE "LENIENT" STRICT SCRUTINY APPLIED BY THE COURTS BELOW.

A. The Court Should Reject Any Suggestion That Respondents' Lofty Goals Entitle Their Racial Balancing Schemes To A More Sympathetic Review.

The racial balancing schemes at issue here are no less offensive because they dispassionately view children as jelly beans, to be arranged by color at the school officials' whim. The record amply illustrates that, although the courts below claimed to be applying strict scrutiny, in fact they accorded the school districts' racial balancing programs a somewhat deferential review because of the programs' supposed lofty motives and benign effect. One judge of the Ninth Circuit Court of Appeals, in his concurrence, as much as conceded that Respondents' racial balance schemes could not survive

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[8] Referring to the *Hirabayashi* and *Korematsu* cases, Justice Powell later wrote, "Only two of this Court's modern cases have held the use of racial classifications to be constitutional." *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). Ironically, those two cases were recently joined by a third, *Grutter v. Bollinger*, 539 U.S. 306 (2003), where "[t]he Court also heeded the judgment of amici curiaeincluding educators, business leaders and the military—" that a compelling government interest was present to justify a law school's use of race. *See Parents*, 426 F.3d at Note 13; *Grutter*, 539 U.S. at 330-331.

actual strict scrutiny, and suggested that this Court should apply "rational basis" scrutiny in any review:

> When the Supreme Court does review the Seattle plan, or one like it, I hope the justices will give serious thought to bypassing strict—and almost always deadly—scrutiny, and adopt something more akin to rational basis review. Not only does a plan that promotes the mixing of races deserve support rather than suspicion and hostility from the judiciary, but there is much to be said for returning primacy on matters of educational policy to local officials.

Parents, 426 F.3d at 1195 (Kozinski, J., concurring).

However, this Court has repeatedly held that racial classifications always require a hostile review. The "mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight," *Croson*, 488 U.S. at 500. As this Court has repeatedly emphasized, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the *individual*." *Shelley*, 334 U.S. at 22 (emphasis added). Thus, as this Court declared in *Adarand*, there are no "benign" racial classifications. "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." 515 U.S. at 227 (emphasis added).

In both *Ho* and the instant cases, state actors essentially argue that diversity programs are benign because they are not motivated by animus and are applied impartially. In *Shelley*, 334 U.S. 1, this Court rejected the notion that equal protection is not violated when individual rights are trammeled as a result of the state's impartial enforcement of schemes with discriminatory impact on individuals. In that case, the Court considered whether states might enforce covenants in residential deeds restricting occupancy to Caucasians. *See* 334 U.S. at 4-7. Rejecting the argument that, because the state

courts were equally willing to uphold restrictive covenants against Caucasians, such action did not violate individuals' rights to equal protection, this Court explained, "The rights established are *personal* rights. . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* at 22 (emphasis added).

Here, as in *Shelley* and *Ho*, school districts cannot trammel the rights of individual members of one group merely because they do so dispassionately and are equally willing to trammel the rights of members of other groups. Because the Constitution protects individuals, and individuals alone, the rights of affected individuals should be placed above all other considerations, including the perceived good of having present in K-12 classrooms some "ideal" racial mix.

Accordingly, programs that classify individuals by race, such as those here, *must* be given a "hostile" review, with no deference to any motives of the state actor or any supposed benign result.

B. The Argument That Students Are Not Really Burdened Because Their "Race" Is Already "Overrepresented" And They Are Placed In School Somewhere Is A Modern-Day Perversion Of The "Separate But Equal" Doctrine.

There is no merit to the suggestion that students in Seattle and Jefferson County are somehow not really burdened because their "race" is "overrepresented" in their chosen school and, in the end, they are assigned to a comparable school somewhere in the district: "All of Seattle's high school students must and will be placed in a Seattle public school. . . . Thus, no stigma results from any particular school assignment." *Parents*, 426 F.3d at 1181.

First, the record shows that the schools at issue are not equal, but "vary widely in desirability." *Parents*, 426 F.3d at 1169. More important, as stated by this Court, it is not the ultimate result of the racial classification that constitutes the harm, but the imposition of the classification itself: "The

'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Northeastern Fla. Ch. of Assoc. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

Nor can it matter that, in the view of Respondent school districts, the school from which the applicant is excluded already has "too many" of the applicant's race. Underlying the arguments of those who favor racial balancing is the mistaken assumption that it is moral to turn away an individual because that person's "group" is already "overrepresented." This kind of thinking invariably is used to oppress individuals, diminishing them as persons in proportion to the perceived numbers of their "group." It also invariably insures that the burden will fall heaviest on the poorer or weaker members of the disfavored group.[9]

In one cautionary example from higher education, in the 1920s, Harvard College and other prominent universities reacted to the perceived "over-representation" of Jews in their student bodies by setting up informal quotas that persisted through the 1950s. *See* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws*, 66 Brook. L. Rev. 71, 111-12 (Spring 2000); Alan M. Dershowitz and

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[9] It is well known that "preference beneficiaries are overwhelmingly from middle- and upper-class families." *See* Peter H. Schuck, *Affirmative Action, Don't Mend It or End It - Bend It*, The Brookings Review, Vol.20 No.1, p. 27 (Winter 2002), *at* http://www.brook.edu/press/review/winter 2002/schuck.htm. Similarly, students from wealthier families tend to escape the burdens imposed by racial balancing. That phenomenon was evident in *Ho:* "Whenever such quotas keep white children out of San Francisco's few good high schools, their parents can often afford to send them to private school. But like many Chinese-American parents, Patrick's mother, who was raising him alone, could not afford private tuition." Michael W. Lynch, *San Francisco's Chinese Wall*, Policy Review, p. 1 (May-June 1997), at www.findarticles.com/p/articles/mi_qa3647/ is_199705/ai_n 8771939. Indeed, in the *Ho* case, it was noted that some school board members who strongly supported the racial balancing scheme sent their own children to private schools. *See id.* at 3.

Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 385-399 (1979); Nathan Glazer, *Diversity Dilemma*, The New Republic (June 22, 1998), *at* http://www.tnr.com/archive/0698/062298/glazer062298.html.

These institutions argued that their diversity schemes brought benefits to all and would lessen ethnic tension. "Harvard initiated its diversity discretion program to decrease the number of Jewish students; President Lowell of Harvard called it a 'benign' cap, which would help the University get beyond race." Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability Of Dworkin's Defense Of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 36 (Winter 1996). No matter how lofty the stated purpose, however, these race-based admissions programs injured individuals by singling them out for unequal treatment. "In the 1930s, it was easier for a Jew to enter medical school in Mussolini's Italy than in Roosevelt's America." Siskind, *supra*.

In *Ho*, a similar sentiment was voiced—that Chinese schoolchildren already had "enough" places in the cities' schools, and that individuals who were turned away had no right to complain: "[T]he Chinese are the largest group at most of the best schools in the city. They can't have it all. If anything, I'd say lower the caps, don't raise them—otherwise we're headed back to segregated schools, only all Chinese instead of all white." Selena Dong, *"Too Many Asians": Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 Stan. L. Rev. 1027, 1057 n.36 (May 1995) (citation omitted) (quoting Lulann McGriff, former president of San Francisco NAACP); *see also* Levine, *supra*, at 138 (observing that to some, "the *Ho* case is about how much is 'enough' for one racial or ethnic group").

Unfortunately, the same arguments are again used today to condone turning away Asian American individuals from the nation's universities. *See* Glazer, *supra*; Dong, *supra*, at 1057, nn.4-5; Leo Rennert, *President Embraces Minority*

Programs, Sacramento Bee (Metro Final) at A1 (April 7, 1995) (reporting that former President Clinton commented favorably on race-based admissions, saying that otherwise, "there are universities in California that could fill their entire freshman classes with nothing but Asian Americans"). "Today's 'damned curve raisers' are Asian Americans . . . ." Kang, *supra*, at 47 n.189 (cites and internal quotation marks omitted). Again, mandated "diversity" is seen as the answer. *See* Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 61-64 (Oct. 1994) (university quotas limit Asian American enrollment).

As history shows, artificial attempts to mandate a racially diverse student body invariably lead to oppression. *See* Dershowitz & Hanft, *supra*, at 399 ("Both then and now . . . such unlimited discretion makes it possible to target a specific religious or racial group—then for decrease, and now for increase . . . .").

Here, as in *Ho*, the Seattle and Jefferson County school districts oppress individuals by requiring them to be viewed and treated only as faceless members of the racial groups into which they are classified. As held in *Brown v. Board of Education*, 347 U.S. 483, such classification of schoolchildren by definition causes injury.

IV. THE RESULTS IN *GRUTTER* AND *BAKKE* DO NOT SUPPORT RESPONDENTS' USE OF RACE.

A. The Holding In *Grutter* Should Be Limited To Graduate Education, And Should Not Be Applied To K-12 Schools, Where Racial Classifications Can Only Cause Harm.

Respondents and the courts below mistakenly attempt to shoehorn the Seattle and Jefferson County districts' use of race into the divided holding of this Court in *Grutter v. Bollinger*, 539 U.S. 306, and into the earlier Powell opinion in *Regents of the University of California v. Bakke*, 438 U.S.

265 (1978). Neither of those cases apply, as both considered only whether a compelling interest in diversity could exist at the graduate school level, where there is a recognized special need for strongly diverse viewpoints.

In *Grutter*, this Court granted certiorari to consider "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." 539 U.S. at 322, 328. As the Court emphasized throughout its opinion, its review and conclusions were limited to the context of the special needs and circumstances of a graduate school. *See id.* at 322, 328, 331-334, 342-344. Similarly, in *Bakke*, Justice Powell made abundantly clear in his analysis that he was considering only whether diversity could be a "constitutionally permissible goal for an institution of higher education" such as the medical school there at issue. 438 U.S. at 312-321.

There is little parallel between the situation of adults voluntarily attending a national law school, such as considered in *Grutter*, and children in public K-12 schools where attendance is mandatory. Students who are admitted to law school are adults. They generally expect to move to wherever in the nation the law school that accepts them is located. Therefore, in *Grutter*, this Court could recognize the value of a robust diversity of opinions, experiences and ideas in law school, finding that "universities, and in particular, law schools, represent the training ground for a large number of our nation's leaders." 539 U.S. at 332.

In the K-12 schools at issue here, quite different factors predominate. As the courts below noted, "Traditionally, Americans consider the education of their children a matter of intense personal and local concern." *McFarland*, 330 F. Supp 2d at 850. "The record shows, and common experience tells us, that students tend to select the schools closest to their homes. . ." *Parents*, 526 F.3d at 1194. That is, of course, because the grade school students at issue here and in *Ho* are children, living at home with their parents, with both a need

for, and a legitimate expectation of, a school in reasonable proximity to their homes and families.

Unlike the adult student considered in *Grutter*, a K-12 student is forced by law to attend school.[10] Unless the student's family is wealthy enough to consider private school, the student has no choice but to attend the assigned public school. Accordingly, a student forced, in the name of "diversity," to commute each day to a non-neighborhood school is not only oppressed by racial classification but has also been placed under a significant and continuing practical burden. And that burden is heaviest for the poor, who have no other option. Furthermore, as set forth above, busing students away from neighborhood schools also discourages parental involvement in the educational process—the single factor recognized as most important to the success of the K-12 student. *See* Kahlenberg, *One Pasadena, supra,* at 20.

Therefore, the Court's holding in *Grutter* should be confined to the facts of that case.

B. Even If *Grutter* and *Bakke* Did Apply, Respondent School Districts Impermissibly Use Race As The Sole Determinant Of "Diversity"

Respondents' admissions programs are unconstitutional even under *Grutter* and *Bakke,* because they use race as the sole measure of diversity, and thus cannot be narrowly tailored. As this Court's precedents teach, race-neutral alternatives must be used, if available. *See Croson,* 488 U.S. at 471. As Justice Powell stated in *Bakke*, "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." 438 U.S. at 306. As this Court explained in *Grutter,* if an admissions plan assures some specified percentage of a

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[10] "Compulsory education laws in every state require children to attend school. For the many children whose families cannot afford to send them to private school, complying with the law necessarily means attending public school." Rebecca Aviel, *Compulsory Education and Substantive Due Process,* Vol. 10:2 Lewis & Clark L. Rev. 201, 204 (Summer 2006).

particular group merely because of its race, that "would amount to outright racial balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 329-330 (citations omitted).

There are many sound reasons for foregoing the uneasy proxy of race in determining diversity. Even where generalizations can be made for a group—always a dangerous practice—common sense tells us they are never true of all individuals in the group. *See* Stephan Thernstrom and Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. Rev. 1583, 1624-25 (June 1999) (focus on race ignores true measures of diversity). Race-conscious programs foster unfortunate stereotypes, detrimental even to members of those ethnic groups "favored" by the program. *See id.* at 1608. Racial classifications stigmatize. *See Croson*, 488 U.S. at 493. Accordingly, as explained by Justice O'Connor in her later vindicated dissent in *Metro Broadcasting*, "Social scientists may debate how people's thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

In *Grutter*, this Court held that an institution using race must demonstrate operation of an admission program that evaluates an applicant as "an individual," without race as the "defining" feature. *Grutter*, 539 U.S. at 336-38. This Court found the Michigan law school plan constitutional only because, rather than considering race alone in evaluating "diversity," the law school "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 337. Applying that rule in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court found the college admission plan at issue there unconstitutional because, instead of considering the totality of the diversity the applicant had to offer, it assigned automatic points for race. *Id.* at 270.

The Seattle and Jefferson County districts have failed to show that they review applicants holistically. Instead, they openly use race as the sole criterion of diversity. The Ninth Circuit approved the Seattle district's use of race as the sole determining factor, ruling, contrary to this Court's holdings in *Grutter* and *Gratz*, that "a [school] district need not consider each student in a individualized, holistic manner." *See Parents*, 426 F.3d at 1183. In Jefferson County, the district similarly considers only race: "In a specific case, a student's race, whether Black or White, could determine whether that student receives his or her first, second, third or fourth choice of school." *See McFarland*, 330 F. Supp. 2d at 842.

Both districts completely ignore all other measures of diversity they could have used.[11] Exactly as did the San Francisco school district in *Ho*, the Seattle and Jefferson County districts' blindly seek nothing more than racial "percentages" reflecting their view of diversity.

Thus, because Respondent school districts classify students by race but have failed to implement programs that consider the totality of the person and not just race, the admission programs at issue cannot be narrowly tailored, and are unconstitutional.

CONCLUSION

The Seattle and Jefferson County school districts' use of race is merely the latest chapter in the long history of state attempts to use race in the public school system. Until recently, many states did not allow "Black" and "Yellow"

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[11] For example, the districts could easily have used socio-economic status as a race-neutral measure of diversity. It is a highly relevant factor in K-12 education. *See* Kahlenberg, *One Pasadena*, *supra*, at 5, 20. Indeed, schools around the country utilize economic integration programs to promote diversity and enhance disadvantaged students' performance. *See* Richard D. Kahlenberg, *Economic School Integration: An Update*, The Century Foundation Issue Brief Series (Sept. 16, 2002), *at* http://www.tcf.org/Publications/Education/economicschoolintegration.pdf ("The number of students attending public schools with economic integration plans has jumped from roughly 20,000 in 1999 to more than 400,000 today.")

schoolchildren to attend "White" schools. In the 19th century, children of Chinese descent were denied access to San Francisco's schools. A hundred years later, in the *Ho* case, Chinese Americans were again singled out for unequal treatment. Now, school officials in Seattle and Jefferson County seek to turn the clock back so that, once again, schoolchildren will be denied access to educational opportunities solely because of their race or ethnicity.

If nothing else, these experiences demonstrate the continuing danger of allowing the state to use race except in the most limited circumstances. There simply can be no compelling interest present in K-12 schools—schools that American children are compelled by law to attend—to justify the use of racial classifications. The desire for a "diverse" student body cannot provide such a compelling interest—and certainly not when, as here, diversity is measured only by race.

Any discretionary use of race by K-12 school officials inevitably results, as in *Ho* and the instant cases, in the stigmatization of children. And, as such use of race is unbounded by any fixed, remedial goal with respect to scope and time, it will, if permitted, continue without end, to the detriment of our society.

Therefore, the Seattle and Jefferson County school districts' race-conscious admissions programs further no compelling government interest, are not narrowly tailored, and should be found to violate Petitioners' Fourteenth Amendment right to the equal protection of the laws.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioners,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents,

CRYSTAL D. MEREDITH, CUSTODIAL PARENT
AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioners,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*
Respondents,

On Writs Of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

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BRIEF AMICI CURIAE OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, CHINESE FOR AFFIRMATIVE ACTION, ET AL., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, the Asian American Legal Defense and Education Fund, Asian Americans United, Asian Pacific Islander Legal Outreach, Asian Pacific Islander Youth Promoting Advocacy and Leadership, Boston Asian Youth Essential Service, Cambodian Association of Greater Philadelphia, Chinese for Affirmative Action, Coalition for Asian American Children and Families, Coalition for Asian Pacific American Youth, Detroit Asian Youth Project, Filipinos for Affirmative Action, Japanese Community Youth Council, One Lowell, Providence Youth Student Movement, South Asian Youth Action!, and United Chinese Association of Brooklyn, submit this brief *Amici Curiae* in support of the Respondents in the pending cases of *Meredith* v. *Jefferson County Board of Education, et al.* and *Parents Involved in Community Schools* v. *Seattle School District No. 1*.[1] Attached in the Appendix is a complete list of each *Amici's* statement of interest in this matter. All of the parties have consented to the filing of this brief.

All of the *Amici* groups are nonprofit organizations whose mission is to advocate on behalf of and/or provide direct services to Asian American communities in various jurisdictions across the United States. The geographic areas in which the *Amici* groups work are a broad and representative cross-section of Asian American communities. San Francisco and Oakland are home to one of the country's oldest and most established Asian

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person made a monetary contribution specifically for the preparation or submission of this brief.

American populations—from Chinese and Japanese who are third and fourth generation Americans to new immigrants from across Asia. Similarly, New York City houses a diverse and longstanding Asian American population--ranging from Chinese and Koreans to Indians and Bangladeshis. The greater Boston area, Providence and Philadelphia have significant communities of Southeast Asian refugees who face unique challenges in achieving educational equity. Finally, Detroit is home to an emerging enclave of Hmong Americans that has grown in size and presence only in recent years.

The *Amici* groups dedicate significant time and effort to kindergarten through twelfth grade public educational advocacy issues, including addressing problems rooted in a lack of meaningful racial and ethnic diversity. The *Amici* groups work on a broad range of social and political issues, such as dropout/pushout, gang profiling, post-9/11 terrorist profiling, discrimination and harassment impacting diverse Asian American communities. Many of these groups work directly with Asian American youth experiencing difficulty accessing public education and victims of discrimination and racially-based harassment.

Based on their direct experience, the *Amici* groups believe that they are well qualified to weigh in on the question that is before the Court in these cases—whether the school assignment plans considered in *Meredith* and *Parents* are consistent with the Equal Protection Clause of the Fourteenth Amendment. From their direct experience, the *Amici* groups submit that racially integrated and diverse kindergarten through twelfth grade public education systems profoundly benefit Asian American children—along with children of other races. The *Amici* groups further submit that the Court should affirm that a school district's *voluntary* use of race as a factor in a school

districting plan serves a compelling governmental interest consistent with the Constitution's Fourteenth Amendment, a compelling interest that would best be served by affording school districts with broad discretion in tailoring plans that meet their individualized needs. If the Court were to bar school districts from using race as a factor in student assignment plans or create impractical hurdles to the implementation of such plans, Asian American children would be materially harmed. Accordingly, *Amici* respectfully request that the Court rule in favor of the Respondents.

SUMMARY OF ARGUMENT

Asian Americans are commonly misperceived as a homogenous "model minority," with high incomes and an absence of barriers to educational attainment. In reality, the Asian American population is markedly diverse with over 40 ethnic groups with distinct histories and needs. While some segments of Asian Americans have access to a quality education, many others do not. However, all Asian Americans across ethnicities reap benefits from integrated public schools.

Based on the experience of the *Amici* groups, Asian American children benefit from a diverse academic environment in at least three distinct ways. *First*, the *Amici* groups have found that integration can lead to meaningful reductions in school violence and harassment, which holds particular benefits for Asian American students. *Second*, all Asian American children benefit from developing greater understanding and tolerance of other racial and ethnic groups at integrated schools and from these groups likewise gaining greater understanding and tolerance of them. *Third*, some segments of Asian Americans gain greater educational access and improvements in academic achievements from integrated educational environments, just as African American and Latino American children do.

Among the arguments advanced by the Petitioners in support of reversal is the claim that the school assignment plans at issue are overly simplistic and do not provide for an individualized holistic review of each student. Through their work, the *Amici* organizations are well aware of the budgetary pressures that many school districts face – which are far more severe than those facing elite law schools. The *Amici* organizations believe that for a school assignment plan to succeed, it is imperative that local school boards be vested with broad discretion in the

school assignment process. School districts have different levels of funding and resources available to them, and consequently they are in unique positions to evaluate the feasibility of student assignment plans. Moreover, Asian Americans encompass a broad range of ethnicities, with widely different traits and educational needs. Accordingly, a school assignment plan that works for one city may not work for another.

For these reasons, the *Amici* organizations respectfully request that the Court rule in favor of the Respondents and affirm the decisions of the Courts of Appeals.

ARGUMENT

I. ASIAN AMERICANS ARE COMPRISED OF DIVERSE SEGMENTS WITH WIDELY VARYING MEDIAN LEVELS OF EDUCATIONAL ACHIEVEMENT AND SOCIO-ECONOMIC STATUS.

There is a common misconception that Asian and Pacific Islander Americans[2] constitute a homogenous "model minority," sharing a common identity distinguished by high incomes and an absence of barriers to educational attainment. Based on this misconception, one might conclude that Asian Americans would not benefit if school districts were permitted to consider race in the school assignment process, or even that they would suffer a detriment. In reality, the Asian and Pacific Islander American population is markedly diverse and comprised of over 40 ethnic groups with distinct histories and needs. Moreover, a closer and more accurate understanding of the Asian and Pacific Islander American population reveals alarming gaps in socio-economic status, equal opportunities and educational equity.

Some *Amici* work with a particular Asian American community (e.g., Chinese, Filipino) or with communities

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[2] While *Amici* submit this brief from their perspective as organizations serving Asian American communities, *Amici* speak with solidarity for and an awareness of Pacific Islander communities who are often mingled with Asian Americans for statistical purposes. We will present some statistical information about Pacific Islanders to highlight differences between the diverse constituencies commonly lumped together under an aggregated Asian and Pacific Islander data category, but will limit the focus of our brief to Asian American students, parents, and communities.

from a specific geographic subregion of Asia (e.g., Southeast Asians or South Asians), while others work with Asian Americans from all backgrounds. Southeast Asians include those Americans with ancestry from Brunei, Cambodia, East Timor, Singapore, Indonesia, Malaysia, Laos, Myanmar, Thailand and Vietnam. A sizable number of Southeast Asians in the United States are refugees with origins in Cambodia, Laos and Vietnam, including ethnic subgroups like Hmong and Mien. South Asians include those Americans with origins in Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka. Other Asian ethnic groups include Chinese, Filipinos, Koreans and Japanese. Each of these groups has unique cultural traits, and median educational and socio-economic levels can differ dramatically among them.

For example, a sizable percentage of Indian or Taiwanese immigrants hail from middle class backgrounds in their countries of origin, which translates into higher occupation status and educational outcomes for their children.[3] By contrast, many Southeast Asian refugees hail from working class backgrounds and are less likely to have college educations and hold lower occupational status.[4] According to preliminary results from a 2006 community-

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[3] Pyong Gap Min & Mehdi Bozorgmehr, *Immigrant Entrepreneurship in the United States: Trends, Research and Theory, in Venturing Abroad: Global Processes and National Particularities of Immigrant Entrepreneurship in Advanced Economies* 5 (Robert Kloosterman and Jan Rath eds., 2002), *available at* http://www.aoef.org/papers/2002/bozorgmehr_1.doc.

[4] Noy Thrupkaew, *The Myth of the Model Minority*, The American Prospect, Apr. 8, 2002, *available at* http://www.prospect.org/print/V13/7/thrupkaew-n.html; Heather Kim, *Diversity Among Asian American High School Students* (1997).

based survey by *Amici* Providence Youth Student Movement (PrYSM), six out of ten Southeast Asian youth polled in Providence believe that a high school diploma would be the highest level of education achieved in their lifetime.[5] The socio-economic positions of Southeast Asian Americans are more similar to those of African Americans than to White Americans.[6] An additional variable relating to educational needs is whether Asian Americans are native-born or foreign-born. In general, Asian Americans born in the United States tend to have greater educational advantages than those born outside the United States.

California presents a prime example of how aggregated data regarding Asian Americans can be misleading. Although overall state data suggest that California Asian Americans are above average in household incomes and educational attainment, the data are skewed by ethnic differences. For example, household incomes for Asian American families are inflated by their larger than average household size. Asian households tend to be larger than those of other racial groups, frequently including extended family members. In California, 20% of Pacific Islander households have three or more workers, as do 18% of Asian American households overall. By contrast, only 10% of White households and 9% of African American households in California fall within this category.

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[5] Statement of Kohei Ishihara, Executive Director, Providence Youth Student Movement.

[6] Note, *Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in Grutter v. Bollinger*, 38 U.C. Davis L. Rev. 545 (2005).

Per capita income tells a different story—in California, the per capita income of Asian Americans falls below the median, with some segments falling substantially below the median. Similarly, 13% of Asian Americans in California fall below the Federal poverty line, compared to 8% of Whites. In addition, when the data are disaggregated by ethnicity, it becomes clear that wide chasms exist in the educational attainment of, and available opportunities for, different Asian American populations. A startling 53% of all Hmong in California fall below the Federal poverty line; 40% of Cambodians, 32% of Laotians, 20% of Samoans, 18% of Pakistani and 18% of Vietnamese fall below that line as well.[7]

As noted, language barriers cause further hardships and barriers to educational equity for many non-native born Asian Americans and their children. For example, according to the 2000 Census, the percentage of Asian Americans nationwide who are "linguistically isolated"[8] is approximately 24.7%. For some segments of Asian Americans, the percentage is significantly higher:

- Cambodian – 31.8%;
- Vietnamese – 45.0%;
- Hmong – 35.1%; and

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[7] Asian Pacific American Legal Center of Southern California, Asian Law Caucus & National Asian Pacific American Legal Consortium, *The Diverse Face of Asians and Pacific Islanders in California, Asian & Pacific Islander Demographic Profile* (2005), *available at* http://www.apalc.org/CA_Report_feb_%202_05.pdf.

[8] "Linguistically isolated" means that no member of the household who is at least 14 years old either speaks only English or speaks a non-English language and speaks English very well.

- Laotian – 31.8%.[9]

In California, Asian households experience higher levels of linguistic isolation than any other racial group. Overall, more than a third of Asian Americans and more than a fifth of Asian American children have limited English proficiency. A majority of six Asian ethnic groups are also limited English proficient, including two of the state's five largest groups, Vietnamese and Korean. Nearly a majority of Chinese, the state's largest Asian group, are limited English proficient.[10]

Such contrasts between different segments of the Asian American population are equally evident in other geographic areas. In 2000 in the greater Boston area, the percentage of Asian Americans with less than a ninth grade education was over twice that of the general population. At the same time, the percentage of greater Boston Asian Americans with graduate or professional degrees was also more than twice that of the general population.[11] Similarly, although New York City Asian Americans have a higher than average median household income, almost a quarter of

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[9] Southeast Asia Resource Action Center, *Southeast Asian American Statistical Profile* (2004), *available at* http//www.searac.org/seastatprofilemay04.pdf.

[10] Asian Pacific American Legal Center of Southern California, Asian Law Caucus & National Asian Pacific American Legal Consortium, *The Diverse Face of Asians and Pacific Islanders in California, Asian & Pacific Islander Demographic Profile* (2005), *available at* http://www.apalc.org/CA_Report_feb_%202_05.pdf.

[11] Paul Watanabe, Michael Liu & Shauna Lo, The Civil Rights Project at Harvard University, *Asian Americans in Metro Boston: Growth, Diversity, and Complexity* 18 (2004), *available at* http://www.civilrightsproject.harvard.edu/research/metro/AAMetBos.pdf.

the city's Asian American children live in poverty and 82% of its Asian American elementary and middle school children are eligible for free or reduced price lunch.[12]

Because of these diverse socio-economic conditions, the needs of Asian American and Pacific Islands students and parents vary significantly by ethnicity, and while some segments of the Asian American student population have access to a quality education, many others do not. As set forth below, however, Asian Americans across all ethnicities reap benefits from integrated public schools.

II. THE BENEFITS OF A DIVERSE CLASSROOM EXTEND TO ALL RACIAL GROUPS—INCLUDING ASIAN AMERICANS.

The Court has acknowledged the importance of diversity in the academic setting, particularly during the early formative years. In the landmark case of *Brown* v. *Board of Education*, the Court noted that education is a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." 347 U.S. 483, 493 (1954). More recently, in 2003, Justice Scalia recognized in *Grutter* v. *Bollinger* that teaching tolerance and respect for others with different backgrounds "is a lesson of life rather than law—essentially the same lesson taught to (or rather learned by, for it cannot be 'taught' in the usual sense) people three feet shorter and

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[12] The Coalition for Asian American Children and Families, *Hidden in Plain View: An Overview of the Needs of Asian American Students in the Public School System* 9 (2004), *available at* http://www.cacf.org/PDF/Hidden%20in%20Plain%20View.pdf.

twenty years younger than the full grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens." 539 U.S. 306, 347 (2003) (Scalia, J., dissenting).

The *Amici* groups believe that public schools are vitally important institutions for shaping attitudes towards those of different races and ethnicities. The need for exposure to other races is particularly urgent in elementary and secondary schools, as the benefits of cross-racial interaction are most profound at younger ages.[13] Hence, a diverse classroom is critical to the development of views of racial equality. Indeed, the Court's observations in *Brown* v. *Board of Education* and its progeny are as valid today as at the time they were first made, and they apply to all children, regardless of race or ethnicity.

Based on the experience of the *Amici* groups, Asian American children benefit from a diverse academic environment in at least three distinct ways. *First*, the *Amici* groups have found that integration can lead to meaningful reductions in school violence and harassment, which holds particular benefits for Asian American students. *Second*, all Asian American children benefit from developing greater understanding and tolerance of other racial and ethnic groups at integrated schools and from these groups likewise gaining greater understanding and tolerance of them. *Third*, some segments of Asian Americans gain greater educational access and improvements in academic achievements from integrated educational environments,

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[13] Michael J. Anderson, *Race as a Factor in K-12 Student Assignment Plans: Balancing the Promise of* Brown *with the Modern Realities of Strict Scrutiny*, 54 Cath. U.L. Rev. 961, 987-88 (2005).

just as African American and Latino American children do. Each of these points is discussed below.

A. Integration Can Reduce School Violence and Harassment

Harassment in school is a *bona fide* problem for Asian American students. In a 2004 survey, Asian American youth were more likely than any other group to report being bullied, harassed or assaulted due to their race.[14] According to a report by the Boston Public Health Commission, Asian American high school students in Boston are 80% more likely than White students to miss school because they feel unsafe.[15] In Providence, student dropouts attending *Amici* PrYSM's General Educational Development program report that one reason for leaving school – in addition to the need to work for income – was lack of personal safety due to intimidation and threats of gang violence.[16]

According to Vanessa Leung of the *Amici* New York-based Coalition for Asian American Children & Families:

> When social interaction is limited to one's own social groups, there is a danger of a lack of mutual

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[14] See The Harvard Youth Violence Prevention Center, *Report of the 2004 Boston Youth Survey* (2005), *available at* http://www.hsph.harvard.edu/hyvpc/images/2004BYSfullreport.pdf.

[15] See The Disparities Project, Boston Public Health Commission, *Data Report: A Presentation and Analysis of Disparities in Boston* 44 (2d ed. 2005), *available at* http://www.bphc.org/director/pdfs/datareport/datareport.pdf.

[16] Statement of Kohei Ishihara, Executive Director of the Providence Youth Student Movement.

> understanding and growing mistrust of other groups, especially when students are not equipped with the skills and tools to increase that understanding. Mutual misunderstanding and segregation may promote feelings of in- and out-group identification that can result in vulnerable students being targeted for harassment. [17]

Harassment not only results in poor school attendance, but can also prompt Asian American youth to band together for protection. For example, South Asian youth in the New York City metropolitan area increasingly seek refuge in loose ethnic networks – which are often mistakenly profiled as criminal "gangs" due to factors such as a sense of disaffection from their culture and the American culture and racial harassment from their peers.[18]

Harassment of Asian Americans in many areas has worsened in recent years in part due to a misguided backlash to the World Trade Center attacks on September 11, 2001. Since September 11, South Asians have experienced anti-immigrant and anti-foreign sentiment in the form of hateful speech and violence, even in cosmopolitan areas such as the Bay Area and New York.[19] The impact has been particularly severe on New York-based South Asians and Muslims.

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[17] Interview with Vanessa S. Leung, Education Policy and Program Coordinator, Coalition for Asian American Children & Families (Sept. 28, 2006).

[18] Ana Arana, *A New Crowd in the City: Indian, Pakistani Kids Threaten Community's 'Perfect' Image*, The Village Voice, Feb. 24, 1998, *available at* http://www.xent.com/feb98/0361.html.

[19] See Kamla Bhatt, *Alone in the Crowd*, Outlook, Oct. 1, 2001, *available at* http://www.sree.net/quotes/outlookbacklash.html.

The *Amici* organizations find that diversity in the classroom breaks class stereotypes and fosters cross-racial friendships, which help in curbing race-based harassment of Asian American students. The Asian American Legal Defense and Education Fund (AALDEF) and the United Chinese Association of Brooklyn (UCA) together organize and advocate for the immigrant Asian youth of Bensonhurst, Brooklyn. Many of these youth attend Lafayette High School, which is under an unprecedented United States Department of Justice civil rights consent decree due to repeated incidents of racialized anti-Asian harassment and problems in administration of its English Language Learner program. Immigrant Asian students have reported to AALDEF and UCA that racial tensions are more likely to erupt at their school when different racial groups are unfamiliar with each other and abruptly brought together for the first time.

By contrast, AALDEF and UCA have found their youth constituents more likely to develop cross-racial friendships and become less vulnerable to harassment after attending school in a diverse environment for a few years. Rita Zeng, a 2006 graduate of Lafayette High School and an intern at AALDEF, reports that although she felt vulnerable to harassment when she first emigrated from China and enrolled at Lafayette, over time she developed cross-racial friendships and began to feel safer.[20] Lafayette student Kwan Wa Shum observes that racialized harassment against Asian immigrant students occurs because students do not understand the newcomers' culture

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[20] Interview with Rita Zeng, Lafayette High School graduate (Sept. 29, 2006).

or practices due to lack of exposure.[21] Qi Ping Li, another Lafayette student, reports that after having attended the school for some time, she has become friendlier with non-Asian students, who sometimes now ask her to teach them words in Chinese.[22] The students collectively report that language barriers can lead to misunderstandings for immigrant Asians and others alike, but that, with prolonged exposure, all students – newcomers and others alike – are more aware of the potential for misunderstanding and likely to be more tolerant.[23]

Amici South Asian Youth Action! (SAYA), based in New York, reports similar findings. After conducting "Project Unity", a summer project that SAYA developed to bring diverse students together after September 11, SAYA found that students who participated developed multi-racial friendships and a greater acceptance and understanding of students from other ethnic groups when given the opportunity to interact with each other. Based on its work, SAYA believes that the relative lack of diversity and effort to integrate students in the New York City school system serves to perpetuate racial stereotypes and harassment.

B. Integration Leads to Greater Understanding and Tolerance

The Court noted in *Washington* v. *Seattle School District No. 1* that when a child's environment is "largely shaped by members of different racial and cultural groups,

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[21] Interview with Kwan Wa Shum, Lafayette High School student (Oct. 7, 2006).

[22] Interview with Qi Ping Li, Lafayette High School student (Oct. 7, 2006).

[23] Interviews with Jian Rong Peng, Kelvin Liang, Kwan Wa Shum, & Qi Ping Li, Lafayette High School students (Oct. 7, 2006).

minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage."[24] The *Amici* groups believe that the ability to function in a diverse environment, be it in school or in business, is extraordinarily important to a child's success.

Again, the experience of one of the *Amici* groups, the Chinese for Affirmative Action (CAA), bears this out. CAA represents a broad cross-section of San Francisco's Asian American and Chinese American students—in particular, lower income Chinese American students. CAA maintains an office in the southeast area of San Francisco known as Visitacion Valley. Visitacion Valley—previously populated largely by African American residents—has recently experienced a dramatic increase of primarily immigrant Chinese and other Asian residents, resulting in frequent conflicts. CAA has long focused on education, working with a broad range of community members, parents and community groups to inform and educate the San Francisco Unified School District (SFUSD) about the educational needs of Chinese students, especially those who are limited English proficient and economically disadvantaged.

Based on its extensive work with San Francisco's Chinese American community, particularly in the area of education, CAA places a high premium on the value of

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[24] 458 U.S. 457, 472-473 (1982) (citations omitted).

integrated schools. Christina Wong is a policy advocate with CAA and has worked for the past eight years advocating for the rights and needs of low-income, limited English proficient Asian American parents and students. She observed the following:

> It has become increasingly apparent that racial diversity is an essential component to quality education and should be a core value of every school district. In many schools in SFUSD, students are not equipped to work in collaboration with other ethnic groups. I have also observed the need for English Learners to be in a diverse setting so that their English language skills are enhanced at a faster rate. English Learners who are isolated within their own language groups do not have the opportunity to receive the benefits of English speakers as their English language models.
>
> A race conscious student assignment plan would at the very least provide an initial opportunity for students to be in a racially diverse environment. In order to establish a diverse learning environment, race must be a factor in the student assignment process.[25]

The benefits of integrated schools are further evidenced by the following commentary of Cindy Choi, a resident of Visitacion Valley and a CAA volunteer. Ms. Choi serves as an outreach worker for the San Francisco Parents for Public Schools, an organization dedicated to improving public schools in San Francisco, and also serves on the San Francisco Unified School District's Parent

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[25] Statement of Christina Wong, Policy Advocate, Chinese for Affirmative Action.

Advisory Council and on the District English Learner Advisory Council:

> I immigrated from Hong Kong to San Francisco five years ago with my family. My daughter attends El Dorado Elementary School in Visitacion Valley. It would be easy to have my only daughter go to a school with a majority of Chinese students like herself, but that would not allow her to learn and benefit from other groups of people. The diversity has positively challenged her to be a strong and open minded youth who appreciates and values the differences of other ethnic groups.[26]

Students interviewed by the *Amici* groups also described how they benefit from diversity in the classroom. Ty Lee, a senior at Malden High School, a public high school located in Malden, Massachusetts, is a member of the Coalition for Asian and Pacific American Youth (CAPAY), a Boston-based youth group. She is of Vietnamese heritage and started Malden High School as a sophomore. Prior to attending Malden, she was a student at Everett High School, which had substantially less diversity. She makes the following observations about students of other races: "They are just like me, just the same. I feel more comfortable around them."[27] Similarly, Ty's classmate Vinh Nguyen, who is also Vietnamese American and also a member of CAPAY, observes "In school, I hang out with people from different races all around the school and I have a huge tolerance for everyone....I think diversity

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[26] Statement of Cindy Choi, Volunteer, Chinese for Affirmative Action.

[27] Interview with Ty Lee, Malden High School student (Sept. 26, 2006).

has helped my outlook in life and view perspectives from everyone. [Diversity] helps give you an impression of the real world."[28]

Another *Amici* organization, the Detroit Asian Youth Project (DAY), reports similar findings. The Asian American student population in Detroit consists of mostly Hmong and Laotian youth. Because many of the Hmong and Laotian youth are the children of refugees or refugees themselves from Thai refugee camps, they arrived here in dire circumstances and continue to suffer from high levels of poverty. The Detroit public school system is currently in a state of crisis; an estimated 40-50% of students drop out every year.[29] In addition, the system is poorly integrated. Many Hmong youth have expressed to DAY Project staff that they have had significant problems with cross-racial relations. In contrast, in the neighboring city of Warren, there is more diversity and the school population has a more balanced mix of White, Asian, and African American students. As a result of this diversity, DAY Project staff Michelle Lin observes that Warren's school curriculum is more mixed, there are more extracurricular activities which represent its different ethnic populations, and students who attend Warren schools report that they have a better

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[28] Interview with Vinh Nguyen, Malden High School student (Sept. 26, 2006).

[29] Ann Mullen, *Reform School Lessons,* Metro Times, Oct. 20, 1999, *available at* http://www.metrotimes.com/20/03/Metrobeat/metrobet.html (Detroit dropout rate improved slight from 43% in 1995 to 41.7% in 1998); Posting of Ed Brayton, *Why Teacher's Unions Are Hurting Education,* http://positiveliberty.com/2005/08/why-teachers-unions-are-hurting-education.html (Aug. 29, 2005, 10:16 EST)

understanding of and are more tolerant of students from other ethnic groups.[30]

C. Integration Fosters Greater Educational Access and Improvements in Academic Achievements

Over fifty years ago, the Court squarely addressed the issue of segregation in the public school system:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.[31]

In doing so, the Court recognized the harms caused by segregated public schools.

The Court's holding in *Brown* v. *Board of Education* has been further buttressed by decades of research not only confirming the harms of segregation, but also the benefits of integration. This research is discussed in detail in the Respondents' filings and in the other *Amicus Curiae* briefs and need not be repeated here. These considerations relate not only to reducing racial prejudice, which is discussed above, but also to the development of critical thinking and cognitive skills, levels of academic achievement and career ambitions and opportunities. [32]

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[30] Statement of Michelle Lin, Director, Detroit Asian Youth Project.

[31] *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

[32] Gary Orfield & Chungmei Lee, The Civil Rights Project at Harvard University, *Racial Transformation and the Changing Nature of*

(footnote continued)

Conversely, racially segregated schools frequently have less qualified teachers, greater turnover of students and faculty, weaker academic curricula and greater incidences of violence.[33] One comprehensive study of the effects of resegregation summarizes the importance of integrated schools:

> A recent study of elite law schools shows, for example, that almost all of the black and Latino students who made it into those schools came from integrated educational backgrounds. Minority students with the same test scores tend to be much more successful in college if they attended interracial high schools.[34]

The greater Boston area illustrates some of the benefits of integrated schools. *Amici* One Lowell and AALDEF advocate for the educational access rights of Southeast Asian and other youths in Lowell, Massachusetts. Lowell is marked by a high concentration of Cambodians who fled their native country during the Khmer Rouge regime. In 2004, The National Institutes of Health determined that 62% of Cambodian refugees who had settled in the United States suffered from post traumatic stress disorder and 51% from depression within

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(footnote continued)

Segregation (2006), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf.

[33] *Id.*

[34] Gary Orfield, The Civil Rights Project at Harvard University, *Schools More Separate: Consequences of a Decade of Resegregation* 9 (2001), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf.

the past year.[35] These issues are compounded by the relative racial isolation in which Cambodians live in Lowell and have resulted in high levels of violence by disaffected youth and a public school system that has not adequately addressed the unique needs of this vulnerable population. In 1996, approximately 85% of the juvenile murders in Lowell were committed by Southeast Asian youth.[36]

Because the parents of Southeast Asian students in Lowell are generally not native born, they are often unaware of their children's right to a public education and to due process in the event of disciplinary or other problems. Moreover, because many of the parents are limited English proficient, they are unable to effectively voice their grievances. AALDEF has collected reports about difficulties such parents face in Lowell's elementary and middle schools, where school enrollment reflects the town's racially segregated residential patterns. As an example, in response to disciplinary incidents, security guards at middle schools are reported to unnecessarily provoke youth, leading to escalation of conflicts—and often, the doling out of harsher discipline. One parent reports that he withdrew his son from a school after a particularly severe disciplinary encounter. Greater integration in the Lowell elementary and middle schools would bring with it more parents who are aware of their rights and better able to seek redress when students are mistreated. This would result in better and fairer

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[35] *PTSD, Depression Epidemic Among Cambodian Immigrants*, NIH News (National Institutes of Health, Bethesda, Md.), Aug. 2, 2005, *available at* http://www.nih.gov/news/pr/aug2005/nimh-02b.htm.

[36] See Margaret M. Chung, National Association of Social Workers, *Intergenerational Effects of Genocidal Disaster among Cambodian Youth*, (Dec. 2000), *available at* http://www.naswnyc.org/di6.html.

administration and greater access to education for all students.

The experience of Boston Asian Youth Essential Service (YES) also shows that integration fosters greater educational access. YES runs an after school drop-in center for Asian youth and works with adolescents from diverse Asian American backgrounds, with a particular focus on lower income youth—ranging from Chinese immigrants in Chinatown to Vietnamese refugees from Boston's Dorchester neighborhood. Many of these students do not attend well-integrated schools. Across these populations, YES has found that inner city Asian American youths face profiling and discriminatory treatment by school officials, such as differential disciplinary treatment and lack of interpretation for limited English proficient youth and families.

For example, YES has found that schools often fail to provide interpretation for meetings with limited English proficient parents, sometimes even when interpretation is explicitly requested. YES has also found that school discipline notices are rarely translated for limited English proficient parents, and that when such parents show up for discipline hearings they rarely—if ever—get translation services despite the weighty nature of such hearings. YES believes that greater integration of public schools in communities that YES serves would bring more capable administration to facilitate these schools' ability to provide adequate interpretation and translation as well as staff training to curb differential treatment and discrimination.

Philadelphia area *Amici* concur that better integrated schools can lead to better, more even-handed treatment of students. Ellen Somekawa of Asian Americans United reports:

> The highly segregated neighborhoods of Philadelphia lead to a high level of racial segregation and inequality in its public schools. This does not benefit Philadelphia's Asian American student population. In particular, segregated schools do not provide a welcoming and healthy learning environment.[37]

These *Amici* have found that schools with a disproportionately low percentage of White children frequently suffer from administrative neglect. The Cambodian Association of Greater Philadelphia (CAGP), which advocates on behalf of Cambodian and other Asian American students in Philadelphia's public school system, has found that their clients often miss up to 60 to 100 classes before any form of school intervention.[38] These *Amici* believe that more integration would bring parents who are better able to call for more attentive administration. This would enhance efforts to detect and address early signs of student truancy, before attendance problems become intractable.

III. LOCAL SCHOOL BOARDS SHOULD BE VESTED WITH BROAD DISCRETION TO PROMOTE INTEGRATION THROUGH RACE CONSCIOUS SCHOOL ASSIGNMENT POLICIES TAILORED TO THEIR COMMUNITIES AND BUDGETS.

Among the arguments advanced by the Petitioners in support of reversal is the claim that the school

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[37] Statement of Ellen Somekawa, Executive Director, Asian Americans United.

[38] Statement of Rorng Sorn, Program Director, Cambodian Association of Greater Philadelphia.

assignment plans at issue are overly simplistic and do not provide for an individualized holistic review of each student. Through their work, the *Amici* organizations are well aware of the severe budgetary pressures that many school districts face. Consequently, while each school district would undoubtedly love to spend the time and resources on the assignment process that an elite law school spends on its admission process, harsh realities dictate otherwise.[39]

The *Amici* organizations believe that for a school assignment plan to succeed, it is imperative that local school boards be vested with broad discretion in the school assignment process. School districts have different levels of funding and resources available to them, and consequently they are in unique positions to evaluate the feasibility of student assignment plans. Moreover, as discussed throughout this brief, Asian Americans encompass a broad range of ethnicities, with widely different traits and educational needs. The established Chinese or Japanese American communities in the San Francisco area have little in common with the Vietnamese community in the same city, let alone the Hmong in Detroit or the Cambodians in Lowell. Accordingly, a school assignment plan that works for one city may not work for another.

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[39] For example, the Seattle plan has been criticized by some because it only divides students into two categories: "White" and "Nonwhite," and rather than taking into consideration other factors. *Amici's* position is that Seattle must be given the discretion to determine in its expertise, and within the constraints of the law and its resources, how best to effectuate its school assignment process.

As Judge Kozinski noted in *Parents Involved in Community Schools*:

> To resort to Chief Judge Boudin's words one last time, "we are faced with a local experiment, pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent. The problems that the . . . plan addresses are real, and time is more likely than court hearings to tell us whether the solution is a good one . . . . " I share Judge Boudin's preference for resolving such difficult issues by trial and error in the real world, rather than by experts jousting in the courtroom. When it comes to a plan such as this—a plan that gives the American melting pot a healthy stir without benefiting or burdening any particular group—I would leave the decision to those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable. It is on this basis that I would affirm the judgment of the district court.[40]

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[40] 426 F.3d 1162, 1196 (9th Cir. 2005) (Kozinski, J. concurring) (citation omitted).

IV. CONCLUSION

For the foregoing reasons, the *Amici* organizations respectfully request that the Court rule in favor of the Respondents and affirm the decisions of the Courts of Appeals.

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APPENDIX

APPENDIX

Asian American Legal Defense and Education Fund (AALDEF)

The Asian American Legal Defense and Education Fund (AALDEF), headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF's educational equity and youth rights project promotes the rights of Asian American students in K-12 public education. AALDEF has an interest in this litigation because its work in the various jurisdictions discussed herein reveals that Asian American students reap myriad benefits from attending integrated public schools.

Asian Americans United (AAU)

Since its founding in 1985, Asian Americans United (AAU) has developed local leadership in Philadelphia, Pennsylvania's Asian community to identify issues of concern and act collectively on their own behalf. AAU has a particular focus on developing youth leadership and struggling for quality public education. AAU initiated the *YS* v. *School District of Philadelphia* lawsuit, brought by the Education Law Center, to give limited English proficient Asian students equal access to Philadelphia public schools. AAU has seen that consideration of racial factors can be an important tool in remediating inequalities in public schools.

Asian Pacific Islander Legal Outreach (APILO)

Asian Pacific Islander Legal Outreach (APILO), founded in 1975, promotes culturally and linguistically appropriate services for the most marginalized segments of the Asian Pacific Islander community in San Francisco and Oakland, California. Based on its work on a variety of social justice issues including youth rights, APILO believes firmly that integrated public schools provide the best education for

Asian Pacific Islander youth and hence has an interest in this litigation.

Asian Pacific Islander Youth Promoting Advocacy and Leadership (AYPAL)

Asian Pacific Islander Youth Promoting Advocacy and Leadership (AYPAL) runs youth-identified and youth-run direct action organizing and arts campaigns for school and community change to improve the lives of Asian Pacific Islander youth in Oakland, California. AYPAL youth have directly benefited from attending integrated public schools. Therefore, AYPAL has a strong interest in the preservation of voluntary desegregation programs in public school districts.

Boston Asian Youth Essential Service (YES)

Boston Asian Youth Essential Service (YES) is dedicated to inspiring Asian youth to discover and actualize their greatest potential, and to this end runs a multi-service drop-in center for the greater Boston area's Asian youth. Through providing these services and supports, YES has found that Asian youth benefit from attending racially integrated K-12 public schools and therefore has an interest in this litigation.

Cambodian Association of Greater Philadelphia (CAGP)

The Cambodian Association of Greater Philadelphia, Inc. (CAGP), founded in 1979, works to improve quality of life for Cambodian Americans in greater Philadelphia by providing services, advocating and empowering them to obtain equal access to social and economic development, as well as to quality healthcare and education. Through this work, CAGP has found that attending racially integrated schools is beneficial to the educational development of Cambodian and other Asian American children.

Chinese for Affirmative Action (CAA)
Chinese for Affirmative Action (CAA), based in San Francisco, California, defends and promotes the civil and political rights of Chinese and Asian Americans within the context of, and in the interest of, advancing multiracial democracy in the United States. Among other things, CAA works to educate the San Francisco Unified School District of the educational needs of Chinese and Asian American students, especially English language learners and those from low-income families. CAA believes racially integrated classrooms are critical to prepare students for success in a multiracial society, and thus is interested in preserving the authority of school districts to create voluntary desegregation programs.

Coalition for Asian American Children and Families (CACF)
The Coalition for Asian American Children and Families (CACF), located in New York City, seeks to improve the quality of life for Asian Pacific American children and families. Among other things, CACF conducts advocacy, produces and disseminates public education materials, and engages in coalition building. Through this work, CACF has found that Asian Pacific American children benefit strongly from attending diverse and integrated public schools and hence has an interest in this litigation.

Coalition for Asian Pacific American Youth (CAPAY)
Founded in 1994, the Coalition for Asian Pacific American Youth (CAPAY) is a youth-run organization that that helps Asian Pacific Islander teens in Boston and the greater Boston area become effective democratic citizens. CAPAY offers workshops in Asian Pacific Islander American history, hosts an annual leadership symposium, and develops innovative and exemplary programs in youth development and civic activism. CAPAY has an interest in

preserving desegregation programs because CAPAY youth have benefited from attending racially diverse schools.

Detroit Asian Youth Project (DAY Project)
The Detroit Asian Youth (DAY) Project is an initiative to develop leadership skills and raise consciousness among Asian American youth in Detroit, Michigan. DAY Project engages youth through community-based projects to promote a greater understanding of Detroit and its Asian American community. As a result of this experience, DAY Project firmly believes that racially diverse public schools improves educational outcomes for all of Detroit's students – including Asian Americans.

Filipinos for Affirmative Action (FAA)
Filipinos for Affirmative Action (FAA), headquartered in Oakland, California, works to build a strong and empowered Filipino community by organizing constituents, developing leaders, providing services, and advocating for policies that promote social and economic justice and equity. FAA has an interest this matter because it runs after school programs for K-12 public school students and strongly believes in the value of diverse classrooms in public education.

Japanese Community Youth Council (JCYC)
Established in 1969, the Japanese Community Youth Council (JCYC) is a multi-service community organization based in San Francisco, California, which offers children and youth a continuum of services from preschool to college. Annually, JCYC programs serve over 6,000 children and youth from all ethnic backgrounds. JCYC has incorporated into its mission the goal of providing leadership in collaborative efforts to foster better relationships and communication among different communities. Based on this value we support all efforts to integrate young people from different backgrounds including in the classroom.

One Lowell
One Lowell is a community-based organization dedicated to improving the life, opportunities and involvement of culturally diverse people in Lowell, Massachusetts. Among other functions, One Lowell provides case management and advocacy to promote the civil rights of immigrant children and parents—including Asian Americans who make up one third of Lowell's public schools. Based on this work, One Lowell strongly believes in the value of racial integration in enhancing the educational experiences of all students, including immigrants and Asian Americans.

Providence Youth Student Movement (PrYSM)
The Providence Youth Student Movement (PrYSM) mobilizes Southeast Asian youth in Providence, Rhode Island in community organizing campaigns addressing among other issues discrimination and inequity in public education. PrYSM has an interest in this matter because its experience has shown that Southeast Asian and other Asian Pacific Islander students reap educational and social benefits from attending racially diverse public schools.

South Asian Youth Action! (SAYA)
South Asian Youth Action! (SAYA), based in New York City, is the first and only United States organization working to develop the skills, talents, and leadership potential of South Asian youth. SAYA! provides programming and advocacy to create broad social and systemic changes positively impacting South Asian and other immigrant youth. SAYA!'s interest in this litigation arises from its belief that South Asian and other immigrant youth benefit strongly from attending racially diverse public schools.

United Chinese Association of Brooklyn (UCA)
The United Chinese Association of Brooklyn (UCA) mobilizes Asian American communities to defend against

anti-Asian discrimination and violence, focusing particularly on helping immigrant students overcome language barriers and develop cross-cultural communication skills to assist in their adjustment to life in the United States. Through its work, UCA has found that attending integrated public schools fosters this adjustment process for immigrant Chinese and Asian students, and thus has a strong interest in preserving desegregation programs in K-12 public education.

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PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER, AND ASIAN AMERICAN INSTITUTE, *ET AL.*, IN SUPPORT OF RESPONDENTS

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The National Asian Pacific American Women's Forum
The National Coalition for Asian Pacific American Community
Development, Inc.
National Federation of Filipino American Associations
National Korean American Service & Education Consortium
Organization of Chinese Americans, Inc.
South Asian American Leaders of Tomorrow
Southeast Asia Resource and Action Center

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Asian American Justice Center ("AAJC") is a national, nonprofit, nonpartisan organization whose mission is to advance the human and civil rights of Asian Americans (collectively, "Asian Americans"). AAJC is committed to supporting racial diversity in education as a way of ensuring equal education and opportunities for all students and as a means of remedying and combating racial discrimination and prejudice. Joining AAJC as *amici curiae* in this brief are 19 public interest legal and civil rights organizations listed in the Appendix to this brief that also are dedicated to protecting the rights of Asian Americans (collectively, "*Amici*"). *Amici* include Japanese, Chinese, Filipino, Korean, Hmong, South Asian, Pacific Islander, Cambodian, Laotian, and Vietnamese American public-interest groups. *Amici* also include some of the largest and oldest Asian American organizations in this country that are involved in challenging racial discrimination, safeguarding civil rights, and advocating for affirmative action programs. *Amici* thus have an important and substantial interest in this case, which addresses the constitutionality of the limited use of race by the Seattle School District No. 1 ("Seattle") to assign students to secondary schools and the Jefferson County School Board ("Jefferson County") in assigning students to elementary and secondary schools.

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[1] In accordance with Supreme Court Rule 37.3(a), Petitioners and Respondents have filed with the Clerk of the Court letters consenting to the filing of this brief. No person or entity other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief, and no counsel for Petitioners or Respondents had any role in authoring this brief.

SUMMARY OF ARGUMENT

Asian Americans bring a unique perspective to this case that results from their unusual treatment in the two programs at issue here. In the Seattle school assignment program, Asian Americans are treated as "minorities," whereas in the Jefferson County school assignment program, they are treated as "non-minorities."

Nonetheless, *Amici* support both programs because racial diversity is a compelling governmental interest that benefits all students, regardless of whether they are classified as "minorities," particularly students who (like Asian Americans) suffer from a history of discrimination. The programs at issue are narrowly tailored to serve that interest.

From their unique perspective *Amici* offer four points in support of Respondents' arguments that the programs are constitutional.

First, racial diversity demonstrably reduces prejudice and discrimination, and it thus is a compelling governmental interest. Literally hundreds of empirical studies show that racial diversity in primary and secondary education combats prejudice and discrimination both remedially and prospectively. All students, but particularly students such as Asian Americans that have suffered from discrimination, benefit when children learn to interact successfully and meaningfully with members of other races.

Second, racial diversity is also a compelling interest because decades' worth of empirical studies demonstrate that racially integrated schools provide an education superior to that of segregated minority-dominated schools. Learning in racially integrated schools causes all students, but particularly groups that historically have been discriminated against, to achieve superior levels of educational achievement and to realize the opportunities that flow from

that achievement. Again, as the Asian American experience demonstrates, this is true regardless of whether students are classified as "minorities" or "non-minorities."

Third, as a result of historical discrimination, both Seattle and Jefferson County continue to be residentially segregated, which has caused school segregation under the traditionally used residential-based school selection systems. Absent some use of race in making primary and secondary school assignments, residential segregation will continue to result in racially segregated schools that cannot offer a racially diverse learning environment and that perpetuate the detrimental effects of racial isolation. The experience of Asian Americans in Seattle, like the experience of African Americans in Jefferson County, demonstrates that the nature of local residential segregation reflects local history and circumstances. Because each program is sensitive to the actual racial composition of the community at issue, each program works in a narrowly tailored manner to ameliorate the effects that local residential segregation has on local public education.

Fourth, both programs at issue are narrowly tailored because they offer a forward-looking and flexible approach that does not cause any student to suffer a constitutional deprivation. Each program is predominantly choice-based and family-oriented, and makes only limited use of race. This limited use of race works to provide every student with an equal education regardless of whether the student is classified as a "minority" or a "non-minority." Neither program creates "winners" and "losers" because all students benefit and no one race is advantaged over another. Moreover, under the terms of both programs, as demographics and the operation of choice reduce racial segregation in schools, the use of the race-based "tiebreaker" likewise will decline and, ultimately, may no longer apply at all. Thus, these programs are narrowly tailored to serve the

compelling interest in the benefits that flow from racial diversity.

For all of these reasons, *Amici* support the high school assignment programs in Seattle and Jefferson County. Accordingly, *Amici* respectfully request that this Court affirm the judgments below.

BACKGROUND

The critical importance to Asian Americans of achieving racial diversity in primary and secondary education, as well as the way that the Seattle and Jefferson County programs apply, is best understood in the context of the long and continuing history of discrimination against Asian Americans, particularly discrimination in education and in the school districts at issue here. Asian Americans long have suffered from racial discrimination by the federal government, state governments, and private citizens and associations. *See generally* DOUG CHIN, SEATTLE'S INTERNATIONAL DISTRICT: THE MAKING OF A PAN-ASIAN AMERICAN COMMUNITY 10-12 (2001) ("Chin") (describing the history of anti-Asian sentiment in the form of violence and murder, discriminatory laws restricting immigration, citizenship, and employment, discriminatory taxes, forced deportation, and internment). Discrimination against Asian Americans continued through the twentieth century. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans during World War II).

Racial discrimination was nowhere more evident than in the Washington territory. For example, Asian immigrants suffered horrific acts of violence (including beatings, dismemberment, and murder), discriminatory laws, and denial of citizenship. Chin at 11, 38 (describing the Asian American experience in Washington).

In the educational context, the discriminatory "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954), long prevented Asian Americans from receiving an equal education. In *Gong Lum v. Rice*, 275 U.S. 78 (1927), this Court faced the issue of whether "the Mongolian or yellow race" was a "colored race" under Mississippi's constitutional provision that "Separate schools shall be maintained for children of the white and colored races." *Id.* at 82. The Court held that it was, and that Mississippi could "giv[e] [a Chinese child] the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races." *Id.* at 85.

Today, there is a myth that Asian Americans have overcome historical discrimination and experienced widespread educational, socioeconomic, and professional success in America. *See, e.g.*, C.N. Le, "*The Model Minority Image,*" *in Asian-Nation: The Landscape of Asian America* (2006), http://www.asian-nation.org/model-minority.shtml; Stephan Thernstrom, *Farewell to Preferences?*, 130 Pub. Interest 34, 47-49 (1998) (referring to the claim that Asian Americans "face enormous problems in contemporary America because of their race" as a "fiction" and as a "silly notion"). Nationwide demographic data show that this myth is false.

With respect to education, Asian American adults are less likely than whites to have graduated from high school. AAJC, *A Community of Contrasts: Asian Americans in the United States* 7 (2006), *available at* http://www.advancingequality.org/files/comcont.pdf. (stating that 19% of Asian Americans have not graduated from high school, as opposed to only 15% of whites). More than a fifth of Pacific Islander adults have not completed high school, and only 17% have a bachelor's degree or higher, compared to 24% of the nation overall. *Id.* In Seattle specifically, the proportion

of Asian Americans without a high school degree is almost double that of the general King County population; and Pacific Islanders have the lowest college graduation rate of any major racial or ethnic group in King County. *Id.* at 57.

Nor do Asian Americans achieve the same professional success as their Caucasian American counterparts. Nationwide, the stereotype pervades of Asian Americans as unassertive "grinds" who lack leadership skills. D. Woo, GLASS CEILINGS AND ASIAN AMERICANS: THE NEW FACE OF WORKPLACE BARRIERS 129 (2000) (discussing cultural stereotypes about Asian Americans' leadership abilities). This stereotype hinders Asian Americans' ability to advance to management positions. P. Brest and M. Oshige, *Affirmative Action for Whom?*, 47 Stan. L. Rev. 855, 894 (1995) (noting effect of negative stereotype that Asian Americans have poor leadership and interpersonal skills).[2] Asian Americans experience such "glass ceiling" barriers in many occupational contexts, including the corporate sector,[3] the federal government,[4]

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[2] *See, e.g.*, LEAP Asian Pacific American Pub. Policy Inst. & UCLA Asian American Studies Ctr., *The State of Asian Pacific America* 215-216 (1993); EEOC, *Job Patterns for Minorities and Women in Private Industry* (2003), *available at* http://www.eeoc.gov/stats/ jobpat/ 2003/tables-1.html; C.N. Le, "*Employment & Occupational Patterns,*" in *Asian-Nation: The Landscape of Asian America* (2006), http://www.asian-nation.org/employment.shtml.

[3] C. Cheng, *Are Asian-American Employees a Model Minority or Just a Minority?*, 33 J. Applied Behavioral Sci. 277, 292 (1997); White House Initiative on Asian Americans and Pacific Islanders, *A People Looking Forward, Action for Access and Partnership in the 21st Century* 60-61 (2001) ("A People Looking Forward"), *available at* http://www.aapi.gov/resources/interimreport3.pdf.

[4] *See, e.g., A People Looking Forward* at 104-105; Asian Americans and Pacific Islanders Joint Task Force, *AAPI Federal Employment and Glass Ceiling Issues* 11 (2001).

science and engineering,[5] academia,[6] and the federal judiciary.[7]

With respect to socioeconomic success, more Asian Americans than whites live in poverty. DIANA TING LIU WU, ASIAN AMERICANS IN THE WORKPLACE 60 (1997). In Seattle specifically, Asian Americans are more likely to live in poverty, more likely to live in overcrowded homes, and less likely to own their own homes than whites. *A Community of Contrasts* at 58-59.

Asian Americans face significant and consistent levels of discrimination in housing. *See* M. Turner & S. Ross, Urban Institute, *Discrimination in Metropolitan Housing Markets: Phase 2 – Asians and Pacific Islanders, Final Report* iii-iv (March 2003), *available at* http://www.huduser.org/publications/pdf/phase2_final.pdf.[8] The overall level of discrimination against Asian Americans in buying and renting homes is comparable to the level experienced by African Americans and Hispanics. *Id.*

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[5] *See, e.g.*, National Science Foundation, *Women, Minorities, and Persons with Disabilities in Science and Engineering* (2002), *available at* www.nsf.gov/statistics/nsf03312.

[6] *See, e.g.*, WOO, GLASS CEILINGS, at 118-119; Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 Asian L.J. 7, 33 (1996).

[7] *See* Office of U.S. Courts, *Judiciary Fair Employment Practices, Annual Report* 35, 10/1/03-9/30/04.

[8] In a 2001 study of American attitudes toward Chinese Americans and Asians, of those respondents holding decisively negative views, 34% said they would be upset if a significant number of Asian Americans moved into their neighborhood and 57 percent believed that increased Asian American population is bad for America. Committee of 100, *American Attitudes Toward Chinese Americans and Asians ("American Attitudes")* 46, 50 (2001).

Finally, the racism and violence that Asian Americans experienced in the nineteenth century persists today. In 2001, a comprehensive survey revealed that 71% of adult respondents held either decisively negative or partially negative attitudes toward Asian Americans. *See* Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56 (2001). Racial representations and stereotyping of Asian Americans, particularly in well-publicized instances where public figures or the mass media express such attitudes, reflect and reinforce an image of Asian Americans as "different," "foreign," and the "enemy," thus stigmatizing Asian Americans, heightening racial tension, and instigating discrimination. C. Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 181 (1995); S. Turnbull, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 Asian Pac. Am. L.J. 72, 74-75 (2001); Terry Yuh-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000); Jerry Kang, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-32 (1993); T. Devos & M. Banaji, *American = Caucasian American?*, 88 J. Personality & Soc. Psych. 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not "American").

Such negative racial representation and stereotyping can and does incite violence directed against Asian Americans. Chen, *Hate Violence*, 7 Asian L.J. at 74-76. Thousands of incidents of anti-Asian American violence have been documented in recent years, including harassment, assault, attempted murder, and murder. *See* National Asian Pacific American Legal Consortium, *2000 Audit of Violence Against Asian Pacific Americans* 9 (2001).

ARGUMENT

This Court has emphasized repeatedly that secondary education is a vital means of preserving the values of American society and preparing citizens to participate in a democratic system. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court explained that "education has a fundamental role in maintaining the fabric of our society" and that "[w]e have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests." *Id.* at 221 (citations omitted). *See also Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) ("education . . . is the very foundation of good citizenship") (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (the inculcation of civic values is "truly the work of the schools"); *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (public schools transmit to children "the values on which our society rests," including "fundamental values necessary to the maintenance of a democratic political system").

The Seattle and Jefferson County programs are designed with these very purposes in mind. The evidence shows that, by using race as a factor in composing primary and secondary school populations, these programs ensure that all students will gain the education and American values that public schools should provide.

Amici have a unique perspective on these programs. In the Seattle program, Asian Americans are treated as minorities; in Jefferson County, by contrast, Asian American are classified as non-minorities. *Compare Parents Involved in Community Schools v. Seattle School District No.* 1, 426 F.3d 1162, 1166 (9th Cir. 2005) (*en banc*) *with McFarland v. Jefferson County Bd. of Educ.*, 330 F. Supp. 2d 834, 840 n.6 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005).

Nevertheless, *Amici* support both programs because they benefit Asian Americans (and all other students) regardless of their classification as "minorities" or "non-minorities."

From their unique vantage point, Asian Americans are able to make four fundamental points to show that the programs at issue are narrowly tailored to achieve a compelling governmental interest. We discuss each of these points below.

I. RACIAL DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION IS A COMPELLING GOVERNMENTAL INTEREST BECAUSE IT PROMOTES RACIAL UNDERSTANDING

This Court recognized in *Grutter* that racial diversity in education "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" 539 U.S. at 330. These benefits inure to Asian American students whether they are treated as "minorities" (*e.g.*, non-white) or as "non-minorities," (*e.g.*, non-black). By promoting diversity, the Seattle and Jefferson County plans reduce the stereotypes and racial prejudice that cause discrimination against Asian Americans.

A. Empirical Evidence Demonstrates That Racial Diversity Improves Relations Between Races

Racial diversity demonstrably reduces racial prejudice, and therefore is a compelling governmental interest. Hundreds of empirical studies show that meaningful contact between members of different races significantly reduces prejudice among racial groups. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. of Personality &

Soc. Psych. 751 (2006) (reviewing and analyzing over 500 empirical studies); C. Aberson, C. Shoemaker, & C. Tomolillo, *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. of Soc. Psych. 335, 335 (2004) ("Meaningful" contact occurs when "members of different groups have equal status, common goals, are in a cooperative or interdependent setting, and have support from authorities.").

Recent studies of voluntary integration plans demonstrate that students in racially diverse educational environments feel comfortable with, and prepared to work and interact with, members of other races. *See, e.g.*, Michel Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District*, The Civil Rights Project, Harvard University (Jan. 2002), *available at* http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.pdf; Kurlaender & Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Lynn, MA School District*, The Civil Rights Project, Harvard University, (Feb. 2002) *available* at http://www.civilrightsproject.harvard.edu/research/diversity/LynnReport.pdf. Indeed, in Jefferson County, about 90% of the students report "that exposure in the curriculum to diverse cultures and experiences has helped them to better understand points of view different from their own." Kurlaender & Yun, *"Is Diversity a Compelling Educational Interest? Evidence from Jefferson County," in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111, 123 (G. Orfield & M. Kurlaender eds. 2001) *("Is Diversity a Compelling Educational Interest?").*

Thus, integrated schools serve to counteract racial prejudices. "Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this

country's law and practice." *Gratz v. Bollinger*, 539 U.S. 244, 274 (2003) (Ginsburg, J., dissenting) (citing Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 Calif. L. Rev. 1251, 1276-1291 (1998) (describing unconscious discrimination and bias based on race)). By combating the prejudice and bias, "both conscious and unconscious," that Asian Americans face, the Seattle and Jefferson County programs work to create equal opportunity and nondiscrimination.

B. Diversity Is Particularly Important in Elementary School and Secondary School

Nowhere is the reduction of prejudice more important than at the K-12 level. Judge Kozinski's concurring opinion in *Parents Involved in Community Schools* explains the importance of teaching racial tolerance to children:

> It is difficult to deny the importance of teaching children, during their formative years, how to deal respectfully and collegially with peers of different races. . . . The reality is that attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact successfully with individuals who are very different from oneself.

426 F.3d at 1194 (Kozinski, J., concurring). *See also id.* at 1176 (majority opinion) (holding that racial diversity at the secondary level is compelling in part because "the public school context involves students who, because they are younger and more impressionable, are more amenable to the benefits of diversity").

Empirical evidence supports the views of Judge Kozinski that "attitudes and patterns of interaction are

developed early in life." *Id.* at 1194 (Kozinski, J., concurring). Studies have shown that racial bias and prejudice exists as early as age six. A. Baron & M. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations From Ages 6 and 10 and Adulthood*, 17 Psych. Science 53, 55-56 (2005), *available at* http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1467-9280.2005.01664.x?cookiesSet=1. Thus, "the need for exposure to other races is more urgent in elementary and secondary schools, as the benefits of cross-racial interaction are most profound at younger ages." M. Anderson, *Race as a Factor in K-12 Student Assignment Plans: Balancing the Promise of Brown with the Modern Realities of Strict Scrutiny*, 54 Cath. U.L. Rev. 961, 988 (2005).

Moreover, a substantial number of high school graduates do not attend college. Nationwide, more than a fifth of Pacific Islander adults have not completed high school, and in Seattle, the proportion of Asian Americans without a high school degree is almost double that of the general population. As the Ninth Circuit noted in the opinion below, "[f]or these students, their public high school educational experience will be their *sole* opportunity to reap the benefits of a diverse learning environment." *Parents Involved in Community Schools*, 426 F.3d at 1176 (emphasis in original).

Combating racial prejudice and stereotypes at the K-12 level is a highly effective means of combating racial prejudice and the acts of discrimination it engenders. Like other racial groups, Asian Americans continue to experience racism and discrimination in many aspects of life. As described above, racial stereotypes prevent Asian Americans from achieving equal levels of professional success and result in negative attitudes and violence against Asian Americans. Improving race relations at the primary and secondary levels prevents the growth of racism that results in

this discrimination and violence. Moreover, instituting race-conscious measures at earlier stages of education that improve education and reduce (or even eliminate) the root causes of discrimination makes it more likely that race-conscious measures currently used in college, graduate school, and employment will become unnecessary. *See, e.g.*, Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 755 (2004) ("[I]f 'diminishing the force of [racial] stereotypes is a compelling pedagogical interest in elite higher education, it can only be more so in elementary and secondary schools – for the very premise of *Grutter*'s diversity rationale is that students enter higher education having had too few opportunities in early grades to study and learn alongside peers from other racial groups.").

II. THE RESPONDENTS' INTEREST IN RACIAL DIVERSITY IN PRIMARY AND SECONDARY EDUCATION ALSO IS COMPELLING BECAUSE INTEGRATION IMPROVES EDUCATIONAL PERFORMANCE

Empirical evidence has confirmed this Court's holding in *Brown* that a separate education is not an equal one. As the Ninth Circuit recognized in its opinion below, overwhelming empirical evidence shows that "racially concentrated schools are characterized by much higher levels of poverty, lower average test scores, lower levels of student achievement, with less qualified teachers and fewer advanced courses – 'with few exceptions, separate schools are still unequal schools.'" *Parents Involved in Community Schools*, 426 F.3d at 1177 (quoting Erica Frankenberg, et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 11 (The Civil Rights Project, Harvard Univ. Jan. 2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/reseg03_full.php) ("Are We Losing the Dream?").

Segregated minority schools "tend to offer their students weaker academic preparation." NAACP Legal Defense and Educational Fund, Inc., *Looking to the Future: Voluntary K-12 School Integration* 16 (2005), *available at* http://www.naacpldf.org/content/pdf/voluntary/Voluntary_K-12_School_Integration_Manual.pdf. These schools tend to have students with less skills preparation outside of school; teachers are less qualified and less experienced; and educational offerings and resources are limited. *Id.*; *Are We Losing the Dream?* at 11 & n.28.

Moreover, predominantly minority schools tend to transmit lower expectations to their students, and these expectations have a direct and negative effect on students' performances. *Id.* at 24; J. KANG & M. BANAJI, FAIR MEASURES: A BEHAVIORAL REALIST REVISION OF "AFFIRMATIVE ACTION," 22, 28-32 (2006) (describing empirical evidence showing that lowered expectations depress student performance). This lower performance continues into college. *See* Douglas S. Massey & Mary J. Fischer, *The Effect of Childhood Segregation on Minority Academic Performance at Selective Colleges*, 29 Ethnic and Racial Studies 1, 21 (2006) ("the degree of school and neighborhood segregation experienced between the ages of 6 and 18 was strongly associated with diminished academic performance later").

In contrast, students who attend more integrated schools have increased academic achievement and higher test scores. R. Crain & R. Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: Meta-Analysis*, 88 Am. J. of Sociology 839 (1983); *Are We Losing the Dream?* at 12. These students receive greater academic preparation for college, learn superior critical thinking skills, and have higher educational and occupational aspirations. Massey & Fischer, *supra*, 29 Ethnic and Racial Studies at 20; *Are We Losing the Dream?* at 12-13; P. Gurin, B. Nagda & G. Lopez, "*The Benefits of Diversity in Education for*

Democratic Citizenship," Journal of Social Issues (Jan. 2003), *available at* http://www.personal.umich.edu/~pgurin/benefits.html; *"Is Diversity a Compelling Educational Interest? in* DIVERSITY CHALLENGED at 111, 116.[9] And, students from racially integrated backgrounds experience greater academic success at the college level. Massey & Fischer, *supra,* at 19 ("Shifting a student from a completely integrated to a completely segregated background is expected to lower his or her cumulative GPA by 0.13 points. . . .").

While "it should be equally clear that Caucasian American as well as [minority] children benefit from exposure to ethnic and racial diversity in the classroom," *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982), the advantages of a racially integrated education are of particular importance to members of historically discriminated against groups. As shown above, Asian Americans nationwide, and in Seattle in particular, have not achieved socioeconomic equality and, on average, have achieved lower levels of education than Caucasian Americans. Racial integration at the secondary (and elementary) level will provide Asian Americans with the tools needed to achieve educational equality.

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[9] Petitioners suggest that the "[b]elief" that racial diversity has educational benefits "may rest on the 'assumption that nonwhites, when left on their own, cannot achieve.'" Brief for Petitioner Parents Involved in Community Schools at 30 n.14 (citation omitted). Petitioners are incorrect. As the above-described authorities show, the "belief" in the educational benefits of racial diversity rests on extensive empirical evidence.

III. THE SEATTLE AND JEFFERSON COUNTY PROGRAMS COUNTERACT THE DELETERIOUS EDUCATIONAL EFFECTS OF RESIDENTIAL SEGREGATION

As Justice Powell recognized, "[t]he principal cause of racial and ethnic imbalance in . . . public schools across the country . . . is the imbalance in residential patterns." *Austin Independent School Dist. v. United States*, 429 U.S. 990, 994 (1976) (Powell, J., concurring). *See also Parents Involved in Community Schools*, 426 F.3d at 1194 (Kozinski, J., concurring) ("To the extent that students gravitate to the schools near their homes, the schools will have the same racial composition as the neighborhood. This means that student patterns of interacting primarily with members of their own race that are first developed by living in racially isolated neighborhoods will be continued and exacerbated by the school experience.").

This imbalance is not caused simply by the private free market and personal choice. To the contrary, residential segregation primarily results from public and private race-based discrimination. *See, e.g.*, James E. Ryan, *Schools, Race, and Money*, 109 Yale L.J. 249, 278 (1999) (explaining that residential segregation results primarily from public and private discrimination); Casey Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 6 J. Urban Affairs 379 (2004); Mark Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. Land Use & Envtl. L. 89, 106 (1998), *available at* http://www. law. fsu.edu/Journals/landuse/Vol141/seit.htm; Michael Selmi, *Race in the City: The Triumph of Diversity and the Loss of Integration*, 22 J.L. & Pol. 49, 59 (2006).

For example, in the 1930s and 1940s, government agencies rated neighborhoods with significant numbers of

non-whites as high risk for mortgage default ("redlining"), which limited access to credit in diverse areas and created incentives for white residents to live in segregated neighborhoods. Kate Davis, Housing Segregation in Seattle 40 (2005), *available at* http://evans.washington.edu/research/psclinic/pdf/04-05/davis_final.pdf. In 1924, the National Association of Real Estate Brokers added a clause to their ethics code which remained until 1950: "[A] Realtor should never be instrumental in introducing into a neighborhood . . . members of any race or nationality . . . whose presence will be detrimental to property values in that neighborhood." *Id.* at 6.

Indeed, at times such discrimination occurred as a result of public and private acts combined. For example, in the 1930s, the U.S. Federal Housing Administration provided a model restrictive covenant barring minorities that private landowners could use. *See* Seattle Civil Rights and Labor History Project (www.civilrights.washington.edu), "*Racial Restrictive Covenants*" (2006) *available at* http://depts.washington.edu/civilr/covenants.htm ("*Racial Restrictive Covenants*").

Recent studies show that residential discrimination against Asian Americans is not a thing of the past. For example, a study in 2003 conducted by the Urban Institute shows that Asian Americans face significant and consistent levels of discrimination in searching for housing in large metropolitan areas. *See* M. Turner & S. Ross, Urban Institute, *Discrimination in Metropolitan Housing Markets: Phase 2 – Asians and Pacific Islanders, Final Report* iii-iv (March 2003), *available at* http://www.huduser.org/publications/pdf/phase2_final.pdf.[10] Indeed, the overall level

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[10] In a 2001 study of American attitudes toward Chinese Americans and Asians, of those respondents holding decisively negative views, 34 percent said they would be upset if a significant number of Asian Americans moved into their neighborhood and 57 percent believed that

(Continued ...)

of discrimination against Asian Americans in buying and renting homes is comparable to the level experienced by African Americans and Hispanics. *Id.*[11] Another study conducted in 2004 reveals that Asian Americans are more likely to have home loan applications rejected than are Caucasian American with similar incomes. Davis at 37.

In Seattle and Jefferson County, residential segregation historically has directly resulted in racially segregated public schools. Absent some effort to counter the effects of racial segregation, schools will become racially isolated, and students will be deprived of the benefits of racial diversity.

A. Residential Segregation Exists in Seattle

In Seattle, as elsewhere in the nation, residential segregation of Asian Americans results from a specific history of discrimination as well as the current discrimination and prejudice that exists nationwide.

In the first half of the twentieth century, covenants in Seattle forbade the sale of land to Asian Americans and other disfavored groups. A typical covenant at that time stated:

> No part of said property hereby conveyed shall ever be used or occupied by any Hebrew or by any person of the Ethiopian, Malay or any Asiatic Race, . . . excepting only

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(... Continued)
increased Asian American population is bad for America. *American Attitudes* at 46, 50.

[11] The residential segregation of African Americans and Hispanic Americans also results from decades of discrimination. *See* Davis, *passim*.

> employees in domestic service on the premises . . . .

Racial Restrictive Covenants. *See also id.* ("No person of African, Japanese, Chinese, or of any other Mongolian descent shall be allowed to purchase, own or lease said real property or any part thereof.").

This Court upheld such covenants in 1926. *See Corrigan v. Buckley*, 271 U.S. 323 (1926). Indeed, the Civil Rights Project at the University of Washington has documented almost two hundred such restrictive covenants covering areas ranging from entire neighborhoods to small blocks. *Racial Restrictive Covenants, supra.* Given the widespread prevalence of these covenants, "[p]eople of color had little chance of finding housing except in the central neighborhoods of Seattle." *Id. See also, e.g.*, DOUG CHIN, UPHILL: THE SETTLEMENT & DIFFUSION OF THE CHINESE IN SEATTLE 39 (1973) ("[T]he Chinese moved into the First Hill and Beacon Hill areas [located in the central district] only because they were the only districts not covered by the restrictive covenant.").

Early affordable housing initiatives enacted by the Seattle Housing Authority focused on the central district area. Because minorities earn less on average than whites – over 54% of Asian Americans currently are classified as low or moderate income, *see* Davis at 41 – the concentration of public housing in the central district contributes to racial segregation. *See, e.g.*, *Gautreax v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969) (placing public housing in minority neighborhoods promotes segregation). Early land use policies and exclusionary zoning – that is, zoning regulations that effectively exclude low-income households, for example by limiting the number of households per area – further contributed to racial segregation. Davis at 67; *see also id.* at 62 (in 1976, the

Seattle Human Rights Department found evidence of exclusionary zoning).

Today, housing in Seattle remains segregated. *See Parents Involved in Community Schools*, 426 F.3d at 1166. As a result, Asian Americans predominantly live in minority-dominated southern Seattle. *Id.; see* Davis at 29. Without a school assignment program that takes race into account in some fashion, residential segregation will perpetuate racial isolation in Seattle's public schools.

B. Residential Segregation Exists in Jefferson County

In Jefferson County, as elsewhere in the South, there is an analogous history of racism and discrimination against African Americans that has led to residential segregation. *See, e.g.*, Ryan, 109 Yale L.J. at 276-279. For example, Louisville, Kentucky, the county seat of Jefferson County, had a city ordinance enforcing residential segregation that was not struck down until 1917. *See Buchanan v. Warley*, 245 U.S. 60 (1917). As a result of that ruling, whites began to enforce private restrictive covenants in which property owners agreed to sell or rent to whites only. When private covenants too were ruled unconstitutional in *Shelley v. Kraemer*, 334 U.S. 1 (1948), practices such as "redlining" by real estate agents, banks, and homeowners insurance companies became prevalent. *See, e.g.*, Penny Loeb, Warren Cohen, & Constance Johnson, *The New Redlining: It's Different From the Old, But Minorities Are Still Getting Shortchanged*, U.S. News and World Report 51-58, Apr. 17 1995, *available at* http://wjcohen.home.mindspring.com/usnclips/redline.htm.

To be sure, the Jefferson County program at issue was not expressly aimed at preventing racial isolation. Nonetheless, the fact remains that, as in Seattle, absent

efforts to promote racial diversity in schools, racial isolation will increase.

C. Absent Efforts to Integrate Schools, Residential Segregation Will Lead to Racially Isolated Schools, Thus Depriving Students of the Benefits of Racial Diversity

The majority of Americans believe in the benefits of racially integrated education and favor racially integrated schools. *See Is Diversity a Compelling Interest?* at 117 (as of 1996 the majority of Jefferson County citizens preferred to continue school desegregation efforts through choice and desegregation standards); *Are We Losing the Dream?* at 15. Yet, because of the pervasiveness of residential segregation, desegregation in education will not occur without an intentional effort. F. Grissmer & S. Williamson, "*Why Did the Black-White Score Gap Narrow in the 1970s and the 1980s?*," *in* THE BLACK-WHITE TEST SCORE GAP (C. Jencks & M. Philips eds. 1998). As the Ninth Circuit below noted, "[i]n Seattle the threat of having to attend a racially concentrated or isolated school is not a theoretical or imagined problem." *Parents Involved in Community Schools*, 426 F.3d at 1177. Avoiding racial isolation is the logical and necessary corollary to promoting racial diversity. The importance of promoting racial diversity in Seattle and Jefferson County is particularly urgent because of the history of discrimination that has resulted in racial isolation.

The limited use of race by the Seattle and Jefferson County school districts is exactly the type of intentional effort that will succeed. The use of proximity as the determining factor in school assignments would perpetuate racially segregated schools. Indeed, the use of individual

choice as the sole factor arguably would have the same effect.[12]

The Seattle and Jefferson County programs use race in a targeted fashion to correct for residential discrimination (and arguably bias in individual choice). The use of race in these circumstances is not racial engineering, but rather the decision of an elected school board to promote diversity in a localized and historical context of racial isolation and segregation. As the Ninth Circuit recognized:

> [T]he District's choice to increase diversity along the white/nonwhite axis is rooted in Seattle's history and current reality of de facto segregation resulting from Seattle's segregated housing patterns. The white/nonwhite distinction is narrowly tailored to prioritize movement of students from the north of the city to the south of city and vice versa.

Parents Involved in Community Schools, 426 F.3d at 1187. *See also id.* ("It is this de facto residential segregation across a white/nonwhite axis that the District has battled historically and that it seeks to ameliorate by making the integration tiebreaker a part of its open choice Plan. The District,

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[12] James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 Yale L.J. 2043, 2096-2102 (2002) (arguing that school choice would effectuate racial integration at the margins only, if at all). Indeed, in the Western District of Kentucky's decision below, the court noted that the majority of high school students choose to attend a neighborhood (or "resides") school. *McFarland*, 330 F. Supp. 2d at 845. That said, the school board in Seattle decided to institute a choice-based program because of the high value it placed on "increase[ing] parental involvement in the schools and promot[ing] improvement in quality through a marketplace model." *Parents Involved in Community Schools*, 426 F.3d at 1168.

mindful of both Seattle's history and future, appropriately places its focus here.").[13]

Thus, Petitioners' contention that these plans do not account for diversity within minority subgroups does not account for the history and reality of residential segregation in Seattle, which falls along "white" and "nonwhite" lines. The same is true of the Jefferson County program, where residential segregation overwhelmingly falls along "black" and "non-black" lines. *See McFarland,* 330 F. Supp. 2d at 840 n.6.

In sum, the Seattle and Jefferson County programs are appropriate efforts to reduce the number of racially isolated schools that otherwise would exist. The programs thus promote racial diversity in education reach all students.

IV. THE PROGRAMS ARE NARROWLY TAILORED; THEY DO NOT CREATE A CONSTITUTIONAL DEPRIVATION BECAUSE THEY ARE FLEXIBLE AND CLOSELY LINKED TO ACTUAL DEMOGRAPHICS

Petitioners portray themselves as victims of racial balancing. *See, e.g.,* Brief of Petitioner Parents Involved in Community Schools at 25 *et seq.* In their view, petitioners have suffered a constitutional injury because of unconstitutional affirmative action. *See, e.g., id.* And certain *amici* argue that Asian Americans in particular suffer from affirmative action. *See* Brief of the Asian American Legal Foundation as *Amicus Curiae* in Support of Petitioners

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[13] Likewise, the Western District of Kentucky in the decision below concluded that the black/non-black distinction in the Jefferson County program reflected the fact that students of other races represent less than five percent of the total student population. *McFarland,* 330 F. Supp. 2d at 840 n.6.

at 1 (arguing that Asian Americans "have also suffered from similar racial classification in the San Francisco, California public school system"); Brief *Amicus Curiae* of Timothy Don-Hugh Mak in Support of Petitioner at 6 ("Affirmative action is almost *exclusively* 'paid for' by Asian-American students.").

The present cases, however, are quite different from the typical affirmative action dispute. In the typical affirmative action case, applicants compete based on their individual qualifications for a contract, a job, or a place in a college or graduate school. One applicant argues that he is entitled to win because he is better qualified (*e.g.*, his test scores were higher than those of the other applicant) but that he lost to a less qualified minority applicant.

In the present cases, by contrast, there is no competition based on qualifications. *See Parents Involved in Community Schools*, 426 F.3d at 1181 ("Students' relative qualifications are irrelevant because regardless of their academic achievement, sports or artistic ability, musical talent, or life experience, any student who wants to attend Seattle's public high schools is entitled to an assignment; no assignment to any of the District's high schools is tethered to a student's qualifications."); *McFarland*, 330 F.Supp. 2d at 859 (Jefferson County's assignment process "does not involve weighing comparative criteria in a competitive manner"). Students are not assigned to schools on the basis of grades or test scores, and therefore there can be no argument that a minority applicant with lower grades or scores has taken a seat that should have been awarded to another applicant with higher grades or scores.

The absence of competition distinguishes this case from *Gratz* and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), in which white applicants argued that they had been denied admission to competitive graduate school programs in favor of minority applicants

with lower grades and test scores. The absence of competition likewise distinguishes this case from *Ho v. San Francisco Unified School District,* 147 F.3d 854 (9th Cir. 1998), on which the Asian American Legal Foundation relies, in which Chinese American students argued that they had been denied admission to a selective high school in favor of African American and Hispanic students with lower grades and test scores. Brief of the Asian American Legal Foundation as *Amicus Curiae* in Support of Petitioners at 8 (describing competitive admissions at Lowell High School in San Francisco and the allegedly adverse effects of diversity on Chinese American applicants). Here, all students are admitted to a qualified school, and all schools are improved by decreased segregation and racial isolation.

Consequently, neither Petitioners, nor Asian Americans, nor any other students, suffer a *constitutional* deprivation. In the relatively few situations where a student's race is used as a tiebreaker, no particular race is given an edge over another. *See Parents Involved in Community Schools,* 426 F.3d at 1193 (Kozinski, J., concurring) (unlike affirmative action, these assignment programs do not "'give one racial group an edge over another"') (citation omitted); *McFarland,* 930 F.Supp. 2d at 861 ("no student is directly denied a benefit because of race so that another of a different race can receive that benefit"). *Compare, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). To be sure, students who are not admitted to the public school of their choice will be disappointed, but they have not suffered a constitutional injury, because "a student has no constitutional right to attend a particular school." *McFarland,* 330 F.Supp. 2d at 860 (citing cases); *accord Parents Involved in Community Schools,* 426 F.3d at 1181 n.21.

Moreover, as discussed above, the racial classification used in each program reflects local history and racial dynamics. As those dynamics change over time, the

programs' use of racial classification automatically will change or even become unnecessary. Similarly, by linking the use of race to population demographics, the admissions programs automatically will change as demographics shift.

For example, over time, as students attend integrated schools, they will become more comfortable with students of other races. This increasing level of comfort likely will influence school choices; students will be more likely to choose integrated schools than they would have been absent the admissions programs. As more students choose integrated schools, fewer schools will be racially isolated and more will have populations that reflect the racial make-up of the district as a whole. These choices, in turn, automatically will lessen and ultimately may eliminate the number of cases in which the racial "tiebreakers" at issue here are applied. Moreover, so to the extent residential segregation decreases over time, students who choose neighborhood schools will contribute to the integration of those schools.

Thus, unlike the admissions plans in *Bakke*, which reserved a certain number of seats in the University for minorities *ad infinitum*, and *Gratz*, which similarly granted minorities extra points on their college applications in perpetuity, the plans at issue here are self-limiting. As integration increases, the use of race will decrease and eventually cease. Thus, the plans are limited in time and should be deemed narrowly tailored.[14]

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[14] Petitioner Parents Involved in Community Schools complains that the Seattle plan "does not even recognize any racial diversity among non-whites, but lumps together all ethnic and racial categories other than non-Hispanic whites." Brief for Petitioner Parents Involved in Community Schools at 13. The United States similarly argues that Seattle's "broad characterization of all 'non-white' students into a single racial category for purposes of the racial tiebreaker demonstrates that the plan does not aim to provide either genuine diversity . . . or a 'highly individualized, holistic review' of a student's assignment request . . . ." Brief for the United States as *Amicus Curiae* Supporting Petitioner, No. 05-908, at 13.

(Continued ...)

In short, in each program, race is used in a targeted and limited fashion; the use of race is flexible and will change over time; and, no student suffers a constitutional deprivation. Accordingly, both of these programs are narrowly tailored to serve compelling governmental interests.

(... Continued)

These arguments are a red herring. If the plans at issue distinguished among Asian Americans, Hispanic Americans, African Americans and others, Petitioners and their *amici* would nonetheless contend that the plans amounted to unconstitutional racial balancing. Moreover, "[narrow tailoring does not require that [the school board] ensure diversity among every racial and ethnic subgroup as well." *Comfort v. Lynn Sch. Com.*, 418 F.3d 1, 22 (1st Cir. 2005).

CONCLUSION

For all of the foregoing reasons, *Amici* respectfully request that this Court affirm the judgment of the Ninth Circuit in *Parents v. Seattle School District No. 1* and affirm the judgment of the Sixth Circuit in *Meredith v. Jefferson County*.

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APPENDIX

APPENDIX

List of *Amici Curiae*

The Asian American Business Roundtable (AABR)
AABR was established in 1989 to help Asian Pacific and other minority-owned companies expand their market with the Federal government as well as the commercial sector by providing information that is accurate and timely to enable them to make informed decisions beneficial to their companies.

The Asian American Institute (AAI)
AAI is a pan-Asian, nonprofit organization, whose mission is to empower the Asian American & Pacific Islander community through advocacy, utilizing research, education, and coalition-building. AAI is committed to remedying past and present social inequalities by advocating for policies that promote social, economic, educational, and political equality of the Asian American community as a whole.

The Asian American Legal Center of Texas (AALC)
AALC is a nonprofit civil rights organization dedicated to advancing the civil and legal rights of Asian Americans and educating Asian Americans regarding those rights.

The Asian Law Alliance (ALA)
ALA, founded in 1977, is a nonprofit, public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. ALA has provided community education and legal services on affirmative action and discrimination issues.

The Asian Law Caucus (ALC)

ALC is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian Pacific Islander communities. Founded in 1972, the ALC is the nation's oldest Asian Pacific Islander civil rights legal organization. The ALC has provided legal services and community education on discrimination, represented individuals in discrimination suits, and conducted local and regional policy advocacy on the importance of diversity programs. ALC is affiliated with the Asian American Justice Center.

The Asian Pacific American Labor Alliance, AFL-CIO (APALA)

APALA was founded in 1992 with the strong support of the AFL-CIO and is the first and only organization of Asian American and Pacific Islander trade unionists. Since its inception, APALA has been committed to organizing the unorganized, mobilizing the Asian American and Pacific Islander community for political action and mobilization, advocating for workers' rights, civil rights, and immigrant rights, and building alliances between labor and community. APALA has always been a strong supporter of programs that benefit the Asian American and Pacific Islander communities beyond labor issues.

The Asian Pacific American Legal Center of Southern California (APALC)

APALC is the largest provider of direct legal services, civil rights advocacy, community education, and impact litigation for low-income Asian Pacific Americans in the country. Since 1982, APALC has represented Asian Pacific Americans in a number of areas, including anti-discrimination, workers' rights, family law, immigration, and hate crimes. APALC is also a leader in bringing diverse

communities together to improve race relations. APALC is also co-counsel for defendant intervenors in cases filed against the Capistrano Unified School District and the Los Angeles Unified School District, in which APALC seeks to preserve the right of school districts to track the racial effect of school boundaries and use race when appropriate to ensure desegregation.

The Association of Asian Indian Women in Ohio (AAIWO)

AAIWO is a nonprofit organization representing Asian Indian Women. Founded in 1989, AAIWO fosters and supports Asian Indian women to assume leadership roles through networking and volunteering opportunities, and by encouraging new immigrants to mainstream into American society. AAIWO emphasizes education and provides scholarships to displaced homemakers and youth. AAIWO presents multicultural events to promote diversity and mutual understanding between different cultures. The AAIWO Helpline is staffed by professionals to help women and youth in crises. Membership and all services are free.

The Association of Asian Pacific Community Health Organizations (AAPCHO)

AAPCHO is a national association representing community health organizations dedicated to promoting advocacy, collaboration, and leadership that improves the health status and access of Asian Americans, Native Hawaiians, and Pacific Islanders within the United States, its territories, and freely associated states, primarily through its member community health clinics.

Hmong National Development, Inc. (HND)

HND is a national, nonprofit organization developing capacity to ensure the full participation of Hmong in society. HND works with local and national organizations, public and

private entities, and individuals to promote educational opportunities, to increase community capacity, and to develop resources for the well-being, growth, and full participation of Hmong in society.

The Japanese American Citizens League (JACL)

JACL, founded in 1929, is one of the oldest and largest Asian American nonprofit, nonpartisan organizations committed to securing and upholding the human and civil rights of Americans of Japanese ancestry and others. During World War II, Japanese Americans were denied constitutional rights and were incarcerated by the United States for no reason other than their ethnicity. Through JACL and other groups, those who were wrongfully forced into internment camps obtained redress, but discrimination against Japanese Americans remains an issue. Knowing the harm caused by discrimination and the importance of programs that counter the effects of discrimination, JACL has worked hard to educate people on the need for affirmative action programs.

The National Asian Pacific American Bar Association (NAPABA)

NAPABA is the national association of Asian Pacific American attorneys, judges, law professors, and law students, providing a national network for its members and affiliates. NAPABA advocates for the legal needs and interests of the Asian Pacific American community and represents the interests of over 40,000 attorneys and 50 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the area of civil rights, and combating anti-immigrant backlash and hate crimes. To advance its goals,

NAPABA monitors legislative developments and judicial appointments, and advocates on issues of importance to Asian Pacific American lawyers and their communities.

The National Asian Pacific American Women's Forum (NAPAWF)

NAPAWF is a grassroots organization dedicated to forging a progressive movement for social and economic justice and the political empowerment of Asian and Pacific American women and girls. NAPAWF believes that affirmative action programs are necessary to address the myriad educational and economic obstacles facing APA women and girls.

The National Coalition for Asian Pacific American Community Development, Inc. (National CAPACD)

CAPACD is the first national advocacy organization dedicated to addressing the housing, economic, and community development needs of Asian Americans and Pacific Islanders. Our mission is to be a powerful voice for the unique community development needs of Asian American and Pacific Islander communities and to strengthen the capacity of community-based organizations to create neighborhoods of hope and opportunity. National CAPACD is built on the principle that equal access in education and employment is essential to progress in all communities.

National Federation of Filipino American Associations (NaFFAA)

NaFFAA is a nonprofit, nonpartisan civil rights organization dedicated to promoting the interests and betterment of Filipinos and Filipino Americans in the United States. Founded in 1997, NaFFAA represents over 300 Filipino American community organizations and institutions. NaFFAA works in coalition with other civil rights

organizations to ensure that Asian Pacific Americans enjoy equal opportunities in education, employment, and industry.

National Korean American Service & Education Consortium (NAKASEC)

NAKASEC was established as a consortium in 1994 by local Korean American community organizations to advance a national Korean American civil rights agenda. NAKASEC's founding organizations are also its affiliates: The Korean American Resource and Cultural Center (KRCC) of Chicago, The Korean Resource Center (KRC) of Los Angeles, and YKASEC – Empowering the Korean American Community of New York. NAKASECs founding is the culmination of the base building work that its affiliates have carried out for decades in their respective cities. NAKASEC and its affiliates have an interest in this amicus brief because their organizations believe that quality public education is a civil right and that racial diversity leads to equality in education.

Organization of Chinese Americans, Inc. (OCA)

OCA is a nonprofit, nonpartisan civil rights organization dedicated to ensuring the equality of Chinese Americans, Asian Americans, and all Americans in the United States. Founded in 1973, OCA currently represents over 10,000 members in 50 chapters and 30 college affiliates. OCA has worked to ensure that Asian Pacific Americans are treated fairly and are accorded the rights guaranteed to them under the Constitution, federal, state, and local law.

South Asian American Leaders of Tomorrow (SAALT)

SAALT is a national, non-profit organization dedicated to ensuring the full and equal civic and political participation of South Asians in America. Using a social justice framework, SAALT meets its mission through four strategies: civil and

immigrant rights advocacy; community and public education; coalition-building; and leadership development.

Southeast Asia Resource and Action Center (SEARAC)
SEARAC was founded in 1979 to facilitate the relocation of Southeast Asian refugees into American society as well as the development of nonprofit organizations led by and for Southeast Asians. SEARAC's principal mission is to advance the interests of Southeast Asian Americans by promoting community empowerment and leadership development, as well as advocating for and representing the diverse Southeast Asian American community on issues and concerns such as education, health care, safety, economic development, and civil rights.

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Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Association of the Bar of the City of New York (the "ABCNY") is one of the nation's oldest and largest professional associations with approximately 22,000 lawyers, who collectively continue the Association's 136-year tradition of pursuing political, legal, and social reform.[1] The ABCNY is home to over 160 committees, including the Committee on Civil Rights, the Committee on Diversity in the Profession, and the Committee on Education and Law. The ABCNY has long been involved in the struggle for equality of opportunity, including in the area of public education, and has addressed issues involving the improvement of educational opportunities and resources for New York City public school students. Most recently, it submitted an amicus curiae brief in support of plaintiffs seeking to vindicate the rights of New York City public school students to the opportunity for sound basic education guaranteed by the New York State Constitution. The ABCNY therefore has a keen interest in addressing the legality of efforts by local school boards to improve educational opportunities for their children by combating the rampant *de facto* segregation that exists in many urban school districts.

STATEMENT OF THE ISSUE

Whether Seattle or Louisville[2] can constitutionally engage in voluntary efforts to combat the adverse effects of *de facto* segregation in the public schools through an

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[1] The parties have filed letters with the Court consenting to all amicus curiae briefs. No counsel for a party authored this brief in whole or in part and no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] All references to Louisville refer as well to Jefferson County, which encompasses the city of Louisville.

assignment plan that makes race one factor to take into account to avoid *de facto* segregation.

SUMMARY OF THE ARGUMENT

In *Brown v. Board of Education*, the Court held that states and cities could not maintain segregated public school systems. In so holding, the Court recognized the profoundly destructive effect of segregated education on black school children, and acknowledged the basic truth that for these children, separate is inherently unequal. Recognizing that a segregated school system can be maintained just as surely by knowing inaction as by deliberate action, Seattle and Louisville have adopted school enrollment programs that attempt to prevent racial segregation by taking race into account as one factor among others in school assignments. A holding that these plans are unconstitutional would allow the evil that *Brown* condemned to replicate itself, with the same adverse impacts on black school children that *Brown* recognized as the inevitable consequence of school segregation.

Since *Brown*, it has become evident that the vast majority of urban schools will be *de facto* segregated unless school boards do something to prevent segregation from occurring. While numerous factors have contributed to this reality, the end result is undeniable: fifty years after *Brown*, the promise of ending racial segregation in public education and eliminating the educational and social disadvantages that accompany racially segregated schools has been lost in many of our nation's largest school districts. New York City is a particularly poignant case in point: it is widely known for its racial and ethnic diversity and eliminated *de jure* segregation long ago, yet its public schools are

among the most heavily segregated in the nation. Numerous schools reflect a level of racial segregation that has led prominent critics to label them "apartheid schools," and most New York City public school students attend schools whose racial and ethnic makeup has little or no relation to the demographics of the city in which they live.

While the circumstances of New York City and many of the country's other large cities are not the product of policies by school boards to promote segregation, the maintenance of segregated schools results with equal certainty when school boards adopt policies that accept and perpetuate *de facto* segregation. New York City is in fact an archetype of what happens in urban schools when nothing is done to counteract the effects of residential and social segregation in public school populations. *Brown* and its progeny identify a compelling state interest in integrated public schools, and local school boards should be permitted to take race into account to advance that interest, lest their schools fall victim to the *de facto* segregation exemplified by New York City's public schools and the adverse effects this has had on racially isolated public school students.

ARGUMENT

I. *BROWN* AND ITS PROGENY SET FORTH A COMPELLING GOVERNMENT INTEREST IN INTEGRATED PUBLIC SCHOOLS

"Separate educational facilities are inherently unequal." *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("*Brown I*"). Beginning with that statement, the Court has repeatedly announced that racial segregation has no place in our public schools. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 26 (1971) ("*Swann I*"); *Green v.*

County Sch. Bd., 391 U.S. 430, 436 (1968) ("The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about."); *Cooper v. Aaron*, 358 U.S. 1, 19-20 (1958) ("The principles announced in [*Brown*] . . . are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us."). This basic truth is now part of the bedrock of American society. *See, e.g.*, President George W. Bush, Remarks at Grand Opening of Brown v. Board of Education National Historic Site (May 17, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/05/print/20040517-4.html (describing *Brown I* as "a decision that changed America for the better, and forever," by causing "[t]he system of racial oppression in our country [to lose] its claim to legitimacy"). *Brown* and its progeny recognize that to prevent integration of schools and promote segregation is not only unconstitutional, but also wrong. *See Swann I*, 402 U.S. at 15 (characterizing segregation as "the evil struck down by Brown I"); *see also Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("Segregation in public education is not reasonably related to any proper governmental objective.").

Under *Brown v. Board of Education*, 349 U.S. 294 (1955) ("*Brown II*"), it is local school authorities that are primarily responsible for integrating their schools. *Id.* at 299. In carrying out this responsibility, they are to "make every effort to achieve the greatest possible degree of actual desegregation," *Swann I*, 402 U.S. at 26, so as to obtain a public school "system without a 'white' school and a 'Negro' school, but just schools." *Green*, 391 U.S. at 442. Setting forth the goal of converting segregated schools "to a unitary system in which racial discrimination [is] eliminated root and branch," *id.* at 437-38, the Court has made clear that fostering integration, and not merely prohibiting

overt segregation, is the principle underlying its opinions. *See Balaban v. Rubin*, 20 A.D.2d 438, 447, 248 N.Y.S.2d 574, 583 (2d Dep't) ("[T]he Brown cases constitute a clear mandate to the Boards of Education, in selecting the site for a new school and in establishing its attendance zone, to act affirmatively in a manner which will prevent *de facto* segregation in such new school."), *aff'd*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964).

While *Brown* and its progeny deal with *de jure* segregation, the harms to minority children from segregated schools are just as severe from the *de facto* segregation that exists in so many urban school districts, and the compelling state interest in eliminating those evils and providing an integrated public school system is just as great. If local school districts, which are in the best position to judge local facts and local needs, are disabled from considering race as a factor in school assignment programs designed to remedy *de facto* segregation, more cities are likely to become like New York City, where, despite a diverse urban population, the public schools are overwhelmingly segregated by race.

II. THE GOAL OF INTEGRATION SET FORTH IN *BROWN* AND ITS PROGENY HAS NOT BEEN REALIZED IN NEW YORK CITY, LEAVING IN ITS PLACE THE VERY HARMS THIS COURT OBSERVED FIFTY YEARS AGO

New York City illustrates what a twenty-first century American city's school system may look like, absent the ability to consider race to avoid *de facto* segregation in the public schools. One of the most racially and ethnically diverse cities in the country, New York has long prided

itself on its open-mindedness and its openness to peoples from around the world. New York nonetheless has some of the most segregated schools in the nation. This *de facto* segregation, and the damage it causes to minority students who suffer from it, are an object lesson in why school districts like Seattle and Louisville that are still capable of avoiding *de facto* segregation through racial balancing programs should be permitted to do so.

A. New York City's Schools Are Some Of The Nation's Most Racially Segregated Institutions

To many Americans, New York City with the Statue of Liberty and its multiplicity of ethnicities is the nation's symbol of diversity. Whites, blacks, and Latinos[3] each constitute at least 25% of New York's population of more than 8 million residents.[4] Despite its reputation for diversity and its diverse demographics, however, New York City is like most American cities in that an overwhelming majority of its residents not only reside, but also are educated, in racial isolation.[5]

David Dinkins, the former mayor of New York City, has observed that "New York is a 'tale of two cities,' and it

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[3] The terms "Latino" and "Hispanic" are used synonymously for the purposes of this brief and as the author used them in the original source.

[4] *See, e.g.*, John Logan & John Mollenkopf, *People & Politics in America's Big Cities* 14 (Drum Major Institute for Public Policy May 15, 2003) (breakdown of 35.0% white, 25.6% black, 27.0% Latino, and 10.6% Asian, according to 2000 Census).

[5] Nearly 100 boundary changes were made in New York City from 1959 to 1963 in attendance areas for public schools in an effort to desegregate; despite these changes, the "extent of segregation in the city's schools was greater in 1963 than it had been in 1958." Jonathan Kozol, *The Shame of the Nation: The Restoration of Apartheid Schooling in America* 190 (2005).

should come as no surprise that each of these cities has its own school system."[6] How did New York, with its "image as a pioneer in civil rights, become the epicenter of segregated public education?"[7] Pervasive segregation of New York City's residential housing, which remains at the same level today as in 1960, is largely to blame.[8] Historically segregated housing patterns, as in most American cities, have resulted in racial polarization in New York City's five boroughs.[9] Black-nonblack segregation is particularly striking: almost half of the city's 42 neighborhoods (designated as such by the New York City Department of Health and Mental Hygiene) are less than 10% black, while almost a quarter of New York City's neighborhoods are less than 9% white.[10]

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[6] *Id.* at 141 (quoting David Dinkins, Manhattan Borough President in 1986 before being elected Mayor of New York City) (quotation marks omitted).

[7] *Id.* at 32 (internal quotation marks omitted).

[8] *Id.*

[9] For example, Manhattan's celebrated neighborhoods are often divided by race. The north Manhattan neighborhood of Inwood-Washington Heights is 71% Hispanic. N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Inwood and Washington Heights, Manhattan*, at 2 (2003). Directly south of this area is Central Harlem-Morningside Heights, which is 67% black. N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Central Harlem, Manhattan*, at 2 (2003). Continuing south, Manhattan's Upper East Side is 82% white. N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of the Upper East Side, Manhattan*, at 2 (2003). Lower Manhattan (including Chinatown) is 53% white and 24% Asian. N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Lower Manhattan*, at 2 (2003); *see* Logan & Mollenkopf, *supra* note 4, at 16-17.

[10] *See, e.g.*, N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Southwest Brooklyn*, at 2 (2003)

Like most of the nation's cities, including Seattle[11] and Louisville,[12] New York City has schools that are even more segregated than its neighborhoods. Students of color in New York City are likely to attend schools that are more segregated than the already racially divided neighborhoods in which they reside, with many of the city's schools as segregated, if not more segregated, than they were thirty years ago.[13] For New York City the "overall scale of racial isolation . . . is so extreme" that critics have used the term "apartheid education" to describe New York City school's racial imbalance.[14]

In fact, most of the city's school-age population attends segregated schools. New York City is the sixth most segregated city in the nation for black schoolchildren,[15] with the

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(1% black); N.Y. City Dep't of Health & Mental Hygiene, *Community Health Profiles: The Health of Hunts Point and Mott Haven, Bronx*, at 2 (2003) (1% white).

[11] *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1166 (9th Cir. 2005) ("Seattle public school enrollment breaks down nearly inversely [to residential demographics], with approximately 40 percent white and 60 percent nonwhite students."), *cert. granted*, __ U.S. __, 126 S. Ct. 2351 (2006).

[12] *See* Stip. of Facts ¶ 36 (student enrollment in Jefferson County public schools is approximately 34% black and 66% "other"); *see also McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 840 n.6 (W.D. Ky. 2004) (county does not distinguish between white, Hispanic, and Asian students), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, __ U.S.__ , 126 S. Ct. 2351 (2006) (per curiam).

[13] Kozol, *supra* note 5, at 19.

[14] *Id.* at 236.

[15] *See* John Logan, Dierdre Oakley & Jacob Stowell, *Choosing Segregation: Racial Imbalance in American Public Schools 1999-2000*, at 9 (Lewis Mumford Center for Comparative Urban and Regional Research, University of Albany Mar. 29, 2002).

average black child attending a school that is overwhelmingly black.[16] New York City is the third most segregated city in the nation for both Hispanic[17] and Asian children.[18]

The school-age population of children in New York City's public schools is currently 14.3% white, 33.1% black, 39.0% Hispanic, and 14.3% Asian.[19] While these figures show that the overall public school population is less diverse than the city's population, the racial segregation within individual schools is even more pronounced. Many members of each racial group attend schools that are dominated by a particular racial group, and in some cases, in near total racial isolation.[20] For example, Tottenville High School in Staten

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[16] The average black child in New York City will attend a school that is 60.8% black. *See id.* at 10.

[17] *Id.* at 13.

[18] *Id.* at 16.

[19] *See, e.g.*, N.Y. City Dep't of Educ., *2004-2005 Annual Regional Report, Region 7*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/7.pdf (last visited Oct. 3, 2006). In contrast, New York City's overall population is 35.0% white, 25.6% black, 27.0% Latino, and 10.6% Asian. *See* Logan & Mollenkopf, *supra* note 4, at 14.

"White flight" to private schools and to the suburbs of New York is a significant factor behind these numbers. *See generally* Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. Gender Race & Just. 163, 195 (1999) (describing white flight from urban public schools during the 1970s); *see also* Editorial, *Segregation Reigns on LI*, Newsday, Aug. 21, 2006, at A32 (whites comprise 70% of all students on Long Island and attend schools that are 81% white and 5% black; blacks comprise 11% of all students); Jonathan Kozol, *Segregated Schools: Shame of the City*, Gotham Gazette, Jan. 16, 2006, *available at* http://www.gothamgazette.com/article//20060116/202/1718 ("Only one percent of [suburban Bronxville's] students are black or Latino.").

[20] *See* Kozol, *supra* note 5, at 17; *cf.* Gary Orfield & John T. Yun, *Resegregation in American Schools* 19-20 (The Civil Rights Project at

Island is 81.1% white,[21] P.S. 6 on Manhattan's Upper East Side is 77% white,[22] P.S. 114 in Belle Harbor Queens is 81.4% white,[23] and P.S. 195 in Manhattan Beach, Brooklyn is 87.1% white,[24] whereas P.S. 65 in Mott Haven, Bronx has no white students but is 29.3% black and 70.5% Hispanic,[25] and P.S. 6 in East Flatbush, Brooklyn is comprised of nearly all

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Harvard University 1999) (measuring segregation by percentage black students in majority white schools, percentage white students in typical black student's school, and percentage of black students in 90-100% minority schools, respectively).

[21] The racial breakdown is 81.1% white, 2.7% black, 9.0% Hispanic, and 7.2% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 7, H.S. 455*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/531455.pdf (last visited Oct. 3, 2006).

[22] The racial breakdown is 77% white, 5.9% black, 9.2% Hispanic, and 7.9% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 9, P.S. 6*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/102006.pdf (last visited Oct. 3, 2006).

[23] The racial breakdown is 81.4% white, 8.2% black, 6.1% Hispanic, and 4.3% Asian. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 5, P.S./M.S. 114*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/427114.pdf (last visited Oct. 5, 2006).

[24] The racial breakdown is 87.1% white, 6.3% black, 4.1% Hispanic, 2.4% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 6, P.S. 195*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/322195.pdf (last visited Oct. 5, 2006).

[25] The racial breakdown is 0.0% white, 29.3% black, 70.5% Hispanic, 0.2% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 9, P.S. 65*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/207065.pdf (last visited Oct. 3, 2006).

black students (88%) with an insignificant 0.4% white population.[26]

The most academically successful schools in New York City "tend [ ] to be clustered in more privileged communities" and are just as segregated as their non-elite counterparts.[27] Predictably, private schools exhibit this characteristic,[28] but so do New York City's three most elite public high schools: Stuyvesant High School in lower Manhattan is only 5.6% black or Hispanic;[29] Bronx High School of Science is only 13.4% black or Hispanic;[30] and Brooklyn Technical High School is 24.7% black

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[26] The racial breakdown is 0.4% white, 88.8% black, 10% Hispanic, and 0.8% Asian and others. N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 6, P.S. 6*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/317006.pdf (last visited Oct. 3, 2006).

[27] Kozol, *supra* note 5, at 203.

[28] The racial breakdown of New York City private schools is 66% white, 13.7% black, 15.5% Hispanic, and 4.7% Asian; 15% of New York City students attend private schools. *See* Andrew Beveridge, *High School Students*, Gotham Gazette, Apr. 28, 2005, *available at* http://www.gothamgazette.com/article/demographics/20050428/5/1395. The disparity is much greater for non-Catholic religious private high schools, which are 93.3% white, 2.7% black, 1.5% Latino, and 2.4% Asian, and non-religious private high schools, which are 76.8% white, 9.7% black, 5.1% Latino, and 8.3% Asian. *Id.*

[29] *See* N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 9, H.S. 475*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/102475.pdf (last visited Oct. 3, 2006) (38.5% white, 2.6% black, 3.0% Hispanic, and 55.9% Asian and others).

[30] *See* N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 1, H.S. 445*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/210445.pdf (last visited Oct. 3, 2006) (32.9% white, 5.7% black, 7.7% Hispanic, and 53.7% Asian and others).

or Hispanic.[31] In contrast, *71.4%* of the general public school population is black or Hispanic.[32]

Moreover, these statistics reflect a nationwide trend towards public schools actually becoming more racially segregated.[33] In 1979, blacks made up nearly 13% of Stuyvesant's student body;[34] by 1995, the black student percentage there had fallen to 4.4%,[35] and today blacks are a meager 2.6% of Stuyvesant's enrollment. As these high schools are prohibited by statute from using race as a factor in their admissions process, with students admitted solely by competitive examinations whose results reflect the negative effects of segregated primary schools, the New York City Department of Education has found no viable alternative to address this steady decline in black enrollment.[36]

W.E.B. Dubois wrote one hundred years ago that "[i]t is a hard thing to live haunted by the ghost of an untrue dream."[37] Unfortunately, the dream of integrated schools

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[31] *See* N.Y. City Dep't of Educ., *2004-2005 Annual School Report, Region 8, H.S. 430*, at 2, *available at* http://schools.nyc.gov/daa/SchoolReports/05asr/313430.pdf (last visited Oct. 3, 2006) (26.5% white, 15.8% black, 8.9% Hispanic, and 48.8% Asian and others).

[32] *See* Elissa Gootman, *In Elite N.Y. Schools, a Dip in Blacks and Hispanics*, N.Y. Times, Aug. 18, 2006, at A1.

[33] *Id.*

[34] *Id.*

[35] *Id.* In 1995 blacks constituted 11.8% of Bronx Science and 37.3% of Brooklyn Tech.

[36] *Id.* Although the city has developed some tutorial assistance programs aimed at minority students to increase enrollment at Stuyvesant, for example, the help is insufficient and ill-suited to address the deep seated roots of this problem.

[37] Kozol, *supra* note 5, at 274 (quoting W.E.B. DuBois, *The Children of Disappointment*, *in* The Souls of Black Folk (1990)).

following *Brown* has become such a ghost in many of our cities, as in New York City; the hope for integrated schools has been displaced by the reality of *de facto* segregation.

B. The Negative Effects Of Segregated Schools On Minority Children That The Court Observed In *Brown* And Its Progeny Are Evident In New York City's *De Facto* Segregated School System

While the Court in *Brown* and its progeny first noted the damaging effects of school segregation in the context of *de jure* segregation, the same harms are also prevalent in today's *de facto* segregated schools.[38] Segregated schools—whether *de jure* or *de facto*—are "institutions of concentrated disadvantage"[39] that systematically fail minority students.[40] Students in predominantly minority districts are more likely to attend schools with inadequate resources, are more likely to have unqualified teachers, are more likely to be counseled with lower expectations, and are more likely to be tracked into lower quality academic programs.[41] The New York Court of Appeals found this to be the case in New York City where public schools with the highest per-

[38] Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 Am. U. L. Rev. 1307, 1331 (Summer 1990) (observing that any "[d]ifferentiation between de jure and de facto segregation, however, is largely illusory").

[39] Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 7 (The Civil Rights Project at Harvard University Jan. 2005).

[40] *See Brown I*, 347 U.S. at 495 ("Separate educational facilities are inherently unequal.").

[41] *See* Claude M. Steele, *Not Just a Test*, The Nation, May 3, 2004, at 3 (reviewing conclusions of scholarly research on effects of segregation and author's own research).

centage of minority children "have the least experienced, the most uncertified teachers, the lowest-salaried teachers, and the highest rates of teacher turnover."[42]

Minority students attending segregated schools also internalize the degrading effects of segregation. In addition to feelings of shame and anger, minority students attending segregated schools have lower expectations of themselves.[43] "It's like we are being hidden," says one female student in New York City who attends a segregated public school in the Bronx.[44] "It's as if [students of color] have been put in a garage where, if you don't have room for something but aren't sure if they should throw it out, they put it there where they don't need to think of it again," she says of her attendance at her decrepit school.[45] She continues to explain her feeling of neglect by concluding, "[i]f people in New York woke up one day and learned that we were gone, that we had simply died . . . I think they'd be relieved."[46]

Despite the fact that a high school education is considered the basic minimum requirement for an individual's education, only half of black, Hispanic and Native American students graduate from high school.[47] In New York

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[42] *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 909, 801 N.E.2d 326, 333, 769 N.Y.S.2d 106, 113 (2003) (quotation marks and citation omitted).

[43] *See Brown I*, 347 U.S. at 494.

[44] Kozol, *supra* note 5, at 28 (internal quotation marks omitted).

[45] *Id.* (internal quotation marks omitted).

[46] *Id.* at 28-29 (internal quotation marks omitted).

[47] Christopher Swanson, *Who Graduates? Who Doesn't? A Statistical Portrait of High School Graduation, Class of 2001*, at 2 (Education Policy Center and the Urban Institute 2001).

City, public school students in high minority districts have extremely low graduation rates, especially black and Latino males.[48] Studies show that, independent of poverty, the level of segregation and the lack of exposure to white students for minority students is a strong predictor of failure to graduate from high school.[49] While the graduation rates at affluent white schools are near 100%, in high minority districts less than 50% of all ninth graders graduate within four years.[50]

As former Assistant United States Attorney General and member of the Washington D.C. Board of Education Roger Wilkins noted, "I used to feel sick at graduations when I saw how many of the ninth grade students had been lost in those four years. It was like seeing an army regiment returning from a war . . . look at these young black people who have fallen by the way."[51] Nationally, in schools that are comprised of at least 90% students of color, only 42% of freshman even advance to grade 12.[52] These segregated

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[48] Gary Orfield, Daniel Losen & Johanna Wald, *Losing Our Future* 56 (The Civil Rights Project at Harvard University Mar. 2004) ("The district data showing low graduation rates in high minority districts are consistent with the findings . . . that segregation and percentage of minority students in a district had a strong relationship with low graduation rates, independent of poverty.").

[49] *Id.* at 6.

[50] Christopher Dunn & Donna Lieberman, Op-ed, *Deepening Racial Isolation and Despair for Black and Latino Children in New York's Public Schools*, Newsday, June 24, 2003, at 2; *see also Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 914, 801 N.E.2d 326, 336, 769 N.Y.S.2d 106, 116 (2003).

[51] Kozol, *supra* note 5, at 239 (internal quotation marks omitted).

[52] Orfield & Lee, *supra* note 39, at 6.

schools are afflicted by "lower levels of competition by peers, less qualified and experienced teachers, narrower and less advanced course selection, more student turnover during the year, and students with more health and emotional problems related to . . . living in [the] ghetto."[53] Few whites, even poor whites, ever experience such schools.[54]

New York City's largely separate and unequal schools exhibit the same dismal statistics. Only 30.1% of Latinos and 32.2% of blacks graduate from high school in New York City.[55] The New York Court of Appeals found that New York City's graduation rate compares unfavorably with the state and nation, which the court considered "symptomatic of a system breakdown."[56] The segregated schools having the highest concentration of minority students are frequently also the poorest, with blacks and Hispanics often attending class in run-down buildings, having few academic and extra-curricular resources, and being taught by uncertified or poorly trained teachers.[57] The overwhelming majority of students at two of New York City's largest high schools—which are both 98% black and Hispanic—did not pass a single one of the state's five required Regents tests required for graduation, a striking

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[53] Orfield et al., *supra* note 48, at 7.

[54] Orfield & Lee, *supra* note 39, at 6.

[55] Swanson, *supra* note 47, at 38.

[56] *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 914, 801 N.E.2d 326, 337, 769 N.Y.S.2d 106, 117 (2003) (quotation marks and citation omitted).

[57] *See* Gail Robinson, *Fifty Years After Brown*, Gotham Gazette, May 17, 2004, *available at* http://www.gothamgazette.com/article//20040517/200/981.

illustration of the substandard quality of education for New York City's most vulnerable children.[58]

In sum, the segregation of New York City's public schools severely undermines minorities' educational development and future opportunities. The devastating effect of racial segregation is "a national horror hidden in plain view,"[59] preventing fulfillment of the promise of integration proclaimed by the Court in *Brown*.

III. VOLUNTARY EFFORTS TO DESEGREGATE PUBLIC SCHOOLS, INCLUDING THROUGH THE CONSIDERATION OF RACE, NOT ONLY ARE CONSTITUTIONAL, BUT ALSO ADVANCE THE PRINCIPLES OF *BROWN* AND ITS PROGENY

Faced with the prospect of becoming like New York City already is, Seattle and Louisville have decided that it is in the best interests of their students and communities to try to avoid *de facto* (and, in the case of Louisville, the continuing effects of former *de jure*) segregation in their school system. Having identified a compelling state interest in integrated public schools, they have determined that race is a factor that must be considered to remedy the problem of *de facto* segregation.

A. There Is A Compelling State Interest In The Benefits Of Integrating Public Schools

Confronted with the adverse impact of segregated schools—reinforced racial isolation, the concentration of poverty, internalized anger and lowered expectations and

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[58] *See* Tamar Lewin, *More Students Passing Regents, But Achievement Gap Still Persists*, N.Y. Times, Mar. 18, 2004, at B1.

[59] Kozol, *supra* note 5, at 240 (quoting Roger Wilkins) (quotation marks omitted).

consistently low levels of achievement for students of color—Seattle and Louisville, along with other cities across the country, have identified a compelling state interest in integrating their public schools. Aware of both the harms resulting from segregation, and the benefits that have been identified for students of all races and ethnicities who attend integrated public schools, the local school boards of these cities have determined that a plan of integration is in the best interest of their students and communities.

That Seattle and Louisville's local school boards have determined that voluntarily integrating their schools is in their students' and communities' best interests is not surprising. Numerous studies show that substantial benefits in both intellectual and social development are common for children enrolled in integrated schools.[60] In an increasingly multiracial society, exposure to racially integrated schooling can help combat racial prejudice as well as "break the tendency for racial segregation to become self-perpetuating for all students later in life."[61] Integrated schools have a myriad of educational benefits that segregated schools do not. *See Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 16, 18-19 (1st Cir. 2005) (en banc) (including the "preempt[ion of] racial stereotypes through intergroup contact," which "ameliorate[s] racial and ethnic tension and [fosters] interracial tolerance," as well as the "positive impact of racial diversity on student safety and attendance"), *cert. denied*, __ U.S. __, 126 S. Ct. 798 (2005). Students of all races who attend diverse, integrated schools have been shown to feel more comfortable about living

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[60] Orfield & Lee, *supra* note 39, at 40.

[61] *Id.* (quoting Wells & Crain, Perpetuation Theory and Longterm Effects of School Desegregation) (quotation marks omitted).

near and working with people of different backgrounds.[62] Moreover, as the world of work and citizenship is an integrated one, schools that are segregated by race cannot prepare students for that world. *See* State Education Commissioner's Advisory Committee on Human Relations and Community Tensions, *Desegregating the Public Schools of New York City: A Report Prepared for the Board of Education of the City of New York*, at ix-x (May 12, 1964) (Addressing "the education necessity to prepare every child to take his place in a world where no race may any longer live alone. . . . [I]t cannot be denied that a child who has learned from experience to understand and appreciate people of races other than his own has a sounder basis for both this education and his life.").

The Court has recognized these "substantial" benefits arising from a diverse classroom. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). In *Grutter*, the Court found that a diverse class "promotes cross racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races . . . . These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id.* (quotation marks and citation omitted). As the Court noted, expert studies and reports have found that diverse student bodies "better prepare[ ] students for an increasingly diverse workforce and society, and better prepare[ ] them as professionals." *Id.* (quotation marks and citation omitted).[63]

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[62] *Id.*

[63] The Court further noted that this was not only important for the students but also required by "American businesses [that] have made

The Court's observations are borne out by common experiences and common sense. A black adult, whose mother had her bused across town to a school that welcomed inner-city youth, said of her suburban, predominately white school that "everyone talked about college so she just assumed that she would go to college too."[64] By the time she enrolled at Brown University (to which she had applied, without any personal knowledge of the school, because a much-admired peer had gone there), this student observed, "I had already sat next to white students. I had already been on teams and in student politics with them . . . I could deal with the academic part and wasn't stressed about the social part."[65] After graduating, working, and eventually attending graduate school, she said that "[n]one of that would have been possible if [I] had not gone to integrated schools."[66]

The profound impact from integrating a city's public schools is also apparent in an examination of those cities that have followed this course. The public schools in Lynn, Massachusetts have been racially and ethnically integrated starting at the primary level since 1988 due to the district's voluntary desegregation plan.[67] Researchers who surveyed

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clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints." *Id.*

[64] This comment was made by a student whose mother had her bused from Boston to suburban Lexington, Massachusetts, one of the 32 districts in its area that are a part of one of the longest-lasting voluntary integration programs in the nation. Kozol, *supra* note 5, at 229.

[65] *Id.* (internal quotation marks omitted).

[66] *Id.* at 230 (internal quotation marks omitted).

[67] Michael Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity in Educational Outcomes: Lynn, MA School District 2* (The Civil Rights Project at Harvard University Feb. 2002).

student experiences found positive educational impacts from diversity for students in the district.[68] First, students of all racial and ethnic backgrounds reported being "comfortable" or "very comfortable" working for a supervisor from a different racial background than their own.[69] Second, all Lynn students, regardless of their racial background, held high educational aspirations and felt that their schools promoted these aspirations to students equitably.[70] Lynn's integrated schools have successfully fostered an educational environment that students themselves feel provides the skills "necessary to live and work in diverse environments."[71]

The desire to give children "access to the majority culture, so they could negotiate it more confidently"[72] is not limited to the residents of cities like Seattle and Louisville that have voluntary school integration plans. National surveys show that over two thirds of Americans believe that "desegregation improves education for blacks" and a "growing population is convinced that it has positive effects for whites as well."[73] Importantly, 60% of young adults surveyed believe that the federal government has the responsibility to make sure that public schools are inte-

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[68] The students surveyed in the Lynn School District identified themselves as 41.5% white, 11.2% African American, 17.7% Latino, 0.7% Native American; 8.7% stated "other" and 3.6% declined to identify themselves. *Id.* at 3.

[69] *Id.* at 7.

[70] *Id.* at 11.

[71] *Id.*

[72] Kozol, *supra* note 5, at 229.

[73] *Id.* at 233.

grated.[74] These studies show that the majority of Americans want the integrated schools that this Court envisioned fifty years ago in *Brown*. However, under the conditions prevailing in many urban areas, school integration may be possible only if race is made a permissible factor in assigning students to schools.

B. The Consideration Of Race Is Appropriate And Necessary To Advance The Compelling State Interest In Integrated Public Schools

The integration of segregated schools cannot be achieved without using race as at least one factor in the school assignment process. When attempting to address issues of racial segregation it is almost axiomatic that race should be taken into consideration. The Court acknowledged this reality in *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971) ("*Swann II*"), where a North Carolina statute prohibited school assignments "on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins." *Id.* at 44 n.1. Observing that this "'color blind' . . . requirement, against the background of segregation, would render illusory the promise of *Brown*," the Court held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.* at 45-46 (noting further that the statute "would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems").

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[74] *Id.*

Judge Kozinski's concurrence in the Seattle case cogently reasoned that a less demanding standard than strict scrutiny was appropriate in reviewing the Seattle racial balance plan, which treats whites and blacks exactly the same.[75] But even assuming that strict scrutiny is the proper standard whenever race is a factor at all, where, as here, a compelling interest exists, race may be used as a factor so long as its use is narrowly tailored to achieve that interest.[76] Narrow tailoring generally requires the proponent to show that a plan or practice is (i) necessary to the declared purpose, (ii) proportional to the declared purpose, and (iii) not more burdensome than necessary on third parties.[77]

The use of race as a factor in integrating schools is necessary and proportional because in many instances race-neutral alternatives are not effective in addressing the issue of segregation. School districts looking at race-neutral alternatives, such as lotteries, magnet schools, no-transfer policies, unrestricted transfers, redrawing district lines, forced busing, and plans based on socioeconomic status, have determined that these plans simply do not work. In *Comfort* the Lynn School Committee looked at all of these options, only to find that each alternative either was ineffective or impractical or exacerbated the racial imbalance. *See Comfort*, 418 F.3d at 7, 22. Specifically, the Committee found that magnet schools were "only modestly successful in alleviating racial imbalance," *id.* at 7, a

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[75] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring), *cert. granted*, __ U.S. __, 126 S. Ct. 2351 (2006).

[76] *Comfort*, 418 F.3d at 16.

[77] *United States v. Paradise*, 480 U.S. 149, 187 (1987) (Powell, J., concurring).

finding supported by other school districts.[78] Lotteries and redrawing of district lines were considered impractical. *Id.* at 22 (observing that redrawing district lines would not be viable, and that "demographic and scheduling factors made [a lottery system] impracticable"). Even worse, the Committee found that no-transfer policies, unrestricted transfers, forced busing, and plans based on socioeconomic status only deepened the racial segregation or created other unrelated problems. *Id.*; *see also Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 374, 387-89 (D. Mass. 2003) ("There are good reasons to give deference to school boards' . . . determinations of whether race-neutral alternatives are adequate. They are the experts in what will or will not work because they are uniquely attuned to the needs of a diverse urban community;" discussing in detail the problems of race-neutral alternatives), *aff'd*, 418 F.3d 1 (1st Cir.), *cert. denied*, __ U.S. __, 126 S. Ct. 798 (2005).

The limits of race-neutral alternatives are supported by scholarship suggesting that these methods simply do not alleviate segregation in elementary and high schools. As one expert on voluntary integration plans has written: "Relying solely on racially neutral policies has simply not proven successful in preventing racial segregation in the K-12 arena. Realistically, race must be taken into account in order to address this compelling government interest."[79]

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[78] *See* Sandy Banks, *Mixed Results for L.A.'s Magnet Schools*, L.A. Times, Jan. 20, 2006, at 1 (87 of Los Angeles Unified School District's 162 magnet schools "are virtually all black or Latino, and almost all of those considered integrated—those with 30% white students—are in or near the San Fernando Valley or the Westside").

[79] Celia M. Ruiz, *Can Voluntary Racial Integration Plans at the K-12 Educational Level Meet Grutter's Constitutional Standard?*, 67 Ohio St. L.J. 303, 319 (2006).

Nor is it feasible, at the grade school level, to consider race only as part of the individual consideration of each student, as was done at the graduate school level in *Grutter*. As one commentator has noted, "demanding that K-12 schools use race only in the same manner as universities ignores the fundamental differences between those institutions."[80]

Simply stated, race-neutral alternatives alone cannot solve long-standing problems such as residential segregation[81] and white flight into private schools (which are 66%–93% white in New York City[82]) and the suburbs,[83] all of which contribute to school segregation. Under these circumstances, failing to use race as a factor in assigning students to schools renders the promise of *Brown* illusory. The Court should not foreclose other state and local governments that want to try to avoid what has happened in New York City from using race as a factor in voluntary efforts to reduce *de facto* segregation in their public schools. *See Swann I*, 402 U.S. at 16; *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 713 (2d Cir. 1979) (though "there is no judicially-enforceable constitutional obligation" to remedy *de facto* segregated school system,

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[80] James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 Ohio St. L.J. 327, 342 (2006).

[81] *See, e.g., Monroe v. Bd. of Comm'rs of City of Jackson*, 391 U.S. 450, 458 (1968) ("Because the homes of Negro children are concentrated in certain areas of the city, a plan of unitary zoning, even if prepared without consideration of race, will result in a concentration of Negro children in the zones of heretofore 'Negro' schools and white children in the zones of heretofore 'white' schools.") (quotation marks and citation omitted).

[82] *See supra* note 28.

[83] *See supra* note 19.

"[i]t is permissible . . . for local officials to attempt voluntarily to correct or combat such an imbalance").

C. Courts Should Defer To Local School Boards In Their Determination Of What Means To Use To Address *De Facto* Segregation

The decisions of the local school boards in Seattle and Louisville that it would be in the best interests of their students to integrate their schools and combat *de facto* segregation should be granted great deference. This Court has "long recognized that local school boards have broad discretion in the management of school affairs," and that federal courts ordinarily should not interfere with local educational decisions. *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982); *see also Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools."); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Brown II*, 349 U.S. at 299 ("Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems."); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

This Court has already noted that choosing to remedy *de facto* segregated schools is within the broad discretionary power of local educational authorities. In *Swann I*, the Court stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example,

> that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

402 U.S. at 16. This sentiment was echoed in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1972), in which the Court, upholding the constitutionality of a public education-financing program, noted: "[T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems." *Id.* at 43; *see also Swann II*, 402 U.S. at 45 (noting that "school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements").

The school boards for both Seattle and Louisville decided that it was in the best interest of their children to attempt to integrate their schools and that race was an appropriate and necessary factor to consider. Because that decision was well within the broad discretionary powers of their local educational officials, those school boards are entitled to judicial deference.

D. The Affirmative Steps Taken By Seattle And Louisville To Effectuate Integration In Their Schools Are Not Only Constitutional But Also Models For Other School Districts Where *De Facto* Segregation Threatens To Render Meaningless The Principles Of Brown And Its Progeny

Seattle and Louisville have taken affirmative measures to combat the growing segregation in their schools. Their local school boards have recognized the extraordinary harm of segregated education, and after careful deliberation decided on plans to try to integrate their schools. By doing so, these school systems are voluntarily following the goal of integration that this Court advanced in *Brown* and its progeny. These plans are not only constitutionally permissible, but also models for other schools districts to follow to integrate our public schools.

The use of non-racial factors alone has not proven sufficient to avoid *de facto* segregation. Obviously, adequate physical and educational resources are also needed to make the public schools attractive to all parents and students. But by not considering racial factors as well, it may be impossible to prevent the segregation of urban schools. To disallow the consideration of race for voluntarily integrating schools is effectively to eliminate a city's means to ward off *de facto* segregation. If local school boards are prevented from using race as a factor in remedying *de facto* segregation within their schools, cities will become complicit in the segregation of their public schools. It would be a bitter irony if the principles of *Brown* and its progeny, which condemned state action to create and maintain seg-

regated school systems, were perversely held to prevent state action to desegregate schools.

CONCLUSION

For the reasons set forth within, the ABCNY respectfully urges this Court to affirm the rulings of the Ninth and Sixth Circuits that the school enrollment programs of Seattle and Louisville are constitutional.

Respectfully submitted,

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In the Supreme Court of the United States

DAVID MCFARLAND, PARENT AND NEXT FRIEND OF STEPHEN AND DANIEL MCFARLAND, ET AL.,

Petitioners,

V.

JEFFERSON COUNTY PUBLIC SCHOOLS, ET AL.,

Respondents,

AND

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

V.

SEATTLE SCHOOL DISTRICT, NO. 1, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

BRIEF AMICUS CURIAE OF THE BLACK WOMEN LAWYERS' ASSOCIATION OF GREATER CHICAGO, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Black Women Lawyers' Association of Greater Chicago, Inc. ("BWLA") is an association of African-American female lawyers, judges, law professors and law students whose mission is to provide professional support for the continued presence and participation of African-American women in the legal profession. Thus, BWLA's interest in these cases is substantial. BWLA is in a unique position to provide a perspective on issues which may not adequately be covered by the parties in their briefs or by the other *Amici* before this Court. Specifically, BWLA's perspective is unique because many of its members have been beneficiaries of public elementary and high school programs which used race as a factor in school assignment policies in order to desegregate schools. Moreover, many of BWLA's members have been beneficiaries of college, university and law school admissions programs designed to create diverse applicant pools and student bodies and to increase the racial diversity within the legal profession. As an organization whose membership includes attorneys, law professors, and judges, BWLA is in a unique position to describe the experience of practicing law as an African-American lawyer today---more than 50 years after this Court's decision in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954).

A ruling proscribing the consideration of race as a factor, among others, in educational assignment decisions in public elementary and secondary schools would dramati-

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* affirm that no counsel for any party in this case authored this brief in whole or in part. No person or entity, outside of *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

cally affect the environment in which children learn. Such a ruling is likely to return us *de facto* to educational environments which existed during *de jure* segregation. A diverse educational environment helps to deconstruct the conscious and unconscious racial biases against African-Americans which remain in our society as vestiges of our history of slavery and *de jure* segregation. A ruling overturning this Court's recent decision in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), as sought by some *Amici*, would dramatically reduce the number of African-American students admitted to our nation's institutions of higher learning, and thereby curtail professional and other opportunities reserved for those with college and graduate levels of education.

Our members' opportunity for full participation in the legal system is likely to be determined by the outcome of this case. As African-American attorneys and judges, our participation in the legal system is critical to the public's perception that our system of justice is fair, open and inclusive. Finally, a ruling eliminating the consideration of race as a factor in creating diverse and non-segregated educational settings would have a devastating impact on efforts to diversify the legal profession and to remedy past and present discrimination against African-Americans. Such a ruling would likely eliminate the possibility of ever achieving a day when race no longer matters in America.

SUMMARY OF ARGUMENT

Race still plays a part in the lives of every American. History, statistical evidence, case law, and the personal and professional experiences of our members demonstrate the important role that race plays in America. As long as race remains a factor in American life, race must remain a factor in the educational system to ensure that educational opportunities are provided to African-Americans after

hundreds of years of deprivation. Moreover, race must remain a factor to ensure that educational environments are diverse and non-segregated in order to teach both whites and non-whites about each other so that we may reach the day when race no longer matters.

Being educated in a multiracial setting enhances students' knowledge of different cultures and their understandings of perspectives that are influenced by race. This is as true in elementary and secondary school settings as in institutions of higher education. Furthermore, it is only through contact with other races that we begin to break down the racial stereotypes and conscious and unconscious biases which history has engrained in our society. Our members now confront these negative racial stereotypes and conscious and unconscious biases in our daily work and in all aspects of our lives.

At issue in the cases before the Court is the government's voluntary decision to consider race as one factor, among others, to integrate public elementary and secondary schools and to ensure a diverse educational environment. *Grutter* supports the government's compelling interest in student diversity in elementary and secondary education just as it does in higher education. Society's interest in preparing its citizens to participate in a multicultural democracy dictates that learning be conducted in diverse environments. Our members' experiences demonstrate the value obtained from a diverse education and the burdens of working in environments where issues of race are improperly managed. For all of the foregoing reasons, the Respondents' school assignment policies should be upheld.

ARGUMENT

I. The Government's Consideration Of Race In Public School Assignments Furthers A Compelling Interest In Educating Students And In Eliminating The Vestiges Of *De Jure* Segregation

The Court in *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003), held that student body diversity is a compelling state interest that can justify the consideration of race in university admissions. In reaching this decision, the Court recognized that context matters when reviewing governmental actions involving race under the terms of the Equal Protection Clause. *Id.* at 327. *Grutter* acknowledged the substantial benefits of education with a diverse student body: "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society and better prepares them as professionals.'" *Id.* at 330. Moreover, the Court relied on two other reasons to recognize student body diversity as a compelling interest: first, "that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints," *ibid.*, and second, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332.

In upholding the University of Michigan Law School's position that a "critical mass" of underrepresented minorities is necessary to provide a diverse education, *id.* at 318, the Court recognized that race still matters in our society. "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of

being a racial minority in a society, like our own, in which race unfortunately still matters." *Id.* at 333.

The constitutionality of race-conscious remedial measures is well established. Several school desegregation cases have recognized that even absent a judicial or legislative finding of a constitutional violation, a school board could constitutionally consider the race of students in making school assignment decisions. *See, e.g., Swann* v. *Charlotte-Mecklenburg Bd of Educ.*, 402 U.S. 1, 16 (1971); *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971). Accordingly, Respondents' policies of considering race in their school assignment plans are merely an effort to comply with the parameters of *Brown*. Therefore, this Court should support the continued desegregation of educational systems and allow race to be utilized as one factor, among others, in remedying *de facto* segregation.

II. America Is Not Now, And Never Has Been, A Color-Blind Society

In reviewing governmental actions involving race under the Equal Protection Clause, context matters. *See Grutter*, 539 U.S. at 327. The Respondents' actions in these cases occurred within the context of race in America, in general, and the experience of African-Americans, in particular. The experience of African-Americans in America has been an experience rife with discrimination and second-class citizenship based on race.

During slavery, African-Americans endured a lifetime of bondage and treatment as human chattel, sold as easily as one would sell a piece of clothing. Slavery provided the mechanism that promoted and maintained white racial dominance. Enslaved African-Americans had no rights. It was illegal for African-Americans to learn to read or to become educated, nor could they congregate among them-

selves. Additionally, African-American families were routinely and systematically separated. Children were sold away from their parents and wives were sold away from their husbands. *See generally* John Hope Franklin, FROM SLAVERY TO FREEDOM (4th ed. 1974); Richard Kluger, SIMPLE JUSTICE (1975).

Despite its articulated ideals of equality and democracy, simultaneously the United States Constitution recognized slavery and expressly prohibited legislation on the "[i]mportation" of slaves until 1808. U.S. Const. art. I, § 9, cl. 1. Moreover, slaves were considered three-fifths of a person for apportionment purposes, although they had no right to participate in governance. U.S. Const. art. I, § 2, cl. 3. If a slave escaped into free territory, the Constitution required that the slave be returned to his or her rightful "owner" upon request. U.S. Const. art. IV, § 2, cl. 3.

This Court played a role in promoting and enforcing laws which treated African-Americans as inferior and affirmed whites as superior. *See, e.g., The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *Groves* v. *Slaughter*, 40 U.S. (15 Pet.) 449 (1841); *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). In *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 407 (1856), denying a slave's claim for freedom, Chief Justice Taney wrote that African-Americans were not citizens of the United States because African-Americans were "an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."

In the post-Civil War Era, the Court determined that the "pervading purpose" of the Civil War Amendments was to emancipate former slaves. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872). Despite this interpretation, the Court later approved legalized segregation under

the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), thereby, maintaining the subjugation of African-Americans.

The "separate but equal" legal doctrine continued largely unabated well into the twentieth century. In a series of cases, the inequality of separate educational facilities for African-Americans was challenged. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950). In *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954), this Court explicitly rejected racial segregation in education. In reaching its decision, the Court gave great weight to the negative psychological effects of attending segregated schools and the implied inferior status of African-American children. *Id.* at 494. Writing for a unanimous Court, Chief Justice Warren stated that "[s]eparate educational facilities are inherently unequal." *Id.* at 495.

Despite the Court's decision invalidating *de jure* school segregation, many school boards either refused to comply with *Brown* or significantly delayed its implementation. One year after the original *Brown* decision, the Court mandated school desegregation with "all deliberate speed" and required "good faith compliance at the earliest practicable date." *Brown* v. *Board of Educ.*, 349 U.S. 294, 300-01 (1955); *see also Watson* v. *City of Memphis*, 373 U.S. 526 (1963); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Griffin* v. *County Sch. Bd.*, 377 U.S. 218 (1964).

For almost 20 years after *Brown*, school districts blatantly refused to desegregate their once *de jure* segregated schools. In *Green* v. *County School Board*, 391 U.S. 430, 435-36 (1968), the Court defined desegregation as the elimination of prior segregationist policies in every aspect of a school, which included student and teacher assign-

ment. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-18, 29-30 (1971), endorsed judicial oversight of desegregation plans and allowed the use of busing to achieve integration.

Given the history of racial discrimination against African-Americans and the disparities among races which continue to exist, states have a compelling interest in providing schools with diverse student bodies. Indeed, this Court has validated that interest as long as the remedy is narrowly tailored. *Grutter*, 539 U.S. at 333.

A. Statistical Evidence Demonstrates that the Effects of *De Jure* Segregation Persist

The elimination of *de jure* discrimination against African-Americans did not end the effects of hundreds of years of government-sanctioned racial discrimination. The vestiges of *de jure* segregation continue to destroy communities, families and the hearts and minds of those who are forced to endure day to day injustice based on race. Recently, in the aftermath of Hurricane Katrina, the racial disparities between African-Americans and whites were magnified as the world watched thousands of African-Americans wade through debris, human feces and dead bodies with no help in sight. The horrific images of American citizens abandoned by their government served as a very painful reminder that race still matters in this country.

Racial disparities persist in every aspect of our society including employment opportunities, earning potential, housing and healthcare. In the employment arena, racial discrimination is an unfortunate reality that continues to burden society and contradicts the ideals of fairness and justice for all. It was only nine years ago that Texaco, the United States' third-largest oil company, was scandalized

by a disclosure of a secret tape of senior officials referring to African-Americans as "black jelly beans" who were "glued to the bottom of the jar." *See* Susan L. Brinson & William Benoit, *The Tarnished Star: Restoring Texaco's Damaged Public Image*, 12 MGMT. COMMUNICATION Q. 483, 484 (1999). Clearly, the statements evidenced racial bias by the senior officials. *See Roberts* v. *Texaco, Inc.*, 979 F. Supp. 185, 190 (S.D.N.Y. 1997).

Further, statistical data reveals that institutional racism and racial segregation drastically reduce employment opportunities for African-Americans. *See* David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 406 (2001). Some corporations use race to determine the location of their facilities. *See ibid.* Often, major corporations will avoid areas where there is a high concentration of African-Americans and direct their attention to predominantly white suburbs. *See ibid.* Unfortunately, as more and more corporations move to the suburbs, so do high paying entry level jobs. *See ibid.* Additionally, when companies have to cut their workforce, African-Americans are disproportionately impacted by such measures. *See ibid.* For example, during the economic downturns in 1990-1991, the Wall Street Journal analyzed more than 35,000 companies and discovered that African-Americans were the only racial group that experienced a net job loss. *See ibid.* Since September 2001, African-American communities have been marked by economic stagnation. For example:

- More than one in ten African-Americans are now unemployed--more than twice the number of unemployed whites.
- In cities such as New York and Chicago, some estimates put the number of unemployed black males at 50%.
- Long-term African-American unemployment is now at a 20-year high.

TAVIS SMILEY *et al.*, THE COVENANT WITH BLACK AMERICA 166 (Third World Press 2006).

Overall, this data indicates that economic progress for African-Americans is declining with no hope in sight. *See id.*

Further evidence of the effect of continued racial discrimination is found in the disparity between the earning potentials of African-Americans and whites. In 1998, whites earned more than African-Americans and had lower levels of poverty. *See* David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 407 (2001). Even where whites and African-Americans have the same educational credentials, whites still earn more money.

Given the disparities in income between blacks and whites, there is a large gap between black and white wealth in this country. At every income level, African-Americans continue to fall short in building wealth. One major problem is that racial segregation dramatically impacts the value of homes in different areas. *See ibid.* African-Americans receive smaller investment returns on their homes than whites. *See ibid.* Accordingly, since home equity plays a significant role in building wealth, African-Americans are falling farther behind in their efforts to reverse economic stagnation in their communities. *See ibid.*

This country remains residentially segregated on the basis of race. African-American/white segregation in housing remains the most extreme of all residential segregation. Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 235 (1993). Housing is the market that determines one's schooling, peer groups, safety, jobs, insurance costs, public services, home equity, and ultimately, wealth. No other ethnic or racial group in the history of the United States has ever, even briefly, experienced the high levels of residential segregation that African-Americans face. Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, in 1 American Becoming 399, 401 (Neil J. Smelser et. al. eds., 2001).

Race does not just impact the socio-economic status of African-Americans. Race also affects the type of health care and medical attention received by African-Americans. Historically, the United States denied African-Americans proper healthcare on the basis of race. *See* Gerald E. Thomson, *Discrimination in Health* Care, 126 ANNALS OF INTERNAL MED. 910, 911 (1997). Over the last century, racial inequalities have continued to prevent African-Americans from receiving the medical attention needed to live a healthy life. TAVIS SMILEY, THE COVENANT WITH BLACK AMERICA 3 (Third World Press 2006). In 2000, racial disparities in the health care system led to 85,000 African-American deaths — 24,000 deaths from cardiovascular disease, 4,700 infant deaths, 22,000 deaths caused by diabetes and 2,000 deaths due to breast cancer. *See ibid.* All of these deaths could have been prevented if there were equal access to quality health care. *See ibid.*

Moreover, African-Americans are underrepresented in clinical trials for new drugs. *See* Marc Seitles, *The Perpetuation of Residential Racial Segregation in America:*

Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies, 14:1 J. LAND USE & ENVT'L LAW 89, 105 (1998-1999). They are less likely to undergo diagnostic testing or receive discretionary surgeries. *See* Thomson, *supra*, 126 ANNALS OF INTERNAL MED., at 910, 911. Unfortunately, our society and our health care system continue to afford limited access to African-Americans, which leads to unnecessary deaths in the African-American community.

The above statistics are consistent with our members' experiences and provide ample evidence establishing the overwhelming *present-day* discrimination faced by African-Americans in all facets of our lives. The one factor that has served to narrow the professional, housing and economic gaps is access to diverse educational opportunities for African-Americans. *See* Seitles, *supra*, at 89, 103-104. If school districts are precluded from using race as a factor to overcome racial segregation, the plight of the African-American community will remain tied to the legacies of our past.

B. Our Members' Experiences Demonstrate the Continuing Effects of *De Jure* Segregation

Justice Marshall wrote in *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 400 (1978) (Marshall, J. dissenting), that "[t]he experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups." The collective experiences of our members corroborate Justice Marshall's observation and underscore the necessity of integrated educational institutions at all levels. Below, we provide a representative sample of some of the experiences of our members to demonstrate that segregated public schools act as a significant sociological barrier for both African-Americans and whites alike.

One of our members describes growing up in Chicago during the late 1970's and early 1980's and attending college almost thirty years after *Brown* as follows:

> In approximately the eighth grade, I moved to a very racially segregated neighborhood on the south side of Chicago. The neighborhood was predominantly white. My family was the first black family on our block. I was one of only eight black students in my eighth grade class. I was called "nigger" and "little black girl" and shunned by all but the few black students in the class. Within one year of my family moving to our block, every white family on the block moved out and was replaced by black families. Not only did my block change over racially, but the entire neighborhood changed from white to black. During the first year, however, the police were at our house constantly due to the racial harassment my family faced. On several occasions, we were awakened to crosses burning in the yard. One night, someone set our garage on fire which caused the gas lawnmower inside to catch fire.
>
> In the late 1970's, after I graduated from high school, I went to the largest public university In Illinois. I was the only black person in my field of study. I was the only black person in classes in my major. Once, in a standing-room-only lecture hall, white students chose to stand as opposed to sit down in the empty seats next to me on either side or behind or in front of me.

Another of our members describes her experience growing up in Chicago and attending college, law school and practicing law since *Brown* as follows:

I grew up on the south side of Chicago in an all-black segregated neighborhood and attended public elementary and high schools in Chicago. In order to attend a high school with greater educational opportunities, my mother sent me to an integrated school outside my neighborhood. I finished near the top of my high school class and graduated from Harvard College with honors in 1977. I am the beneficiary of race-conscious admissions and I do not feel stigmatized by that fact. No other member of my family attended Harvard. I am the first lawyer in my family.

Since law school, I have worked in the legal departments of two Fortune 200 companies, two large law firms, one small law firm and a government legal department. In most of my jobs since law school, I have been the only black lawyer or one of less than a handful of black lawyers. On a few occasions, I was the first black lawyer or the first black female attorney to work at that company or firm. During my 21 years of practicing law, I have rarely been in a meeting in a business setting where another black person was present. These experiences made me feel very isolated and alone. For many of the white people with whom I have worked, their experience with me was their first meaningful experience with a black lawyer and, as a result, I often have had to spend time and energy trying to dispel the negative stereotypical assumptions they have about black women lawyers or black people, in general. I attribute all I have accomplished in my legal career to my hard work and the opportunity to attend Harvard College and Harvard Law School.

This member describes her experience with desegregation in the South after *Brown* and her experience in the practice of law in Chicago:

> In 1966, twelve years after *Brown*, a decree entered by the Court of Appeals for the Fifth Circuit finally brought integration to the schools in my southern home town. I, together, with two other young children, each day left my segregated community to attend a school on the other side of town. Although the schools were integrated, movie theaters, doctor's offices and the dressing rooms of many retail establishments remained segregated. I was ridiculed and taunted by white children who were opposed to my presence in the school. During most of my fourth grade year, my teacher referred to me as a "negress." In 1971, we moved to Chicago. After graduating from high school in the top two percent of my class, I attended the largest state university in Illinois. I was the only African-American student in the entire department in my field of concentration. Students ignored my presence and very few would offer me any assistance. I later attended law school and graduated in 1983. I joined the law department of a local public agency, where I was one of four African-American attorneys in an office of over 150 attorneys. I presently work as a partner in a large law firm. My years of practice have been marked by negative events arising solely from my race. My competence has been challenged repeatedly. I have been mistaken for the court clerk, judge's secretary and an office secretary. I have learned to live with a sense of isolation in the practice.

These experiences are provided as anecdotal evidence of the experience of African-American women lawyers. There are as many different stories as there are members of our organization. However, one thing is clear: African-American attorneys, and African-American women attorneys in particular, have experienced and continue to experience qualitatively different present-day work experiences based on racial misunderstanding and intolerance bred from the history of *de jure* segregation in our society.

C. *De Facto* Public School Segregation is as Powerful as *De Jure* School Segregation

Today, although *de jure* segregation no longer exists, *de facto* segregation manifests itself as a persistent vestige of *de jure* segregation negatively impacting the current and future advancement and success of African-American children and adults. *De facto* school segregation serves as a breeding ground for beliefs of racial superiority and inferiority.

Examine any city in America and one can easily see patterns of *de facto* segregation by race which are strongly linked to segregation by poverty. Clusters of poverty, in turn, are strongly linked to unequal opportunities and unequal outcomes for African-American students. Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School District* 1, 3 (Aug. 2002), available at http://www.civilrightsproject.harvard.edu (follow "Research" hyperlink, then follow "racial diversity" hyperlink). In fact, a recent study conducted by the University of Miami and the University of South Florida concluded that segregated schools are institutions of concentrated disadvantage. Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 1, 7 (Jan. 2005), available at http://www.civilrights

project.harvard.edu. Minority students who most often attend high-poverty public schools are more likely to face educational inequality due to a lack of resources, a dearth of experienced and credentialed teachers, lower parental involvement, and high teacher turnover. Chungmei Lee, Gary Orfield, & Erica Frankenberg, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 1, 35 (Jan. 2003), available at http://www.civilrights project.harvard.edu. The greater burden on administrators and veteran faculty presented with a relatively inexperienced faculty and particularly challenging student bodies complicates and compromises the opportunities to learn offered to all students in segregated African-American schools. *Id.* at 11.

Segregated minority schools overwhelmingly contend with the educational impacts of concentrated poverty (defined as having 50% or more of the student population eligible for free or reduced lunch), while segregated white schools are almost always middle class. Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* 2, 10 (July 2001) available at http://www.civil rightsproject.harvard.edu

De facto school segregation and its effect on African-American children is evidenced by declining test scores and increasing drop-out rates. *Ibid.* Indeed, state testing programs, which now publicly distribute testing data in almost all states, identify the lowest performing schools as those that are also segregated by race and economic standing. *Ibid.* The undeniable correlation between the percentage of poor students in a school and its average test scores leaves minority students in segregated schools facing a much less challenging educational curriculum. *Ibid.* The unavoidable result is that there are not enough minority students ready for advanced placement courses and

those courses are eliminated even for students who are ready because there are not sufficient students to fill a teacher's minimum student enrollment requirement. *Id.* at 11.

A study in the Journal of Negro Education researched the cumulative effects of attending a segregated minority elementary school. *See* Roslyn Arlin Mickerson, *The Effects of Segregation on African-American High School Seniors' Academic Achievement*, 68 J. NEGRO EDUC. 566, 582 (1999). The greater the proportion of a child's education that took place in a segregated African-American school, the lower his or her grades and the less likely the child was to be placed in college-bound tracks in secondary school. *See id.* at 577. The invisibility of this problem is shown by the fact that many colleges give special consideration to students who have taken advanced placement classes, ignoring the fact that such classes are far less available in segregated minority high schools. Orfield, *Schools More Separate, supra* at 11.

In contrast, racially diverse schools have benefits that are palpable. A recent research study by Professor Willis Hawley of the University of Maryland in Orfield & Lee, *Why Segregation Matters, supra*, at 42, reported the following evidence on the cognitive impacts of diverse educational institutions:

- African-American and Hispanic students learn more in schools that are majority white than in schools that are predominantly minority.

- The earlier students experience racially desegregated learning environments, the greater the positive impact on achievement.

- The integration of schools that remain majority white appears to have no negative effect on white students.

However, white students in predominantly non-white schools may achieve at lower levels than students from similar socio-economic backgrounds who attend majority white schools.

There are a variety of things that children learn in inter-racial schools about understanding and working together with people of other racial and ethnic backgrounds---things that are difficult or impossible to learn in segregated schools. A racially diverse educational setting is essential to overcoming the persistent vestiges of *de jure* segregation. Racially, culturally and socio-economically diverse schools are better equipped to provide equal educational opportunities to African-American students---as well as all students.

III. Graduates Of Integrated Schools Value Diversity In The Workplace And In Their Communities

Our members, many of whom are graduates of desegregated public schools, recognize the benefits of attending racially, culturally and socio-economically diverse schools. Indeed, attending desegregated schools often provided our members and their white classmates, a limited opportunity, if not their only opportunity, to interact with people of different racial and ethnic backgrounds. In a study of 1980 graduates of desegregated high schools, a group of researchers found that the white, African-American and Latino students interviewed believed they benefited from integrated schooling:

> Although sometimes difficult and frustrating, this experience [desegregation] yielded a valuable social education not otherwise available through books, videos, or field trips. . . The interviewees stressed the increased level of comfort they now

> have in racially diverse settings, especially when they are in the minority.
>
> * * *
>
> Thus, graduates of all racial and ethnic backgrounds emphasized the importance of 'living' through integration. Furthermore, they appreciate those lessons more than ever, because they have come to realize the uniqueness of their school experiences. It was only after graduating that they understood what they had gained vis-à-vis peers who had not attended diverse schools and who seemed more prejudiced.

Amy Stuart Wells *et al.*, *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society*, Final Report from the Understanding Race and Education Study 2, 16 (2004), available at http://www.tc.columbia.edu/desegregation.

White graduates of integrated schools learned new cultural perspectives which impacted their lives years after schooling. *Ibid.* They attested to a greater appreciation for diverse cultures in high school and as such said they were "less likely to revert to stereotypical assumptions about others based on race." *Ibid.* They also emphasized a decreased fear of people of color. *Ibid.* These graduates astutely observed that their white spouses and friends who did not attend diverse schools, were often frightened in racially diverse and predominantly African-American or Latino settings. *Ibid.* As a white alumnus of a desegregated school noted:

> If you just hang out with a bunch of white people and . . . you do everything that you can to say I'm going to act like a nice, open-minded person when I get around these black folks and Mexican folks,

> you're not going to be as good at it. You're going to be more uptight. You're going to be more stressed out. It's going to be a problem.

Ibid. As a white graduate of the Charlotte-Mecklenberg school system explains, "Charlotte as a community is better for having desegregated its schools and students." *Id.* at 28. She said that if the goal is to "have cross cultural, cross racial relationships, you've got to work at it. And... the Charlotte-Mecklenburg school system did that." *Ibid.* She says that she knows more African-Americans her age in Charlotte than she would have attending an all-white school. *Ibid.*

Similarly, graduates of color in this study cited numerous benefits to an integrated educational experience. *Id.* at 16. The graduates of color attributed their ability to function in predominantly white environments to the fact that they had learned how to cope with racial prejudice at an early age. *Ibid.* Moreover, many graduates of color said they were "more at ease in a white-dominated society because they had learned that not all whites were racist." Most notably, however, due to their daily interactions with white students, graduates of color learned that they could compete with whites academically. *Id.* at 17.

The results of this study are echoed by the experience of one of our members, a graduate of Respondent Jefferson County Public Schools and a parent of a current Jefferson County high school student:

> My classes were pretty well integrated in elementary and middle school; there were usually eight black children and one or two Asian children in each of my classes. High school was different. At times, I was one of the only two black students in the class. It never really bothered me that I was

the only black person in a sea of white faces because I had always had close white friends.

I was in high school when I first encountered racial issues. For instance, I signed a petition to protest the lack of attention given to black history; and white parents consistently challenged grades given by my social studies teacher, a black male.

Throughout high school, there were challenges surrounding racial issues between black and white students. Despite these challenges and the resulting racial tensions, I appreciated attending integrated schools. I made some great friends from diverse backgrounds and had some amazing experiences. Furthermore, attending schools with diverse students helped shape me into the person I am today. It gave me the opportunity to learn from people who experience the world in a different manner as well as to teach people about myself and the experiences of black people.

Moreover, as a parent, I encouraged my daughter to befriend children who did not look like her. Happily, this is one lesson that she listened to because my daughter has always been part of a multiracial group of close-knit friends who attended the same school.

Although addressing issues of diversity can be challenging, exposing students to diverse educational environments fosters an understanding of differences and teaches students to value diverse viewpoints – essential skills needed in our global economy.

IV. Diversity in Public Schools Is A Necessity For Successful Academic And Professional Development In *All* Students

Diversity is a fundamental component to fulfilling the promise of *Brown*. All educational entrance programs must be able to include race as a factor to remedy *de facto* segregation in today's educational systems. In 2003, this Court in *Grutter* stated that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Grutter*, 539 U.S. at 330. Accordingly, the Court explicitly recognized the necessity for individuals to learn about racial and cultural differences in order to become more effective leaders and contributors to American society. Therefore, it is clear that children should be taught in diverse educational settings so they begin to comprehend and accept differences in other individuals, and themselves, at an early stage in their development. *See generally,* Beverly Tatum, *Why are All the Black Children Sitting Together in the Cafeteria?* (1997).

Diversity in classrooms enhances the quality of education for students of color and white students alike. Studies have concluded that diversity in the educational system is a necessity for successful academic and personal development in all students. *See generally* Kathryn A. McDermott, *Diversity or Desegregation? Implications of Arguments for Diversity in K-12 and Higher Education*, 15 J. EDUC. POL'Y 452 (July 2001). Indeed, these studies have determined that students learning in diverse environments have enhanced learning, higher educational and occupational aspirations, and greater social interaction with members of different racial and ethnic backgrounds. *See* Patricia Gurin *et al., The Benefits of Diversity in Education for Democ-*

ratic Citizenship, 60 J. SOCIAL ISSUES 17, 19 (2004); Michael Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest? Evidence from Louisville* 2, 7 (2001), available at http://www.civilrightsproject.harvard.edu. The fact that students have diverse perspectives and experiences presents opportunities to engage in discussions that develop critical thinking skills. Kurleander & Yun, *supra*, at 7. This type of engagement is not accomplished merely by having contact with an individual of another race, but is best served by having genuine and meaningful interaction. Patricia Gurin, *Benefits of Diversity, supra*, at 18. These interactions additionally serve to assist students in understanding divergent perspectives and being able to have honest discourse about those differences. *Id.* at 24. Further, diverse learning environments assist in demonstrating shared values and commonalities and dismantling false and preconceived notions. *Ibid.* Ultimately, educating students in diverse environments teaches them to be receptive to differences and prepares students to become future leaders who are able to be more effective in a global workforce (*i.e.*, to be multiculturally competent). *Id.* at 32.

As with other professional careers, it is necessary that we have racial diversity at elementary and secondary school levels in order to encourage African-American students to pursue their education and, ultimately, to seek careers in the legal profession. Attaining a *juris doctorate* enables students to be productive leaders in a variety of different fields.

Furthermore, increasing the supply of African-Americans in the pipeline to the profession supports long-term diversity in law firms, corporations, government, the courts, and other professional arenas. This goal, however, cannot be accomplished without encouraging and increas-

ing the pipeline of African-American students in elementary school and secondary education. In one of his numerous studies on the issue of diversity in the classroom, Gary Orfield found that almost all of the African-American and Latino students who attended elite law schools came from integrated educational backgrounds. Orfield, *Schools More Separate, supra,* at 9. In 2004, out of the approximately 40,000 *juris doctorates* awarded in the United States, only 8,367 of these degrees were awarded to students of color. *See National Center for Education Statistics website at http://www.nces.ed.gov.* In 2005, African-Americans represented only 6.5% of all students attending law school. *See generally Law School Admission Council, http://www.lsacnet.org.* Unfortunately, there is no evidence that this disparity is decreasing. Accordingly, to address the dearth of African-American attorneys, it is imperative that the issues of lack of diversity and representation of African-Americans at the post-secondary education level be addressed at its earliest stage. In his expert report for *Grutter*, Kent Syverud, former dean of Vanderbilt University School of Law, explained the benefits of having racially heterogeneous students in law school classes. He stated:

> It has been my experience that skills instruction is enhanced dramatically for all students by the interaction in class of future lawyers of all races, and by the different and at times unpredictable viewpoints different people bring to the discussion. It is also my experience that civil democratic discourse among lawyers of all races, in public and in court, is something that, once experienced in the law school classroom, is valued outside it and across my students' careers.

Expert Report of Kent D. Syverud in *Grutter* v. *Bollinger*, No. 97-75928 (E.D. Mich.), available at www.upcomm.umich.edu/admissions/research/experts/syverud.html.

The lack of diversity in lower levels of the educational system not only affects the attendance and matriculation of African-Americans in law schools, but also affects the hiring and retention of African-Americans in law firms. Recently, the American Bar Association studied the issues facing women of color in the practice of law. *See generally* ABA Commission on Women in the Profession, *Visible Invisibility: Women of Color in Law Firms* (Aug. 2006). This study, consistent with our members experiences, corroborates our view that the experience of women of color is a difference in kind—not just degree from our peers. The study found that ["n]early half of women of color but only 3% of white men experienced demeaning comments or harassment." *Id.* at 12. The study also documented that "[n]early two thirds of the women of color but only 4 % of white men were excluded from informal and formal networking opportunities, marginalized and peripheral to professional networks within the firm." *Id.* at 13. "Forty-four percent of women of color but only 2% of white men reported having been denied desirable assignments. *Ibid.* Several of the women participating in the ABA study provided anecdotes describing their experiences in law firms. These participants explained how women of color are often excluded from professional development and client interaction at their firms based upon preconceived notions of their legal ability. *Id.* at 13. They also discussed how they were excluded from networking opportunities because other attorneys were unfamiliar with people of color. *Ibid.* One woman recalled:

> A white male in my firm worked on a transaction from the beginning to just before the closing. He

> had to leave to get married and would be gone for two to three weeks on his honeymoon. So, I stepped in and took over the closing. I worked with the client for one week. At the end of the deal the client said "Wow, you did a great job! We can forget about what's-his-name; I want you to be on our deals going forward." They had a deal in the pipeline and he mentioned it to the partner who was working on the deal. The client said, "I want [her] to work on this deal." Then the partner said, "Okay, we'll talk about that." Right away I could hear some reservation. On our way back to the airport the partner said, "Well I understand that [the client] said he wanted you to work on his next transaction. We'll definitely find a way to get you involved, to a certain extent." I never did anything on the next deal, even though the client wanted me. *Id.* at 57.

Another participant stated:

> I have not had a lot of opportunities for professional development. Junior minority associates, especially females, are required to do a lot of document review whereas our white male counterparts do more challenging assignments and a lot more writing. When I am given writing or research assignments, the assignments are usually short-term [sic] emergencies which do not create learning or development. That is why I am leaving my firm for a federal clerkship and I highly doubt I will ever return.

Id. at 62. Lastly, one woman of color described how preconceived notions of her legal ability affected her work assignments:

> I was a lateral hire and I'd significant experience as a trial litigator. They sent the partner, who was a judge, to interview the judges before whom I had tried cases, and they'd never done that with any other person that they'd hired. Black, white, men, women. The judges before whom I had tried cases came back and told me. They still put me through the ropes. It took another year before they gave me a trial, and I had more trial experience than anybody in the firm [of more than 200 attorneys]!

Id. at 64.

These experiences exemplify the challenges faced by women of color--not only at law firms, but also in the general practice of law. Moreover, the ABA study demonstrated that the culture of discrimination at law firms marginalized and excluded these women of color from receiving opportunities for advancement. This disparate treatment of women of color evidences the need for diversity in the legal practice, and in the educational system. It is imperative that the pipeline to the legal profession is maintained in order to increase the representation of people of color in the practice of law, and also to create an environment where lawyers of color do not feel isolated or disenfranchised from achieving success in their careers. Additionally, it is paramount that all students are introduced to and comfortable with the concept of diversity and differences, so that they can function in a global community. To preserve the principles of *Brown* that were upheld in *Grutter*, this Court must recognize that race is a legitimate consideration in overcoming the obstacles of *de facto* segregation and that the Equal Protection clause does not preclude the consideration of race in public school assignment policies for the purpose of integrating the schools.

CONCLUSION

For the foregoing reasons, the judgments of the Courts of Appeals for the Sixth Circuit and Ninth Circuit should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

CONSOLIDATED BRIEF OF JOSEPH E. BRANN, DANIEL J. COULOMBE, EDWARD F. DAVIS, RONALD DAVIS, AND DARREL STEPHENS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici are current and former law enforcement officers whose professional duties include working with federal, state, and local government officials, including school officials, to deter crime.[1] In *amici's* collective professional experience, based upon decades of leading police departments across the country, high school dropouts are significantly more likely to commit crime than are high school graduates. *Amici* are deeply interested in this case because policies that increase educational opportunity, such as the solutions devised by the Seattle, Washington and Louisville, Kentucky public school systems, promote high school graduation and thus help reduce crime. *Amici* are:

Joseph E. Brann, who served as the Director of the Office of Community Oriented Policing Services, United States Department of Justice, and as the Chief of the Hayward, California Police Department.

Daniel J. Coulombe, who serves as Chief of the Hermiston, Oregon Police Department.

Edward F. Davis, III, who serves as the Superintendent of the Lowell, Massachusetts Police Department.

Ronald Davis, who serves as Chief of the East Palo Alto, California Police Department.

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[1] Pursuant to Sup. Ct. Rule 37.3(a) (2006), the parties have consented to the filing of this brief. A blanket consent to *amici* participation in this case was given by all parties and is on file with the Clerk of the Court. Pursuant to Sup. Ct. Rule 37.6 (2006), counsel for *amici* state that this brief was not authored, in whole or in part, by any counsel for a party, and that no person, other than amici, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Darrel Stephens, who serves as the Chief of the Charlotte-Mecklenburg, North Carolina Police Department.

SUMMARY OF ARGUMENT

The job of law enforcement is to create and maintain safe communities. For most law enforcement officials, the job requires that they understand why offenders commit crimes and think of ways that crime might be deterred. *Amici* have found that many children they arrest have dropped out of school. Based on their experience, *amici* believe that policies that increase the number of children graduating high school will contribute significantly to the reduction in crime.

School districts, like the ones in Seattle, Washington and Louisville, Kentucky, have pursued policies to create more opportunities for students. School officials have determined, in their expert judgment, that a more integrated public school system is a key aspect of these policies. That judgment has a solid foundation.

Minority students who attend more racially integrated schools have much higher graduation rates than those who attend segregated schools. For example, in St. Louis, Missouri, which has encouraged integration of schools, the difference in the percentage of African-American students who graduate from integrated St. Louis County suburban schools is dramatically higher than the percentage graduating from mostly African-American schools in the City of St. Louis Public School District.

If integration can reduce dropout rates, it will also reduce crime. Given the depth of the crime problem in our communities -- the lives shattered, the talents wasted -- *amici* urge that the Court not tie the hands and override the educational judgments of school officials pursuing these goals.

ARGUMENT

The courts below, applying strict scrutiny,[2] upheld the plans implemented in Seattle and Louisville because the courts recognized the judgment of the educators that racial diversity produces a number of compelling educational and social benefits in secondary education.[3] There is another compelling benefit that flows from diversity. Plans such as those implemented in Seattle and Louisville can decrease high school dropout rates. This, in turn, will have the profound benefit of decreasing crime. This compelling interest in fostering efforts to reduce crime through plans such as those used by school districts in Seattle and Louisville provides yet another reason why this Court should not impose a rigid constitutional barrier to those programs.

I. REDUCING THE HIGH SCHOOL DROPOUT RATE WILL REDUCE THE OVERALL CRIME RATE

Amici's message to children is simple: stay in school, stay out of crime. *Amici* firmly support school programs, such as the ones employed in Seattle and Louisville, because

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[2] *Amici* note the persuasiveness of Judge Kozinski's concurring opinion in the Ninth Circuit proceedings. *See Parents Involved Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1193-96 (9th Cir. 2005) (en banc), *cert. granted*, 126 S.Ct. 2351 (2006) (Kozinski, J., concurring) (arguing a "robust and realistic" rational basis standard of review should apply). Even assuming strict scrutiny applies, *amici* submit that the deterrent effect desegregation has on reducing crime is itself a sufficient compelling interest to justify upholding plans such as those used in Seattle and Louisville.

[3] *Parents Involved Cmty. Schs.*, 426 F.3d at 1173; *McFarland v. Jefferson Cty. Pub. Schs.*, 330 F.Supp.2d 834, 853-54 (W.D. Ky. 2004), *aff'd* 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith v. Jefferson Cty. Pub. Schs.*, 126 S.Ct. 2351 (2006).

amici believe that these programs will help prevent crime by reducing the number of children who engage in truancy or dropout of school.

When children are not in school, they are more likely to be drawn into crime. Truancy is the often first sign of trouble for children.[4] "Truancy has been clearly identified as one of the early warning signs that youth are headed for potential delinquent activity, social isolation, and/or educational failure."[5] Truants are more likely to be involved with the juvenile justice system.[6] And, truants are "far more likely not to graduate from high school."[7]

Dropping out of high school in turn increases the likelihood of an individual getting involved with crime. High school dropouts account for the majority of the nation's

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[4] *See* U.S. Dep't of Edu. & U.S. Dep't of Justice, Manual to Combat Truancy 1 (1996), *available at* http://www.doe.k12.ga.us/_documents/doe/external/policy/policy_attendance_manual_truancy.pdf (last visited Oct. 10, 2006).

[5] Baker, et. al, *Truancy Reduction: Keeping Students in School*, Juv. Just. Bull., at 2 (U.S. Dep't of Justice, Office of Juv. Justice and Delinquency Sept. 2001), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf (last visited Oct. 10, 2006).

[6] *Id.* at 2; *see also* Janna Heilbrunn & Ken Seeley, Nat'l Ctr. for Sch. Engagement Colo. Foundation for Families and Children, Saving Money Saving Youth: The Financial Impact of Keeping Kids in School 3 (2003), *available at* http://www.schoolengagement.org/TruancypreventionRegistry/Admin/Resources/Resources/23.pdf.

[7] Lorenzo A. Trujillo, *School Truancy: A Case Study of a Successful Truancy Reduction Model in the Public Schools*, 10 U.C. Davis J. of Juv. Law & Pol'y 69, 79 (2006) (citation omitted).

prison and death row inmates.[8] Estimates from the United States Department of Justice indicate that 30% of federal prison inmates, 40% of state prison inmates and 50% of death row inmates are high school dropouts.[9] Even more troubling, 33% of male high school dropouts will be incarcerated at some point in their lives before they reach 25 years of age.[10] One study indicates that in 1997, people *without* a high school diploma accounted for 54% of all state prison inmates, while people *with* a high school diploma made up only 21% of that population.[11] Individuals with a college or graduate degree made up an even lower percentage, 2.4%, of state prison inmates.[12] High school dropouts also account for more arrests than people with a high school diploma, General Educational Certificate ("GED") or college education.[13]

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[8] U.S. Dep't of Educ. Nat'l Ctr. For Educ. Statistics, NCES No. 2006-062, Dropout Rates in the United States: 2002 and 2003 1 (2006).

[9] *Id.* at 1 n.1.

[10] Michael Wald and Tia Martinez, *Connected by 25: Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds* 6 (William and Flora Hewlett Found. Working Paper, 2003), *available at* http://www.hewlett.org/NR/rdonlyres/60C17B69-8A76-4F99-BB3B-84251E4E5A19/0/FinalVersionofDisconnectedYouthPaper.pdf (last visited Oct. 10, 2006).

[11] U.S. Dep't of Justice, NCJ-19567, Education and Correction Populations. Bureau of Justice Statistics Special Report 2 (2003), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/22/1d/37.pdf (last visited Oct. 10, 2006).

[12] *Id.*

[13] Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports,* 2004 The Am. Econ. Rev. 155, 177 (noting that high school graduation reduces the arrest rate for all men).

The connection between dropout rates and crime is undeniable. This connection is particularly strong for minorities as "[m]inority state prison inmates [are] generally less educated than their white peers.[14]" The same 1997 study revealed that 44% of African-American state prison inmates and 53% of Latino inmates had not graduated from high school or received a GED while only twenty seven percent of white state inmates had not graduated from high school or received a GED.[15]

The higher crime rate for dropouts reflects (and contributes to) their decreased economic opportunities and higher rate of unemployment. In 2003, the median income for high school graduates, including individuals with a GED, was $20,431.[16] By contrast, during this same time period, the median income for high school dropouts was $12,184,[17] almost 40% less than the amount earned by high school graduates. High school dropouts also face increased risk of unemployment. A study that followed a large group of high school students from 1979 through 1992 found that 80% of all the students who failed to receive a high school diploma "were unemployed for at least a full year [and] half were disconnected from the labor force for 3 or more years between their 18th and 25th birthdays."[18]

Low wages, poverty, and unemployment boost the crime rate. The result is that children who drop out of high school often impose significant social costs on society,

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[14] U.S. Dep't of Justice, *supra* note 11, at 7.

[15] *Id.*

[16] U.S. Dep't of Educ., *supra* note 8, at 1.

[17] *Id.*

[18] Wald & Martinez, *supra* note 10, at 6.

particularly through criminal activity and the use of social services.[19]

The flip side of the correlation between dropout rates and crime is that increasing education can reduce criminal activity. Studies show that increasing the average education level by *only* one year has the net effect of reducing overall arrests by 11%.[20] And it is possible that increasing graduation rates by 10% would reduce arrest rates for violent crimes, such as murder and assault, by as much as 20%.[21]

Increased schooling has a larger impact in reducing the likelihood of incarceration for African-Americans than it does for whites. One additional year of schooling results in a 0.10 percentage point reduction in the probability of incarceration for whites, but a 0.37 percentage point reduction in the probability of incarceration for African-Americans.[22] Since African-Americans are incarcerated at a higher rate than whites, it is possible that "23 percent of the difference in incarceration rate could be eliminated by simply raising the average education levels of blacks to the same level as that of whites."[23]

Statistics, however, do not tell the full story. *Amici* experience crime not as statistics but as serious and costly events with life-shattering impact upon members of their communities. What the numbers do show, however, is that improving education and reducing dropout rates will eliminate some crime. A mere one percent increase in high

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[19] *Id.* at 4.

[20] Lochner & Moretti, *supra* note 13, at 175.

[21] *Id.* at 176.

[22] *Id.* at 157.

[23] *Id.* at 162.

school graduation rates in 1990 might have saved the lives of 400 people who were murdered and avoided an additional 8,000 assaults.[24] Moreover, such an increase might have resulted in an estimated 100,000 fewer crimes, including violent crimes such as murder and assault, and property crimes such as burglary, larceny and car theft during this period.[25] Whatever public schools can do, within the law, to improve graduation rates will not only improve the lives of children, it will also make our communities safer.

II. PROGRAMS THAT FOSTER DIVERSITY IN SCHOOLS REDUCE DROPOUT RATES AND THEREBY REDUCE CRIME

America's public schools are rapidly becoming more segregated.[26] The average child in the public school system today is attending a school in which the majority of the students are all of the same race. For example, during the 2003-2004 school year, white students accounted for 58% of all students enrolled in public school, yet the average white student attended a school in which 78% of the other students were also white.[27] Similarly, African-American students made up 17% of all public school students, but the average

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[24] Lochner & Moretti, *supra* note 13, at 182.

[25] *Id.*

[26] Jane W. Schofield & Leslie R.M. Hausmann, *The Conundrum of School Desegregation: Positive Student Outcomes and Wanning Support*, 66 U. Pitt. L. Rev. 83, 90 (2004) (citation omitted) (noting that "schools in the U.S. have undoubtedly become more segregated in the past fifteen years").

[27] Gary Orfield & Chungmei Lee, The Civil Rights Project at Harvard Univ., *Racial Transformation and the Changing Nature of Segregation* 8 (2006) [hereinafter Transformation], available at http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf (last visited Oct. 10, 2006).

African-American student attended a school in which 53% of the other students were also African-American.[28] The story for Latino children is no different. Latinos students made up 19% of all public school students, however the average Latino student attended a school in which 55% of the other students were also Latino.[29]

A. African-American And Latino Students In Segregated Schools Have A Higher Dropout Rate

The "nation's shockingly high dropout problem is squarely concentrated in heavily minority high schools . . . ."[30] In fact, "whether a student attends a school district with a high concentration of minority students . . . is . . . a strong predictor of failing to graduate."[31] Nationwide, 68% of all students graduate.[32] However, in school districts in which the majority of the students are racial minorities, the

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[28] *Id.* at 9.

[29] *Id.*

[30] Gary Orfield & Chungmei Lee, The Civil Rights Project at Harvard Univ., *Why Segregation Matters: Poverty and Educational Inequality* 5 (2005), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf (last visited Oct. 10, 2006).

[31] Gary Orfield et al., The Civil Rights Project at Harvard Univ., The Urban Inst. Advocates for Children of N.Y. & The Civil Society Inst., *Losing Our Future: How Minority Youth are Being Left Behind By the Graduation Rate Crisis* 6 (2004), *available at* http://www.civilrightsproject.harvard.edu/research/dropouts/LosingOurFuture.pdf (last visited Oct. 10, 2006).

[32] *Id.* at 84 Appendix 4, Table A.

graduation rate is much lower as only a little over half, or 56.4% of the students graduate.[33]

The situation is even worse in major urban cities with predominately minority school districts. In Houston, Texas and New York, New York, two cities with predominately Latino school districts, the graduation rates are an abysmal 40% and 38% respectively.[34] This means that less than half of the students in the segregated school districts of these cities are graduating. A similar situation exists in the predominately African-American school districts in Oakland, California and Cleveland, Ohio, which have paltry 30.4% and 30% graduation rates respectively.[35] This means that 2 out of 3 students in these segregated school districts do not graduate from high school.

The reasons for higher dropout rates in heavily minority schools are wide-ranging and complex.[36] *Amici* are law enforcement officers, not experts in the social forces that produced predominately minority school districts. But as law enforcement officers, *amici* understand that more high school dropouts usually means higher crime rates.

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[33] *Id.* at 5.

[34] *Id.*

[35] *Id.*

[36] *See Transformation*, *supra* note 27, at 29 (noting that various inequalities exist in predominately minority schools such as "less qualified, less experienced teachers, lower levels of peer group competition, more limited curricula taught at less challenging levels...any many other factors that seriously affect academic achievement.")

B. Desegregating Schools Lowers The Dropout Rate For Minority Students

Desegregation in education has had a profound impact on achievement by minority students. One area in which desegregated education has noticeably affected student achievement is the high school dropout rate. For minority students, particularly African-American students, attending a desegregated school strongly correlates with lower dropout rates. In fact, the dropout rate for African-American students in school districts that desegregated between 1970 and 1980 declined by 3.6%.[37] The positive correlation between desegregated schools and lower dropout rates for African-American students can also be seen in school districts that have been released from court-ordered desegregation plans. Many school districts that have been released from court-ordered desegregation plans have seen a significant rise in African-American dropout rates, particularly in regions outside of the South.[38]

In many instances, the number of minority students who graduate from high school in integrated schools far outpaces the number of minority students in segregated schools. The school system in St. Louis, Missouri is a perfect example of this. A program called the St. Louis

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[37] Jonathan Guryan, *Desegregation and Black Dropout Rates* 16 (Nat'l Bureau of Econ. Research, Working Paper No. 8345, 2001), *available at* https://www.nber.org/papers/w8345 (last visited Oct. 10, 2006).

[38] Byron F. Lutz, *Post Brown v. Board of Education: The Effects of Court Ordered Desegregation* 3 (December 19, 2005) (unpublished Ph.D. dissertation) (on file with Finance and Economics Discussion Series, Division of Research & Statistics, Federal Reserve Board, Washington D.C.), *available at* http://www.federalreserve.gov/pubs/feds/2005/200564/200564pap.pdf (last visited Oct. 10, 2006).

Student Transfer Program ("Transfer Program") allows African-American students residing in the city of St. Louis to attend one of several school districts in the suburban St. Louis County. The purpose of the program is to integrate the predominately white St. Louis County schools while at the same time desegregating the predominately African-American city of St. Louis public schools. The results have been telling.

In part due to the Transfer Program, Brentwood School District, located in St. Louis County, has a student population that is 28% African-American and 68% white.[39] In 2005, 87.5% of African-American students in the Brentwood school district graduated from high school, a number well above the national graduation rate average of 68%.[40] Similarly, Valley Park School District, also located in St. Louis County, has a student population that is 28% African-American and 65% white.[41] In 2005, Valley Park

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[39] St. Louis Black Leadership Roundtable, 2005 Regional Report Card: Eliminating the African American Academic Achievement Gap 1, *available at* http://www.blackleadershiproundtable.org/Edu/2005ReportCardRegionalIndex.pdf (last visited Oct. 10, 2006).

[40] St. Louis Black Leadership Roundtable, 2005 Regional Report Card: Eliminating the African American Academic Achievement Gap 1, *available at* http://blackleadershiproundtable.org/Edu/ReportCards/Brentwood.pdf (last visited Oct. 10, 2006).

[41] St. Louis Black Leadership Roundtable, 2005 Regional Report Card: Eliminating the African American Academic Achievement Gap 1, *available at* http://blackleadershiproundtable.org/Edu/ReportCards/ValleyPark.pdf (last visited Oct. 10, 2006).

School District had an outstanding graduation rate of 100% for African-American students.[42]

The graduation rates for the African-American students attending the more integrated school districts in St. Louis County stand in sharp contrast to the graduation rates for African-American students attending the more segregated schools in the City of St. Louis Public School District. The City of St. Louis Public School District has a student population that is 81% African-American and 15% white.[43] As is the case with many predominately minority school districts, in 2005 the number of African-American students that graduated from high school was below the national average as only 60% of African-American students graduated.[44] The St. Louis experience suggests that minority children are likely to have higher graduation rates when they attend more integrated schools.

In *Grutter v. Bollinger*, this Court found that the University of Michigan law school "has a compelling interest in attaining a diverse student body." 539 U.S. 306, 328 (2003). Among other reasons, the Court noted that a diverse student body "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* at 330. In reaching that decision, the Court deferred to the "Law School's educational judgment that such diversity is essential to its educational mission . . . ." *Id.* at 328. Such deference is, if

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[42] *Id.*

[43] St. Louis Black Leadership Roundtable, 2005 Regional Report Card: Eliminating the African American Academic Achievement Gap 1, *available at* http://blackleadershiproundtable.org/Edu/ReportCards/SLPS.pdf (last visited Oct. 10, 2006).

[44] *Id.*

anything, more appropriate here -- the interest is more compelling -- because the educators in the school districts are not merely seeking ways to prepare students for a diverse workforce. They are struggling to keep them in school and out of jail.

Amici understand that the reasons for lower dropout rates in integrated schools are not always certain. But educators are entitled to exercise their expert judgment in assessing and responding to the possibility that integrated schools do indeed lower the dropout rate for minority students, especially African-American students. It is critical that these educators have the flexibility to try reasonable approaches to reduce the dropout rate by creating integrated schools. Given this, *amici* believe that it is appropriate to allow local school districts to formulate policies that foster diversity as a means of lowering the high school dropout rate.

CONCLUSION

Children are children regardless of their race. The disproportionate number of crimes committed by minorities is a problem that law enforcement officials cannot ignore. *Amici* believe that modest integration programs, such as those employed by the Seattle and Louisville school districts, have the potential to reduce crime by lowering the dropout rates of minority children. As law enforcement officers who have seen firsthand the devastating effects of crime on society as a whole, *amici* urge this Court not to block educators from exploring this solution. The Court should permit local school districts to implement policies that foster integration in schools.

Respectfully submitted,

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IN THE

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PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,

Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

BRIEF *AMICI CURIAE* OF BRENNAN CENTER FOR JUSTICE, CENTER FOR CONSTITUTIONAL RIGHTS, DĒMOS, NATIONAL VOTING RIGHTS INSTITUTE, AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Brennan Center for Justice at NYU School of Law. The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Brennan Center's Democracy Program seeks to bring the ideal of representative self-government closer to reality. It strives to ensure that public policy and institutions reflect the diverse voices and interests that make for a rich and energetic democracy.

Center for Constitutional Rights. The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. CCR uses litigation proactively to advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, and to strengthen the broader movement for constitutional and human rights.

Dēmos. Dēmos is a non-profit, non-partisan organization whose purpose is to help build a society in which America can achieve its highest ideals. Dēmos believes that this requires a robust and inclusive democracy, with high levels of electoral participation and civic engagement, and an economy where prosperity and opportunity are broadly shared. Mutual understanding and respect of America's diverse citizenry lie at the core of that vision. Voluntary school integration programs, such as those at issue here, can

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[1] The parties have filed letters with the Court consenting to all amicus briefs. No counsel for a party has authored this brief in whole or in part and no person or entity, other than amici, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

measurably advance Dēmos' ambitious mission. By promoting diversity and inclusion, voluntary school integration programs help engender the understanding of and respect for differing viewpoints, backgrounds and experiences—essential predicates for a vibrant democracy and an equitable society.

National Voting Rights Institute. The National Voting Rights Institute (NVRI) is a non-partisan, non-profit legal organization committed to making real the promise of American democracy, a democracy where meaningful political participation and power is accessible to all regardless of economic or social status. Through litigation and public education, NVRI aims to vindicate the constitutional right of all citizens, regardless of their economic status, to participate in the electoral process on an equal and meaningful basis. Because of the importance of public schools in shaping our nation's commitment to democratic values, NVRI views voluntary school integration programs such as those challenged here as vital to the goal of securing a robust and inclusive democracy.

Puerto Rican Legal Defense and Education Fund. The Puerto Rican Legal Defense and Education Fund (PRLDEF) is a national non-profit civil rights organization founded in 1972, dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and education. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

SUMMARY OF ARGUMENT

Public schools instill in our children civic virtue. They have since the founding of this Country. And, since *Brown v. Board of Education*, this Court has found that integrated and diverse public schools perform one additional role: they impart the values necessary to a multi-ethnic democracy that promises equality to all.

Diverse public schools promote these democratic values by inculcating racial understanding, racial tolerance, and the certain knowledge that there is more to a person or an issue than race. They do so by providing the Nation's youth with daily opportunities for face-to-face interactions with those of other races and ethnicities. They reach young children at an age when prejudices and misconceptions about race have not yet formed. And, the mandatory nature of public school attendance ensures that they have an impact on the majority of American citizens.

That they would perform this function has been recognized and lauded. For good reason. It is necessary that our children be prepared to exercise the franchise and engage in civic duties free from deleterious racial prejudice. Moreover, despite the progress made in the wake of *Brown*, we are still in the formative stages of building a society in which the color of one's skin is not a measure of ability or character. Given this, public schools should be *encouraged* to adopt, and most certainly should not be prohibited from adopting, policies that allow our children to socialize with children of other races, study, play, and cooperate with them. All this is of immeasurable benefit to our democracy, which should be animated by our common values rather than hamstrung by imagined racial differences.

Because of the obvious and universally recognized benefits of diverse public schools, and because their enrollment plans do not seek to segregate or impose penalties

based on race, the efforts of Seattle and Louisville to achieve diversity in their schools should *not* be subject to the strictest constitutional scrutiny. The Court should afford Seattle and Louisville the same deference it has historically afforded local school districts.

But even under a strict scrutiny analysis, the challenged enrollment plans easily pass constitutional muster. It is difficult to imagine a government interest more immediate or compelling than the propagation and maintenance of our democratic institutions. The Seattle and Louisville districts have adopted narrowly tailored plans, carefully designed to advance an important government interest, and therefore, under even a strict standard of review, the enrollment plans do not offend the Constitution.

ARGUMENT

I. MAINTAINING DIVERSITY IN PUBLIC PRIMARY AND SECONDARY SCHOOLS IS ONE OF THE MOST EFFECTIVE WAYS TO PROPAGATE AND MAINTAIN OUR DEMOCRATIC VALUES AND THUS OBTAIN THE PROMISE OF A PROPERLY FUNCTIONING DEMOCRACY.

A. Racial Disparities and Perceived Differences Continue to Hamper the Realization of Our Democratic Ideals.

Brown v. Board of Education, 347 U.S. 483 (1954), and the cases that followed it, promised a democracy where all have an equal voice and an equal chance regardless of race, bringing to life for the first time the post–Civil War Amendments' guarantee of full citizenship for all. U.S. Const. amends. XIII, XIV and XV. These cases promised a democracy whose values can be expressed in terms of racial equality, racial tolerance and understanding. However, to realize those values and to maintain a properly functioning

democracy where race does not inhibit opportunity, it is not enough simply to legislate equality and invoke ideals of racial harmony. Such things do not occur by fiat; they require learned behaviors and dedicated practice.

Indeed, although it has been some fifty-two years since *Brown*, racial segregation and inequality are still with us. Racial disparities persist as a result of an admixture of *de facto* segregation, discrimination, and residential and socioeconomic patterns. *See Gratz v. Bollinger*, 539 U.S. 244, 299-300 (2003) (Ginsburg, J., dissenting) (surveying data on residential segregation, income disparity, access to education and healthcare). We continue to confront an America that is "balkanize[d] ... into competing racial factions." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Race remains a critical variable in the opportunities afforded to our citizens. *See Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."). Race remains a central feature of our democracy, as reflected in the continuing role it plays in our elections and politics. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *see also* Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1400 (2001) (discussing voting patterns and noting race-based preferences in candidate selection).

Of course, much progress towards racial equality has been made since *Brown v. Board of Education*, in part because of this Court's Equal Protection jurisprudence. As history has demonstrated, an integrated society cannot be created overnight. In 1954, there were few black children like Linda Brown who lived in or near a white neighborhood.

Yet, still today, children grow up primarily among those of their own race. *See, e.g.*, U.S. Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980-2000* (2002) (documenting residential segregation), *available at* http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf; *see also Gratz*, 539 U.S. at 299 n.4. It is no exaggeration to say that, for many children, their most extended and meaningful interactions with those of other races take place at their public schools. Diversity programs, such as those at issue in this case, promise to help reduce racial disparity, and, in so doing, to strengthen the foundation of our democracy.

B. Diverse Public Schools Are Essential to the Realization of Our Democratic Ideals.

It is already settled that diverse schools are important to racial equality and to a democracy that functions based on common values rather than racial prejudice, animus, or misconception. "Attending an ethnically diverse school" helps students "prepar[e] ... 'for citizenship in our pluralistic society,'" by teaching them "'to live in harmony and mutual respect' with children" of different backgrounds. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473 (1982) (quoting *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., dissenting), and *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 485 n.5 (1979) (Powell, J., dissenting)).

Diversity in schools knits together our heterogeneous society:

> We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue; prejudice blinds us to overlapping interests that in fact exist.

* * *

> Increased social intercourse is likely not only to diminish the hostility that often accompanies unfamiliarity, but also to rein somewhat our tendency to stereotype .... The more we get to know people who are different in some ways, the more we will begin to appreciate the ways in which they are not, which is the beginning of political cooperation.

John Hart Ely, *Democracy and Distrust* 153, 161 (1980) (2002 ed.).

That schools should perform the function of fostering a *demos* capable of such cooperation is uncontroversial. Diverse schools allow "cross-racial understanding, [which] helps to break down racial stereotypes, and enables students to better understand persons of different races." *Grutter*, 539 U.S. at 330 (internal quotation marks and brackets omitted).

Moreover, it has long been acknowledged that schools—and specifically public schools—fulfill an important social function beyond teaching the proverbial three Rs. This Court has "recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government' and as the primary vehicle for transmitting 'the values on which our society rests.'" *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring), and *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)). This Court underscored the point in *Grutter*: "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." 539 U.S. at 331 (quoting *Plyler*, 457 U.S. at 221); *see also Kromnick v. Sch. Dist. of Phila.*, 739 F.2d 894, 905 (3d Cir. 1984) ("Schools are great instruments in teaching

social policy, for students learn not only from books, but from the images and experiences that surround them. One such lesson is of a spirit of tolerance and mutual benefit ...."); *cf. Skoros v. City of New York*, 437 F.3d 1, 18 (2d Cir. 2006) (explaining that schools "teach the lesson of pluralism by showing children the rich cultural diversity of the city in which they live and by encouraging them to show tolerance and respect for [religious] traditions other than their own").

The notion that schools are necessary to the propagation and maintenance of our democratic values did not originate with this Court. This Court has merely echoed the sentiments of our Nation's Founders. In praising Kentucky's public education system, Madison noted:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 *The Writings of James Madison* 103 (Gaillard Hunt ed., 1910).

And, somewhat more prosaically, Jefferson offered this opinion:

> [Education] is the most certain, and the most legitimate engine of government. Educate and inform the whole mass of the people. Enable them to see that it is their interest to preserve peace and order, and they will preserve them. And it requires no very high degree of education to convince them of this. They are the only sure reliance for the preservation of our liberty.

6 The Writings of Thomas Jefferson 391-92 (Memorial ed. 1903); *see also* Michael J. Sandel, *Democracy's Discontent: America in Search of a Political Philosophy* 321 (1996) (noting that schools, among other civic institutions, "form the 'character of mind' and 'habits of the heart' a democratic republic requires. Whatever their more particular purposes, those agencies of civic education inculcate the habit of attending to public things"); Press Release, *President Bush Addresses NAACP Annual Convention* (July 20, 2006) ("The America we seek should be bigger than politics ... we can work together to reduce the obstacles for opportunity for all our citizens. And that starts, by the way[,] with education."), *available at* http://www.whitehouse.gov/news/releases/2006/07/20060720.html.

However our shared values may have shifted since the times of the Founders, the emphasis on the importance of education as a means of preserving our democratic society has remained constant. "'[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.'" *Plyler*, 457 U.S. at 221 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (the inculcation of civic values is "truly the 'work of the schools'" (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969))); *Wieman v. Updegraff*, 344 U.S. 183, 225 (1952) (Frankfurter, J., concurring) ("The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards."); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1175 (9th Cir. 2005) (en banc)

("[D]iversity encourages students not only to think critically but also democratically.").[2]

C. Public Primary and Secondary Schools Play Critical Roles in Instilling Our Children with Democratic Values.

Schools occupy a unique position in Americans' lives. Without discounting the roles of parents and family, this Court and the Nation's Founders recognized that schools—primary and secondary schools—are the principal institution that will instill the shared values we depend upon as a democratic society. As recognized by the Court of Appeals in *Parents Involved*, 426 F.3d at 1174-76, primary and secondary public schools have three advantages over any other institution.

1. ***Face-to-face socialization.*** Schools present opportunities for students of different races to interact with one another—studying alongside one another, joining student groups, participating in school athletics, and forging close friendships. *See Grutter*, 539 U.S. at 328-30; *see also Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (African-American students attending racially segregated law school would be disadvantaged by denying them interaction with white students, faculty, and alumni). They provide opportunities for students to learn from teachers of different races,

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[2] "[S]ome 40 states' constitutions specifically mention the importance of civic literacy among citizens, and at least 13 state constitutions have been interpreted to state that preparation for democratic citizenship is a central purpose of their educational systems." Michael A. Rebell *et al.*, *Today's Students, Tomorrow's Citizens: Preparing Students for Civic Engagement* at 2 (Campaign for Fiscal Equity 2003) (collecting sources); *see, e.g.*, *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995) ("[Public] education [required by the state constitution] should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting or serving on a jury.").

exposing them to different adult points of view, dispelling notions of racial difference, and supplying them with potential role models and advisors. *See Johnson v. Transp. Agency*, 480 U.S. 616, 647 (1987) (Stevens, J., concurring); *Kromnick*, 739 F.2d at 905 (*citing Bernal v. Fainter*, 467 U.S. 216, 220 (1984)); *cf.* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 How. L.J. 705, 755 (2004) (noting *Grutter*'s conclusion that "'diminishing the force of [racial] stereotypes' is a compelling pedagogical interest" (quoting *Grutter*, 539 U.S. at 333)). Plus, classroom diversity "increases the likelihood that students will discuss racial or ethnic issues," and "brings different viewpoints and experiences to classroom discussions ...." *Parents Involved*, 426 F.3d at 1174.

These formative interactions lay a foundation for a lifetime free of racial prejudices and stereotypes, for all children, regardless of race and background:

> Studies have shown that desegregative policies benefit children of all races. Meaningful interaction between students from racially diverse backgrounds leads to an increased sense of civic engagement and increases the likelihood that such students will grow up socializing across racial boundaries and discussing racial matters. These benefits include greater toleration of, and appreciation for, members of other racial backgrounds, a greater sense of civic and political engagement, and an increased desire to live and work in multiracial settings as adults.

Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 67 U. Pitt. L. Rev. 175, 199 (2005) (footnotes omitted).

2. ***The impressionability of youth.*** Public schools are ideal fora for imparting racial tolerance because children are much more amenable to instruction than are adults. The

minds of the young, moreover, are less likely to be tainted by invidious racial prejudices. "The reality is that attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact with individuals who are very different from oneself." *Parents Involved*, 426 F.3d at 1194 (Kozinski, J., concurring).

> [S]tereotypes about race and (visible) ethnicity set in early and are extremely difficult to correct in adolescence and adulthood. ... Stereotypes do not as easily take hold of children who interact early and often with children of other racial and ethnic groups. ... [R]acial stereotyping [is] a "habit of mind" that is difficult to break once it forms. It is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking.

Comfort ex rel. Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 356 (D. Mass. 2003), *aff'd*, 418 F.3d 1 (1st Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 798 (2005).

3. ***Nearly universal public primary and secondary education.*** Finally, public schools are unique in the breadth of their reach: Some 87% of all children attend public school for some or all of their primary or secondary education, including 83% of white children, 93% of African-American children, and 93% of Hispanic children. *See* U.S. Census Bureau, *School Enrollment—Social and Economic Characteristics of Students* tbl.5 (Oct. 2004), *available at* http://www.census.gov/population/www/socdemo/school/cps2004.html. This is, literally, a once-in-a-lifetime opportunity to teach our citizens racial tolerance by exposing them to students and teachers of different backgrounds.

And, if diversity is a compelling interest in law school admissions, *see Grutter*, 539 U.S. at 325; *see also infra* Point

II.B, it must be even more so in primary and secondary schools. Law schools, and even colleges, educate only a small portion of our society. *See* U.S. Census Bureau, *Educational Attainment in the United States* tbl.1 (2004), *available at* http://www.census.gov/population/www/socdemo/education/cps2004.html (only about 25% of U.S. adults graduate from college, and about double that number receive any post-secondary education). It cannot be that racial equality and the inculcation of such a fundamental value as racial tolerance should be reserved only for the academic elite. *See* Liu, *supra*, 47 How. L.J. at 755 ("[I]f diminishing the force of [racial] stereotypes is a compelling pedagogical interest in elite higher education, it can only be more so in elementary and secondary schools—for the very premise of *Grutter*'s diversity rationale is that students enter higher education having had too few opportunities in earlier grades to study and learn alongside peers from other racial groups." (internal quotation marks and footnotes omitted)).

II. THE SCHOOL DISTRICTS' EFFORTS TO ENSURE RACIAL DIVERSITY PASS CONSTITUTIONAL MUSTER.

Against this backdrop, a voluntary effort to maintain diversity in schools passes strict scrutiny. Our democratic values and the functioning of our democracy depend on such heterogeneity in the classroom. That said, we first pause to note that strict scrutiny is in fact not the appropriate standard.

A. The School Districts' Efforts to Maintain Diverse Public Schools Are Not Subject to Strict Scrutiny.

Voluntary programs like those employed by the Seattle and Louisville school districts should not be subject to strict scrutiny because they neither segregate students by race, nor impose any race-based penalties. The districts are doing nothing more than performing a task to which deference is owed:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

The plans at issue in these cases do not seek to promote, encourage, or demand segregation. *See, e.g., Johnson v. California*, 543 U.S. 499 (2005) (prisons); *Johnson v. Virginia*, 373 U.S. 61 (1963) (public facilities); *Brown*, 347 U.S. 483 (schools). They do not resemble rules or regulations that take away some right granted only to one race, but not another. *See, e.g., Carter v. Jury Comm'r*, 396 U.S. 320 (1970); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (ordinance prohibiting the operation of laundries in wooden buildings absent a permit was unconstitutional when only white applicants were granted permits). Nor are they like a prohibition on interracial cohabitation, *McLaughlin v. Florida*, 379 U.S. 184 (1964), or race-based limitations on parental rights, *Palmore v. Sidoti*, 466 U.S. 429 (1984).

The districts' plans stand in contrast to these cases, just as they stand in contrast to traditional "affirmative action" cases. Affirmative action programs have been characterized as a zero-sum process, whether in higher education or public contracts: individuals of a particular group are given preference with respect to the allocation of a limited resource. *See Grutter*, 539 U.S. 306 (university admissions policy using race as a criterion was subject to strict scrutiny);

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (federal highway construction program benefiting minority companies was subject to strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion) (city's minority set-aside program was subject to strict scrutiny); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (admissions program designating a specific number of spots in program for minority students was subject to "most exacting judicial examination").

The plans at issue here neither oppress members of minority groups nor burden the majority. They do not seek to segregate the races. Quite the opposite. The districts' goals are to maintain diverse schools in residentially segregated cities—where *de facto* segregation would otherwise result in racially homogenous and insular educational communities. *See also infra* at Point II.B. The programs do not stigmatize or punish individuals based on race. The programs, thus, do not run afoul of *Brown*. The racial equality that *Brown* promised is not realized in a society where race cannot matter. It is realized in a society in which race is not the basis of penalty or subordination. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 Harv. L. Rev. 1470 (2004).

Moreover, the school assignment plans are not like the programs at issue in the affirmative action cases. First, there is no stigma that can attach from not being admitted into a particular primary or secondary school. No child is labeled as "not being good enough." The children are not left without viable options, because every child in Louisville and Seattle is guaranteed a seat in a public school. Further, one's economic fortunes do not ride on the placement. This stands in contrast to the award of a public contract or admission to a graduate school—either of which could impact one's financial prospects, limit one's future options, or create a

perception as to one's abilities. The programs at issue here use race only to maintain school diversity by determining which schools particular students will attend, not whether they will attend school at all or receive any type of award or special treatment.

Second, inasmuch as particular students may be burdened by the schools' schemes, this burden falls on both white and non-white children equally. This is not a process where the benefit—attendance at one school—will necessarily redound to the benefit of a non-white student, as is the case in virtually every affirmative action case. *See, e.g.*, *Grutter*, 539 U.S. 306; *Adarand Constructors*, 515 U.S. 200; *Bakke*, 438 U.S. 265. Benefits and burdens are shared by members of all races so as to accomplish their shared goals: diversity in public education.

For these reasons, much like the diversity plan approved by the First Circuit in *Comfort v. Lynn School Committee*, the Seattle and Louisville plans are "fundamentally different from almost anything that the Supreme Court has previously addressed." 418 F.3d 1, 27 (1st Cir. 2005) (en banc) (Boudin, C.J., concurring). As a result, and because the plans are not offensive to the values of equality embodied in the Fourteenth Amendment, they should not be subjected to the same exacting review used for invidious forms of discrimination. Instead, they warrant a different approach.

Judge Kozinski has suggested an alternative: a "robust and realistic rational basis review, where the courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it." *Parents Involved*, 426 F.3d at 1194 (Kozinski, J., concurring) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)). Under such a standard, these programs easily pass constitutional muster. The districts' goals are to maintain diverse schools in residentially segregated cities—where *de facto* segregation would otherwise result in racially

homogeneous and insular educational communities. To solve this problem, they developed plans to "stir[] the melting pot," which improved school integration and diversity. *Id.* Because these plans implicate none of the "'original evils at which the Fourteenth Amendment was addressed,'" this Court should show appropriate deference to the school boards' decisions. *Id.* at 1195 (quoting *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring)).

B. In Any Event, the Challenged Programs Survive Strict Scrutiny.

Even were strict scrutiny applied, the Seattle and Louisville programs pass constitutional muster. As this Court has recognized, achieving diversity in schools is a compelling interest, *see Grutter*, 539 U.S. at 326-27, and the programs are narrowly tailored to that end.

Indeed, as this Court noted in *Grutter*, not all governmental uses of race are invalid. There is, in fact, a fundamental difference between taking race into account for the purposes of achieving diversity, and using racial classification to subjugate or segregate a despised minority. *See Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based government action under the Equal Protection Clause."); *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) ("[I]n dealing with claims under broad provisions of the Constitution ... it is imperative that generalizations based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.").

Moreover, our civic life and our democratic principles require diversity in schools. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. It is this acknowledgement—that we are part of a shared

community—that will keep our democracy healthy and prevent sectarian divisions and balkanization from fracturing us into many Americas.

And, again, if the diversity rationale applies to a highly selective law school, it must apply with even greater force in the primary and secondary education setting, where educators can reach a broader, younger, and more impressionable audience. If the *Grutter* Court was apprehensive about the pipeline to national leadership, this Court should be concerned about the quotidian members of the electorate who are largely educated in America's public schools.

That we should value such equality and a unified Nation hardly needs to be stated. But to underscore it: as citizens, we must interact and collaborate. We inhabit political units (cities, counties, congressional districts, and states) that are larger and more heterogeneous than any school district, let alone a single school. We serve as jurors judging our peers; we vote and are elected for public office; we serve our country in the military; we work together. In short, we must coexist as equals. In all of these areas, the ability to operate without irrational prejudices and stereotypes is essential.

The Constitution demands no less when it guarantees, for example, a criminal defendant the right to an "impartial jury" free of racial or other prejudices that could mar its deliberations. *See, e.g.*, *Ristaino v. Ross*, 424 U.S. 589, 594-95 (1976). It is essential to our national security: "[A] highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks ... to provide national security." *See* Consol. Br. of Lt. Gen. Julius W. Becton, Jr. *et al.*, as *Amicus Curiae* at 5, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 1787554. And the more that citizens can come to understand the common interests that transcend race, the less the country

is likely to suffer from the racially polarized voting that taints too many of our elections. *See supra* at 5.

Nor is there a more narrowly tailored means of obtaining this result. *See Grutter*, 539 U.S. at 333 (noting that any program must be narrowly tailored); *J.A. Croson Co.*, 488 U.S. at 493 (same). In public primary and secondary schools, there are no reliable and "workable race-neutral alternatives that will achieve ... diversity." *Grutter*, 539 U.S. at 339. The school districts have no means to counteract the unwanted segregation that results from housing choices other than voluntary integration programs that expressly acknowledge the disfavored racial isolation. For example, there are no court-imposed legal remedies available for school segregation when that segregation results from things such a housing patterns. This, despite the recognition that: "The effect of changing residential patterns on the racial composition of schools, though not always fortunate, is somewhat predictable. Studies show a high correlation between residential segregation and school segregation." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992); *see also Missouri v. Jenkins*, 515 U.S. 70, 116 (1995) (Thomas, J., concurring) ("The continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."); Press Release, *Remarks by the President in Ceremony Commemorating the 40th Anniversary of the Desegregation of Central High School* (Sept. 25, 1997) ("Segregation is no longer the law, but too often, separation is still the rule."), *available at* http://clinton6.nara.gov/1997/09/1997-09-25-remarks-by-president-at-central-high-school-a.html.

To bring it full circle then, when this Court in *Brown* started this Country on the path to racial equality, it recognized the role public schools play in bringing about that goal. This Court "consider[ed] public education in the light

of its full development and its present place in American life throughout the Nation." 347 U.S. at 492-93. Having done so, it recognized "the importance of education to our democratic society" and specifically noted that "it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.* at 493. What was true then, remains true today.

CONCLUSION

For these reasons, the judgments of the courts of appeals should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,
v.
SEATTLE SCHOOL DISTRICT No. 1, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

and

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT
FRIEND OF JOSHUA RYAN McDONALD,
Petitioner,
v.
JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF OF FLORIDA GOVERNOR JOHN ELLIS "JEB" BUSH AND THE STATE BOARD OF EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

Florida Governor Jeb Bush ("Governor Bush") and the Florida State Board of Education ("State Board") respectfully submit this Brief as *amici curiae* pursuant to Sup. Ct. R. 37.3(a).[1] As the chief executive in the State of Florida ("Florida")--a state with a population of almost 17.9 million which enrolls almost 2.7 million students in its pre-kindergarten through twelfth-grade public education system, 280,000 students in its State University System, and 816,000 students in its community college system--Governor Bush has a significant interest in the outcome of all high court proceedings relating to state decision-making based on race or ethnicity in educational matters. So, too, does the State Board, the chief implementing, coordinating, and enforcing body of public education in Florida, with supervisory authority over Florida's entire pre-kindergarten through twelfth grade ("preK-12") system of free public education and community colleges.

The Governor and State Board have an interest in promoting opportunity, irrespective of race or ethnicity, for all students in their public preK-12 education system and for citizens in state-involved programs and initiatives generally (including higher education, state contracting, and employment). *See* § 1000.05(1), Fla. Stat. (2006) (forbidding any restriction of access to programs or courses on the basis of race or ethnicity and requiring that classes be available to all without regard to race or ethnicity). Florida has boldly reformed policies that previously used race and ethnic classifications to give unequal preferences to some individuals, and has turned from such policies advocating the "soft bigotry of low expectations" to

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[1]Both parties have granted blanket consent to the filing of briefs *amicus curiae* by letters of consent on file with the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation of the brief.

those set on ensuring equal opportunity for all individuals. If upheld, the lower court decisions reviewed here have the potential to undercut Florida's reforms and perpetuate harmful stereotypes.

Florida has chosen a better way. Over the past eight years, Governor Bush has initiated policies that give broad opportunities to students, irrespective of race or ethnicity, and that empower their learning and achievement using race-neutral means. In particular, Governor Bush initiated a sweeping race-neutral reform of Florida's preK-12 public schools that has spurred tremendous student achievement gains in all racial and ethnic groups. The results of this and other Florida education reforms, discussed *infra* at Section I.C., demonstrate that student learning and achievement come not by classifying students separately by race or ethnicity, but by affording equal opportunity to all students, and holding them, their teachers, and schools accountable for the results. *See, e.g.*, Jeb Bush and Michael R. Bloomberg, *How to Help Our Students, Building on the 'No Child' Law*, WASH. POST, Aug. 13, 2006, at B07 ("Our emphasis on accountability is a big reason our schools are improving, our students are performing at higher levels and we're closing the achievement gap between poor and minority students and their peers.").[2]

Taking a similar tack, Governor Bush's One Florida Initiative removed preferences, set-asides, and quotas in government contracting, in undergraduate admissions at state universities, and in graduate and professional programs. These policies also would be undercut if this Court recognizes "diversity" as a compelling state interest and thereby more broadly sanctions the use of racial and ethnic classifications.

Governor Bush and the State Board have an additional interest in the Court's overturning its rulings on "diversity"

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[2] *Available at http://www.washingtonpost.com/wp-dyn/content/article/2006/08/11/AR2006081101565_pf.html.*

being a compelling interest in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), or at least confining them to their specific facts. These decisions grant too much leeway for governments to apply subjective notions of "diversity," and on that basis to treat persons unequally. Our national history gives a shameful account of government's abuse of racial classifications, such that its authority to use them should not be expansively restored. "Diversity" is too vague a concept and too subject to manipulation to provide sufficient clarity or protection against discrimination by government based on race or ethnicity.

Finally, Governor Bush and the State Board have a clear interest in this Court's clarification of the principle that government actors are forbidden from engaging in decision-making that treats individuals differently because of race or ethnicity.

SUMMARY OF ARGUMENT

This case presents two questions of particular interest to Governor Bush and the State Board. The first is whether the Respondent school boards violated the Equal Protection Clause of the Fourteenth Amendment by deciding to admit or deny students a place in public educational programs based solely on their race or ethnicity. The second is whether this Court's rulings in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), should be overturned or explicitly limited to clearly restrict government's ability to treat persons differently based on their race or ethnicity--such as here where local school boards have admitted or denied students a place in certain schools based solely on their race or ethnicity.

Government's use of race or ethnicity to dictate the participation or exclusion of individuals from government-involved opportunities violates the Equal Protection Clause of the Fourteenth Amendment and should not be permitted. The Court's clear rule, repeatedly affirmed, is that government may have a compelling interest and classify its citizens on the basis of race *only* when absolutely necessary to remedy the present effects of past discrimination.[3] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989); *United States v. Paradise*, 480 U.S. 149, 170-71 (1987). The lower court decisions disregarded this rule. Citing the compelling "diversity" interest recognized by the Court in *Gratz* and *Grutter*, they concluded that school boards could dictate the racial makeup of schools by admitting or

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[3]The argument presented by *amici* here will focus on the Court's prohibitions against governmental use of racial and ethnic classification, but recognizes and assumes that government may use such classifications when necessary to remedy the present effects of past discrimination consistent with the above-cited cases.

denying students admission solely on the basis of their race or ethnicity.

The policies adopted by the School Boards here--which apply when a school is oversubscribed or when its preferred racial or ethnic mix is threatened--unlawfully cast aside any genuine evaluation of students' viewpoints or experiences that might contribute to a school's achievement or diversity in favor of inflexible, monolithic racial stereotypes (*i.e.*, prescribing one's acceptance or denial based on an assumption of inherent diversity between "whites" and "nonwhites").

This Court has never recognized a compelling governmental interest in the use of purely racial and ethnic classifications. Even in *Gratz* and *Grutter*, the Court recognized a diversity concept broader than race and ethnicity. While Respondents purport to seek certain educational and social benefits of diversity, they take no account of individual viewpoints or experiences. They apparently believe the "right mix" of racial and ethnic groups within their student bodies itself is a valid surrogate for individual consideration. This is incorrect. The Court has consistently rejected as harmful such blatant use of stereotypes.

Florida's experience in the wake of Governor Bush's preK-12 public school reforms and One Florida Initiative demonstrates that increasing students' educational achievement is *not* a function of a school's racial or ethnic makeup. Even if this Court accepts that diversity in the context of higher education represents a compelling state interest, such diversity does precious little in the preK-12 setting to increase student learning and achievement--the paramount goal of public education from which all other goals flow. Florida's students have demonstrated remarkable achievement and have taken large strides in closing the traditional minority/non-minority achievement gap by affording opportunity to students without regard to race or ethnicity, and then by holding students, their teachers, and schools accountable for their achievement results. Florida's across-the-board progress demonstrates that racial and ethnic

engineering of schools does not rise to the level of a compelling interest in meeting public preK-12 education goals.

Florida's ability to spur significant educational progress without the use of racial or ethnic classifications further suggests that the policies at issue here are not narrowly tailored to meet their purported ends--an additional flaw that is fatal to the constitutionality of the programs.

Finally, the Court should overrule its decisions in *Gratz* and *Grutter*, to the extent they denominate "diversity" as a compelling governmental interest. Although the Court wisely sought to confine the "diversity" interest it recognized in those cases to the narrow university context, "diversity" has now escaped from its cage--in this case to harm the fundamental rights of school children to be treated equally in Kentucky and Washington. Many feared, and these cases now confirm, that lower courts would too expansively define "diversity" and for its sake permit government to disregard basic constitutional rights.

ARGUMENT

The pertinent questions before this Court arising out of *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006), and *Parents Involved in Cmty. Sch.*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006), are: (1) whether local school districts violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), by admitting or denying students a place in certain public schools or programs based solely on their race or ethnicity; and (2) whether, in view of the lower courts' expansive applications of this Court's rulings in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court should overturn the compelling governmental "diversity" interest recognized by these rulings and instead re-affirm its prior unambiguous rule that restricts the use of such racial classifications.

Petitioners' briefs comprehensively address the constitutionality of the specific school board programs. This brief will focus primarily on Governor Bush's and the State Board's view of the applicable law and experience in implementing race-neutral programs--programs that increase the learning and achievement of all students, but especially of minority students. Racially and ethnically preferential public school student assignment is patently unconstitutional and unnecessary to achieve the paramount goal of education--learning and achievement gains for all children, irrespective of race or ethnicity.

I. RESPONDENT SCHOOL BOARDS HAVE NO COMPELLING INTEREST IN AWARDING OR DENYING SLOTS TO STUDENTS BASED SOLELY ON THEIR RACE OR ETHNICITY.

A. Standard Of Review.

Understanding that the matter before the Court is one of classification based on immutable racial and ethnic characteristics, the Court's analysis is the same under both the Equal Protection Clause and Title VI: strict scrutiny applies. *Adarand Constructors*, 515 U.S. at 234 (citing *Fullilove v. Klutznick*, 448 U.S. 523 & n.1 (1980)); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992). The underlying purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). This Court has clarified that courts must apply a strict scrutiny standard when evaluating all racial classifications, including those that may be benign. *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 226; *Croson*, 488 U.S. at 493. "[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally."*Johnson v. California*, 543 U.S. 499, 506 (2005) (quoting *Shaw*, 509 U.S. at 651). The Court has repeatedly declined invitations to relax its strict scrutiny standard to more broadly allow government to discriminate by race. *See, e.g.*, *Wygant*, 476 U.S. at 313 (rejecting use of a relaxed standard in the context of teacher layoffs); *Johnson*, 543 U.S. at 509 (declining to apply a lesser standard in the context of prisoner security); *but see Grutter v. Bollinger*, 539 U.S. at 326-28 (appearing to have applied strict scrutiny in name only).

Under the Court's strict scrutiny analysis, there are two questions that must be answered in the affirmative for any challenged racial classification to be constitutional: 1) whether

it serves a compelling state interest; and 2) whether it is narrowly tailored to achieve that interest. *Adarand*, 515 U.S. at 227. The party implementing the classification bears the burden of proving that the racial classification is narrowly tailored to serve a compelling interest. *Croson*, 488 U.S. at 510-11. Governor Bush's experience in reforming Florida's schools answers both questions in the negative.

B. Racial Diversity Does Not Constitute A Compelling State Interest Sufficient To Permit Schools To Discriminate Against Children On Account Of Their Race Or Ethnicity.

This Court's Equal Protection jurisprudence makes clear that states have no compelling interest to achieve diversity for its own sake by dictating an optimal racial or ethnic mix of public school students and admitting or denying students to achieve that mix.

Racial classifications of this sort have been consistently forbidden. *Wygant*, 476 U.S. at 274; *Croson*, 488 U.S. at 500. The Court has not recognized a compelling interest in simple racial diversity, and, in fact, has on numerous occasions enumerated the dangers flowing from a mechanical, inflexible, and exclusive use of race as a determinant. *See, e.g., Grutter*, 539 U.S. at 334 (noting that it insulates the preferred category of applicants from competition with other applicants); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (stating that "preferential programs may *only* reinforce common stereotypes holding that certain groups are unable to achieve success without special protection"); *Croson*, 488 U.S. at 493, 495 (granting benefits based on a quota or other mechanical use of race will breed cross-racial tension and impede the societal goal of relegating racial distinctions to irrelevance); *Johnson*, 543 U.S. at 507 (explaining, in a prison context, that "racial classifications threaten to stigmatize individuals by reason of their membership

in a racial group" and "perpetuate the notion that race matters most").

Contrary to this rule, the lower courts here upheld school board policies that dictate the racial makeup of schools and that admit or deny students to achieve that mix. While some of the goals described by the courts to support their rulings--improving academic education, increasing appreciation for political and cultural heritage, creating competitive and attractive schools, broadening community support, imparting societal values, broadening social interactions, lessening prejudice, increasing sympathy for other viewpoints, promoting cross-racial understanding, and ameliorating the racial concentration due to housing patterns[4]--are laudable (and goals for which Florida itself strives), the Constitution simply does not permit governments to accomplish even laudable goals by treating students differently based solely on their race or ethnicity.

The School Boards' goals and students' fundamental constitutional rights collide here as they would if the boards had allowed or denied students participation based upon their religion or political views. For instance, given current global tensions, a school system might decide that its diversity policy will classify and assign students based upon his or her religion or religious denomination. A district might then classify and assign to its schools a set sum of Buddhists, Christians (which, of course, could be subdivided again, *e.g.*, Catholics, Episcopalians-Anglicans, Baptists, *etc.)*, Muslims, or others. While such classifications might achieve very similar educational and socialization benefits, the Constitution simply will not permit preferences or decision-making on these intrusive grounds.[5]

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[4]*See McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 836, 852-54; *Parents Involved*, 426 F.3d at 1174-75, 1182-83.

[5]*Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."). Should the Court extend constitutional protection to the

The lower courts relied heavily upon this Court's consideration of diversity in *Gratz* and *Grutter* to discount the Court's more applicable precedent. Notably, each acknowledged that the boards' policies were compelling in a "significantly different" manner than those affirmed by the Court in *Grutter*. *Parents Involved*, 426 F.3d at 1175; *see also McFarland*, 330 F. Supp. 2d at 849. They erred. The compelling interest recognized in *Gratz* and *Grutter* differs so fundamentally from the lower court decisions as to make them unconstitutional.

Most obviously, Respondents' policies hinge on group-wide stereotypes that the *Gratz* and *Grutter* opinions disdained. The Court made perfectly clear in *Gratz* and *Grutter* that a race-conscious admissions program must use race in "a flexible, non-mechanical way" if it is to pass constitutional muster. *Grutter*, 539 U.S. at 334; *Gratz*, 539 U.S. at 258, 270-72. Whereas in *Gratz* and *Grutter*, the Court recognized it permissible to take individual account of numerous characteristics and experiences unique to a person (including race, *i.e.*, a "race-plus" standard), the School Boards here mechanically classified students by race without any consideration of students' individuality. The school boards here have used racial stereotypes to classify students *en masse*, regardless of whether their categories correspond to facilitating diverse viewpoints and experiences or foster any educational benefits. Respondents' erroneous assumption is that a defined mix of whites and non-whites itself (corresponding to the cities' population mixes) will spur certain educational and social benefits--even without consideration of individual students' viewpoints and experiences. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 72 P.3d 151,169 n.5 (Wash. 2003) (Sanders, J., dissenting) (noting that the district "conceives of racial diversity in simplistic terms as a dichotomy

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School Boards' policies here, other experiments in engineering a "perfect" diversity may be expected to follow, *e.g.*, gender, disability, national origin, ideological positions, or other permutation of individual backgrounds or beliefs deemed relevant by government.

between white and nonwhite, as if to say all nonwhites are interchangeable").

Any process that seeks to classify and assign students by race will have inherent line-drawing problems, as these cases well demonstrate. The policies and lower court decisions here break students into simplistic "white," "nonwhite,""black," and "other" categories in disparate ways. In *McFarland*, the school district classified the race of each student as "black" or "other," while the lower court there used "black" or "white." *McFarland*, 330 F. Supp. 2d at 840 n.6. Conversely, the school district in Seattle divided students into "white" and "nonwhite" categories. *Parents Involved*, 426 F.3d at 1166. Under the plans, a Hispanic-American student would be considered "other" or "white" in Kentucky, and "nonwhite" in Washington. The contrasting permutations of local race classification policies, as well as the increasingly multi-racial nature of the population calls into question the veracity and legitimacy of "diversity"-seeking endeavors.[6]

The interest in prescribing schools' racial makeup constitutes pure discrimination, as opposed to the purported individual consideration for the students' viewpoints and experiences highlighted in *Grutter*. *See also Miller v. Johnson*, 515 U.S. 900, 920 (1995) (when a state actor makes an assumption that members of a particular race think alike or share the same political views, it engages in "racial stereotyping at odds with equal protection mandates"); *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). Such inflexible, purely race-based classification and decision-

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[6]*See* David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-based Decision-making by Individualized Discretion*, 56 Fla. L. Rev. 483 (2004) ("Racial categorizations of this kind-this individual is black, and that individual is white-are . . . difficult to make."); Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept*, 36 Ariz. St. L.J. 1093 (2004) ("[B]oth the legislatures and the courts have struggled with the fluidity of "racial" categories.").

making find no protection in the Court's prior rulings, even if they do highlight the intrinsically expansive nature of a governmental "diversity" interest wrought by this Court's *Gratz* and *Grutter* rulings.

Even laudable goals must be reached by constitutional means. Our nation has a sad history of invidious and destructive use of racial classifications against our youngest citizens in public school. This history cautions against a policy that would more broadly permit schools to racially discriminate, even where they proffer a laudable reason. The Court has clearly found harm to students when government discriminates solely on the basis of his or her race--a God-given characteristic over which a person has no control. The Constitution does not give leeway for school boards to discount this harm simply because they perceive a greater good can be achieved by discriminating. Because states have no compelling interest in racially classifying their school children and prescribing the racial makeup of their schools, these practices violate the Equal Protection Clause. This Court should reject Respondents' policies, thereby reaffirming the high bar required to establish a compelling interest with respect to the use of racial or ethnic classifications consistent with *Adarand*, *Shaw*, *Wygant*, and *Croson*.

C. Florida's Experience Demonstrates That, Even If Racial Diversity May Be Considered A Compelling Interest In Higher Education, It Has No Notable Benefit In Public School Education.

Even if the Court affirms a compelling "diversity" interest in context of higher education, it should not do so here. Racial diversity has very little impact on the paramount goal of public preK-12 education--increasing students' learning and achievement. Florida's experience in the wake of Governor Bush's preK-12 public school reforms and One Florida Initiative demonstrates that educational achievement and success are not

a function of a school's racial makeup: race-neutral policies will accomplish this goal.

The lower courts compiled a lengthy list of educational and social benefits that supposedly compel schools to discriminate by race.[7] These goals generally fall into three categories: educational benefits; social benefits; and community benefits best served by other means. Of these, the educational benefits of learning and achievement are paramount, the seminal goals from which other benefits flow.

Inherent in the very definition of "education" is the notion of obtaining discrete knowledge or skills, in contrast to having been socialized through one's educational experience. *See, e.g.*, THE *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, 569 (4th ed 2000). While socialization benefits are important and incident to a high-quality education, imparting discrete knowledge, skills, and learning to students must be the highest goal of public education. Schools routinely test and grade students based on their tangible learning of knowledge and skills, not on their socialization skills (that is, once they demonstrate a primary-level ability to "play well with others"). Irrespective of whether school children can, amongst other things, interact sensitively, refrain from stereotypes, or appreciate the heritage of others, if they cannot read or add, the school system has failed them by denying them basic knowledge and skills necessary to fully engage, appreciate, and succeed in the world.

Uniquely informed by Florida's magnificent diversity and successful public school reforms, Governor Bush has found that student educational achievement is most powerfully encouraged by affording opportunity, empowering, and holding students, teachers, and schools accountable for the results--without any need to classify or discriminate on the basis of race or ethnicity to "balance" the make-up of particular schools or programs.

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[7] *See McFarland*, 330 F. Supp. 2d at 836, 852-54; *Parents Involved*, 426 F.3d at 1174-75, 1182-83.

Over the last eight years, Florida has witnessed remarkable gains in the achievement of minority students and a significant narrowing of traditional minority/non-minority educational achievement gaps. These gains, which have occurred across the board for all student racial and ethnic groups, irrespective of the racial and ethnic mix of their schools, demonstrate that the School Boards lack a compelling interest to dictate the racial and ethnic mix of their student bodies.[8]

1. Governor Bush's A+ Plan

Concerned that Florida's public school students were not acquiring the basic educational tools necessary for success in higher education and life in general, Governor Bush and the Florida Legislature implemented the A+ Education Plan in the summer of 1999. *See* 1999 Fla. Laws ch. 99-398; *A+ Plan for Education, available at http//:www.myflorida.com/myflorida/government/governorinitiatives/aplusplan/planEducation.html*; *Governor's Press Release*, February 14, 2006, *available at http://www.flgov.com/ release/7321*. Comprised of a number of

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[8]Florida's public schools are growing and increasingly diverse. From 1990 to 2006, the state's population increased from approximately 13 million to 17.8 million people. During this time, Florida's Hispanic-American population more than doubled, from an estimated 1.5 million to 3.4 million, and its African-American population grew 62 percent, from 1.8 million to 2.9 million. No single racial/ethnic group currently comprises a majority of Florida's public school students. *U.S. Census Bureau News*, Census Bureau Releases Population Estimates by Race (August 4, 2006), *available at www.census.gov/press-release/www/releases/archives/ population/007263.html*; *U.S. Census Bureau, 1990 General Population and Housing Characteristics* (last visited August 14, 2006) *available at http://factfinder.census.gov/servlet/QTTable?_bm=y&-context=qt&-qr_name=DEC_1990_STF1_DP1&-ds_name=DEC_1990_STF1_&-CONTEXT=qt&-tree_id=100&-all_geo_types=N&-redoLog=true&-_caller=geoselect&-geo_id=04000US12&-search_results=01000US&-format=&-_lang=en*; *Florida Education and Community Data Profiles*, Series 2006-11 (July 2006) *available at http://www.firn.edu/doe/eias/eiaspubs/pdf/fecdp0405.pdf*.

components, the operational premise of the program is that every student can achieve if given adequate opportunities, if empowered to improve in deficient areas, and if held accountable with his or her teachers and school. Under the Plan, each school is assigned a yearly grade based on student achievement, such that students, teachers, administrators, and districts are together held accountable for the results. *See* § 1008.34, Fla. Stat. (2006); Rule 6A-1.09981, Fla. Admin. Code (2006). Good schools and their teachers are rewarded for top grades. The list of underperforming schools is also publicized. To them, the state allocates additional resources and encourages administrators to address problems.[9]

The results of the A+ Plan have been striking. Students in all groups have made remarkable progress. Particularly for students in the lower grades and young minority students, Florida is closing the student achievement gap that has existed historically between minority and non-minority students. Since implementation, all groups have demonstrated significant learning gains, but African-American and Hispanic-American students have made the most progress.

The percentage of students scoring at least a level 3 on the Florida Comprehensive Assessment Test (FCAT)--the level equivalent to reading at grade level--has markedly increased since implementation of the A+ Plan. The percentage of Hispanic-American students reading at grade level increased 15 percentage points, from 35% in 2001 to 50% in 2006. *Fla. Dep't of Educ./Governor's Joint Press Release,* May 23, 2006, *available at http://www.fldoe.org/news/2006/2006_05_23-3.asp*; FCAT 2006 http://fcat.fldoe.org. The percentage of African-American students reading at grade level increased 13 percentage

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[9]In addition, students in repeated, failing schools were given an opportunity to transfer to better public schools or to private schools. *See* § 1002.38, Fla. Stat. (2006). In January 2006, the Opportunity Scholarship Program's private school option was struck down by the Florida Supreme Court as violative of the Florida Constitution's supposed prohibition against the State's making such use of non-public schools. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

points, from 26% to 39%. *Id.* The percentage of non-Hispanic white students reading at grade level increased 8 percentage points, from 59% to 67%. *Id.* Likewise for FCAT math scores, 56% of Hispanic-American students and 41% of African-American students performed at or above grade level in 2006, up from 41% and 26%, respectively, in 2001. *Id.*

Undercutting the school boards' policies in this case, Florida students significantly improved with little regard to the relative percentage of racial or ethnic minorities in the district or school. For instance, the State's top-ranked school districts in 2006 for closing the minority achievement gap included districts with large, medium, and small minority student populations. On the top-ten list of districts (of 67 total districts) with respect to African-American students in either reading or math in 2006 were (with percentage of African-American students):[10]

School District	**% African-Am.**
Holmes County	3.4%
Pasco County	4.3%
Lafayette County	10%
Wakulla County	11%
Putnam County	27%
Broward County	37%
Madison County	57%
Jefferson County	69%

[10] *See Fla. Dep't of Educ. Press Release*, June 21, 2006, *available at http://www.fldoe.org/news/2006/2006_06_21.asp*; *Florida Comprehensive Assessment Test 2006 Website*, *available at http://fcat.fldoe.org*; *Florida Education and Community Data Profiles*, Series 2006-11 (July 2006), *available at http://www.firn.edu/doe/eias/eiaspubs/pdf/fecdp0405.pdf*.

On the top-ten list in closing the achievement gap in either reading or math for Hispanic-American students[11] in 2006 were (with percentage of Hispanic-American students):[12]

School District	% Hispanic-Am.
Holmes County	1.4%
Calhoun County	1.7%
Madison County	2.2%
Hamilton County	9.6%
Lafayette County	10%
Indian River County	13%
St. Lucie County	16%
Collier County	38%

This data demonstrates that the achievement results in these top-ranked districts--that closed achievement gaps anywhere from about 3% to 13% in a single year--had little to do with their

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[11]Florida's public school population is 22.5 percent Hispanic-American and is concentrated in five of the State's 67 county school districts (Dade, Broward, Palm Beach, Hillsborough, and Orange Counties). These five county school districts educate approximately 70% of Florida's Hispanic-American public school students. Florida Education and Community Data Profiles (July 2006), *available at http://www.firn.edu/doe/eias/eiaspubs/pdf/fecdp0405.pdf.*

[12]*See Fla. Dep't of Educ. Press Release,* (June 21, 2006), *available at http://www.fldoe.org/news/2006/2006_06_21.asp; Florida Education and Community Data Profiles* (July 2006), *available at http://www.firn.edu/doe/eias/eiaspubs/pdf/fecdp0405.pdf.*

relative racial or ethnic makeup. *Id.* Success may be more accurately attributed to Florida's race-neutral reforms.

Florida's experience with regard to particular schools is much the same. As earlier discussed, under Governor Bush's A+ Plan, Florida assigns a grade every year to each public school in the State based primarily upon student achievement data from the FCAT. *See* § 1008.34, Fla. Stat. (2006); Rule 6A-1.09981, Fla. Admin. Code. (2006). Analysis of school grades over the last eight years shows significant across-the-board improvement for Florida's schools, without regard to the racial or ethnic mix at schools. *School Grade Change Report* from 1999 to 2006 *by School Minority Rate, available at http://www.fldoe.org/arm/pdf/SchGrMinRate.pdf.* Of the Florida schools with the highest minority populations (by quartile), 32% improved one letter grade; whereas 35%, 31%, and 37% of second, third, and fourth quartile-schools, respectively, showed a one-letter grade improvement.[13] *Id.* The number of schools that *declined* a letter grade or more over the period was also roughly the same across all quartiles--between 2% and 4%. *Id.* These results demonstrate that engineering the "right" racial mix at a particular school has little bearing on the actual performance of that school's students.

2. Gifted Programs

Florida's experience also demonstrates little need to favor students by race or ethnicity with respect to entry into school gifted programs. In 2002, Governor Bush abolished the use of racial and ethnic preferences in school gifted programs. Rule 6A-6.03019, Fla. Admin. Code (2006). This change had no deleterious effect on minority participation, but has coincided with an overall increase in participation by minority students in

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[13]Fifty-two percent of schools in the highest minority quartile improved by *more than one* letter grade from 1999 to 2006--a higher percentage than in the other quartiles in part because the highest minority quartile had comparatively fewer A and B schools to begin with than the other quartiles. *Id.*

gifted education programs in Florida by about 5%--from roughly 33%, in 2001 to 38% in 2006. *Profiles of Florida School Districts 2000-2001, available at http://www.firn.edu/ doe/eias /eiaspubs/pdf/ssdata1.pdf*; *Statistical Brief*, Series 2006-08B (Mar. 2006) *available at http://www.firn.edu/doe/eias/eiaspubs/ pdf/esemem.pdf*. Again, providing race-neutral opportunity and holding students accountable to the same standards has proven successful.

3. College Reach Out Program

Some students need additional support in order to achieve success. With this in mind, Governor Bush and the State Board have expanded Florida's College Reach Out Program ("CROP"). *See*§ 1007.34, Fla. Stat. (2006). The Program identifies disadvantaged students, of whatever race, and aims to prepare them for college through an increased number of tutors, homework clubs, and after-school and in-school academic enhancement strategies. CROP projects emphasize continuous educational interaction and offer a wide variety of activities and opportunities for participants. *See College Reach Out Program Summary available at http://www.firn.edu/doe/eeop/crop.htm.*

CROP serves approximately 8,546 students through nine state universities, twenty-five community colleges, and four independent colleges and universities. *Id.* Approximately 72% of these students are African-American and 12% are Hispanic-American. *Id.* Initial studies have shown that CROP is successfully improving the educational preparation and motivation of poor and educationally disadvantaged students. For example, in the 2003-04 school year, 78% of the high school seniors served by CROP received a standard diploma, compared to 62% of the random sample stratified on the basis of race and income. *CROP Achievement Data Summary available at http://www.fldoe.org/arm/pdf/CROPData.pdf.* CROP students were academically promoted (in sixth through eleventh grades) to the next grade at an 86% rate, compared to a 76% rate for the

random sample. *Id.* Of CROP students who graduated, 70% went on to pursue a postsecondary education, compared to only 61% of the random sample. *Id.*

Drop-out rates also significantly improved between 1998-99 to 2004-05 school years for Hispanic-Americans (from 8.3% to 3.6%) and African-American students (from 6.6% to 3.9%), outpacing by a little the improvement for non-minority students (from 4.2% to 2.4%). "*Dropout Demographics in Florida's Public Schools, and Dropout Rates*," *Florida Information Note,* Series 2006-15F (May 2006) *available at http://www.firn.edu/doe/ eias/eiaspubs/pdf/dropdemo/pdf.*

CROP shows that providing opportunity and empowering struggling students is a proven, powerful means to spur their success, without any need to take account of students' race or ethnicity.

4. Advanced Placement Tests and Virtual School

Another way that Florida has increased opportunities for all students has been to partner with the College Board to expand Advanced Placement ("AP") course offerings and to encourage students to enroll in them. As a result, participation in these courses has greatly increased, as has the number of students who take AP tests--especially for minority students.[14] The quality of examination and test scores continues to improve as well, while

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[14] *See Strategic Milestone on the Road to K-20 Education*: 1995 to 2005, *available at http://www.fldoe.org/arm/pdf/StrMilestones05.pdf.* Minority participation in AP courses and the minority passage rate have increased at a much greater percentage than for non-minorities. *Advanced Placement Participation and Results Survey, available at http://www.fldoe.org/arm/pdf/APCourseRes.pdf.* Consider, the number of African-American students taking Advanced Placement tests in Florida rose from 2,595 in 1998-99 to 7,260 in 2004-05. The number of Hispanic-Americans test-takers rose from 6,181 to 17,101 during this time. The total number of Florida test-takers rose from 34,607 to 77,910. *Id.*

more and more minority students are earning scores that qualify for college credit. *See Advanced Placement Participation and Results Survey, available at http://www.fldoe.org/arm/pdf/AP CourseRes.pdf.*

Additionally, the Florida Virtual School provides an online curriculum of AP courses to students who may not have access to such classes at their schools. *See* § 1002.37, Fla. Stat. (2006). Most of these students attend rural or inner-city schools that have yet to expand their AP course opportunities. Minority enrollment in Florida Virtual School classes has climbed from just over 200 in 1999-2000 to over 16,500 in 2005-2006 and continues to increase. *Virtual School Summary Data, available at http://www.fldoe.org/arm/pdf/VirtSchPartic.pdf.*

5. Access To Important Tests

Florida has taken other steps to encourage post-secondary education for all students. Recognizing that students who take examinations such as the Preliminary SAT/National Merit Scholarship Qualifying Test ("PSAT/NMSQT") are more likely to take the SAT or ACT and continue on to college, Florida made the PSAT/NMSQT and the PLAN, which is a tenth grade pre-college test offered by ACT, Inc., available at no cost to all students. Providing these tests free of charge removed the previous cost barriers that hindered economically disadvantaged students. Whereas before the test was administered only to those who were already aspiring to go to college *and could afford it*, Florida made it available to all students. These efforts have resulted in a six-year increase of 618% in the number of African-Americans and a 625% increase in the number of Hispanic-Americans taking the PSAT. *Test Participation Summary, available at http://www.fldoe.org/arm/pdf/PreCollTests.pdf.* Similarly, there has been a 230% increase in the number of African-Americans and a 148% increase in the number of Hispanic-Americans taking the PLAN test. *Id.*

All of these preK-12 reforms were premised on the basic idea that the best way to ensure student achievement for all students, minority students included, is to provide the same opportunities regardless of a students' race or ethnicity, to support those that need additional help, and to hold each student to the same standard as his or her peers.

6. Post-Secondary Admissions Opportunities

While Florida has made significant progress educating its students without the use of racial preferences or quotas, success is never final. Governor Bush determined to give a helping hand particularly to students already in the upper grades who did not have the full benefit of Florida's reforms.

Recognizing the achievement gap that exists between the scores of non-Hispanic white and minority students because of decades-old policies promoting the "soft bigotry of low expectations," Florida helped more students to obtain a post-secondary education. Educationally disadvantaged students who have shown solid classroom achievement and promise--without regard to their race or ethnic origin--have been aided in gaining admission to the State University System.

Upon initiating its Talented Twenty Program, Florida became the only state in America to guarantee state university admission to all of its public high school students who graduate in the top 20% of their class.[15] *See* Rule 6C-6.002(5), Fla. Admin. Code (2006); *Talented Twenty Program Guide 2005-06, available at http://www.firn.edu/doe/osfa/ttfactsh.htm.* To

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[15]Following on this program, the University of Florida instituted a "Talented 5%" Program, guaranteeing admission into the University of Florida for the top quarter of the Talented Twenty Program. *See One Florida Accountability Commission: An Independent Review of Equity in Education and Equity in Contracts Components of One Florida* at 3, 29 (June 2002), *available at http://www.myflorida.com/myflorida/government/otherinfo/documents/executive_summary.doc.*

qualify, students must have completed the required 19 credits of course work and have an SAT or ACT score. *Id.* No minimum test score is required. *Id.*

The Talented Twenty Program is designed to improve post-secondary educational opportunities for minorities and all students by guaranteeing admission to the top students at every school, whether they graduated from a high school that had the best or the worst academic standards in the State. In this way, top students from the poorest performing schools have the same opportunity for admission as top students from high performing schools. It is unlikely that students graduating in the top-20 percent of their class from the state's best schools need the guaranteed admission of the Talented Twenty Program, as they would be otherwise admitted. The program therefore is intended to benefit students at poorer performing schools who may have striven to do their best, but who still need assistance gaining admission to the state university system.

Additionally, Florida has a unique "2+2" system that grants students who successfully complete an Associate's Degree at a community college guaranteed admission into a state university as if he or she had initially attended a state university. *See* § 1007.23, Fla. Stat. (2006); *see also* Rule 6A-10.024 Fla. Admin. Code (2006). Because the Florida Community College System has an open admission policy for students meeting basic admission criteria, even students from the most disadvantaged backgrounds may ultimately gain university admission and a university degree.

This reform of Florida's post-secondary education system took place even as Governor Bush abolished the State's use of racial preferences. In November 1999, Governor Bush presented the One Florida Initiative proposing that racial preferences in state contracting be eliminated and that rules governing admissions into the State University System be modified to prohibit preferential admissions on the basis of race or gender. *See* Rule 6C-6.002(7), Fla. Admin. Code (2006); *One Florida Initiative Website, available at http//:www.myflorida.com/my*

florida/government/governor initiatives/one_florida/index.html. The undergraduate rule was effective for Fall 2000 admissions, and the graduate and professional rule was effective for Fall 2001 admissions. *Id.* Prior to these rule changes, various universities and programs within the university system had used racial preferences. *See, e.g., NAACP v. Florida Bd. of Regents,* 863 So. 2d 294 (Fla. 2003).

Since the implementation of the One Florida Initiative of race-neutral admissions in higher education, Florida's State University System has maintained ethnic and racial diversity within its overall student body, with attendance rates of minorities holding steady or increasing. *One Florida Summary Results, available at http://www.fldoe.org/arm/pdf/OneFL Figs.pdf.* Diversity in graduate and professional school enrollment has remained steady as well. Since the first year of the implementation of Florida's race-neutral admissions policy in 2001, system-wide minority enrollment in graduate programs increased from 16.8% in the Fall of 2000 to 22.2% in Fall 2005. *Id.*

Florida's remarkable educational progress together with the narrowing of the minority/non-minority achievement gap shows that the "compelling" benefits Respondents seek are achieved not by finding the perfect racial or ethnic mix, but by affording opportunities, empowering, and holding the system accountable.

II. FLORIDA'S EXPERIENCE SHOWS THAT SYSTEMS USING RACIAL PREFERENCES TO ADMIT OR DENY STUDENTS ARE NOT NARROWLY TAILORED.

No compelling state interest is served by dictating the racial and ethnic makeup of schools, nor have the School Boards' methods met narrow tailoring requirements.

To be narrowly tailored, the Schools Boards' use of race must be carefully "calibrated to fit the distinct issues raised by the

use of race." *Grutter v. Bollinger*, 539 U.S. at 334.[16] The efficacy of alternative remedies, including race-neutral policies, is a factor to be considered in determining whether a state's racial classification is narrowly tailored. *Paradise*, 480 U.S. at 171. *See also Johnson v. Bd. of Regents*, 263 F.3d 1234, 1252 (11th Cir. 2001); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994). If a compelling interest may be served without resort to racial classification, a race-based program is not narrowly tailored. *Johnson*, 263 F.3d at 1259.

While the lower courts found the School Boards had adequately considered race-neutral alternatives, *Parents Involved*, 426 F.3d at 1188; *McFarland*, 330 F. Supp. 2d at 861, Florida's experience and success in furthering educational achievement for all students in a race-neutral manner, *see infra* at § I.C., demonstrates that the policies involved here fail the narrow tailoring requirement. As in Florida, the School Boards could employ any number of strategies to achieve the educational benefits sought without resorting to racial classifications.

Moreover, Florida's programs and the principles that they advance are more than just *another* way of accomplishing robust public school benefits for all students. They provide a *better* way. Florida's plan is better because it no longer accepts the lack of quality in the public schools that serve our underprivileged children; better because it recognizes the need to provide mentoring, tutoring, and other extra attention to those underprivileged children and their teachers; better because it encourages all students regardless of race or economic status to

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[16]The Court has used four primary factors to determine whether a policy is narrowly tailored: (1) whether it amounts to a quota that seeks a fixed number of students by race and separates groups of applicants from each other; (2) whether the applicant is afforded an individualized review; (3) whether it unduly harms members of any racial group; and (4) whether the government entity has given "serious, good faith consideration of workable race-neutral alternatives" to achieve its goals. *Grutter*, 539 U.S. at 334-339.

aspire to educational success and the promise of a post-secondary education; better because it no longer accepts a separate classification or separate opportunities on the basis of race; better because it focuses on providing all races with the opportunity to meet common standards; and finally, better because the day has arrived when racial classifications and separate standards are no longer necessary.[17]

The ultimate goal of the Equal Protection Clause is to end racially motivated state action. *Hopwood v. State of Texas*, 78 F.3d 932, 947-48 (5th Cir. 1998). Florida's initiatives effectively accomplish this goal by ending racial classifications, improving learning and achievement for all, and providing equal educational opportunities. These reforms are closing the achievement gap. The School Boards' attempts to achieve these goals through race-based means are unnecessary, not narrowly tailored, and should be rejected.

III. THE COURT'S RULINGS IN *GRATZ* AND *GRUTTER* SHOULD BE OVERTURNED TO THE EXTENT DIVERSITY WAS FOUND TO BE COMPELLING OR STRICTLY LIMITED TO THE CONTEXT OF UNIVERSITY EDUCATION.

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[17] It is commonly accepted that children learn and are greatly influenced by the modeling of parents and respected elders. Ironically, the School Boards are contravening the very purposes they intend to advance by treating students differently based upon their race or ethnicity. By using race to classify our youngest students, the School Boards encourage students to make decisions based upon racial and ethnic distinctions and to perpetuate the use of racial and ethnic classifications to the next generation. If government actors are permitted to apply racially-based decision-making to the youngest generation now (whose students will be attending law school about 20 years from now), this Court can little expect that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343.

The Court's recognition of a compelling "diversity" interest in *Gratz* and *Grutter* should be overturned or explicitly limited to the university context. On the basis of *Gratz* and *Grutter*, lower courts have recognized an expansive "diversity" interest that unconstitutionally violates individual rights to equal treatment with little prospect of cessation. These rulings have eroded the Court's previously clear, compelling interest principle that the use of such racial classifications are impermissible. This prior rule afforded notable protection for citizens against unequal treatment by government in all but the most pressing cases. *Gratz* and *Grutter* erroneously changed that simple calculus.

By approving "diversity" as a compelling interest in the narrow context of a university's undergraduate and graduate admissions process, *Gratz* and *Grutter* swung open the doors to regimes that discriminate on the basis of race and ethnicity. Lower courts have paid no attention to the narrow viewpoint and experientially-based diversity interest recognized by the Court, or to the university setting that the Court found uniquely compelling.

Recent lower court decisions concede their interpretations to have applied the Court's rulings in non-university settings that only "resembl[e]" it, and to have recast the diversity interest itself to protect purely race-based classifications. *See, e.g., Comfort v. Lynn School Comm.*, 418 F.3d. 1, 15 (1st Cir. 2005) ("Lynn's asserted interests bear a strong familial resemblance to those that the *Grutter* Court found compelling. There is no reason to believe that these interests are advanced by viewpoint diversity but not racial diversity, or that they are substantially stronger in the context of higher education than in the context of elementary and secondary education."); *see also Parents Involved*, 426 F.3d at 1175 (noting that the school board itself acknowledged its policies to be compelling in a "significantly different" manner than those affirmed by the Court in *Grutter); McFarland*, 330 F. Supp. 2d at 849. By so ruling, the lower courts have tended to defer to governmental classifications, including purely racial classifications, for the sake of "diversity" so long as there is a

colorable, well-sounding rationale.[18] Such deference to government turns on its head traditional strict scrutiny analysis to which racial classifications are subject.

These results indicate that the Court may not have fully anticipated the lower courts' difficulty containing a *narrow* university-specific diversity interest when it decided *Gratz* and *Grutter*. Because the basic rights of individuals are seriously threatened by the lower courts' expansion of "diversity" as a compelling governmental interest, this Court should overturn *Gratz* and *Grutter*, or at least limit these rulings to the context of university education, and re-affirm this Court's commitment to the unambiguous rule that government may discriminate on the basis of racial classifications only to remedy the present effects of past discrimination.

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[18]The very nature of a "diversity" interest implies that government may classify and engineer some "right mix" of persons--an expansive idea with seemingly innumerable permutations. This effectively subjugates equal protection rights to local cultural engineers with little prospect of achieving consistent outcomes. Some, like the lower courts here, trumpet diversity as a paramount value and compelling societal interest, while others note the havoc wrought by the "diversity myth."*See* David O. Sacks and Peter A. Thiel, *The Diversity Myth* (Independent Institute 1995) (arguing that in the name of "diversity," leading universities and cultural institutions have aimed to squelch dissent and intellectual life). Questions such as "what kinds of diversity can be considering compelling?" and "how many slots may legitimately go to each group?" predominate.

CONCLUSION

Amici, Florida Governor Jeb Bush, and the Florida State Board of Education, respectfully request that this Court reverse the decisions of the lower courts and elucidate a rule that effectively proscribes courts from upholding unlawful racially- and ethnically-based classifications.

Respectfully submitted,

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No. 05-908 and No. 05-915

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In The
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE CAUCUS FOR STRUCTURAL EQUITY AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

No. 05-908

Whether the District's limited use of a race-based student assignment plan to preserve integration violates the Equal Protection Clause of the Fourteenth Amendment.

No. 05-915

Whether Jefferson County's limited use of a race-based student assignment plan to preserve integration violates the Equal Protection Clause of the Fourteenth Amendment.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*, THE CAUCUS FOR STRUCTURAL EQUITY

The question presented in these appeals is whether the limited use of race-based student assignment plans to preserve integration in Seattle and Jefferson County is consistent with the Equal Protection Clause of the Fourteenth Amendment. The Caucus for Structural Equity believes strongly that the Constitution does not proscribe race-conscious efforts to promote racial equity in school assignments.

The Caucus is a collaborative of policy oriented nonprofit organizations and legal and social science academics focused on devising strategies to help alleviate persistent racial inequality in the United States.[1] The parties have lodged universal letters of consent with the Clerk of Court for the filing of briefs *Amicus Curiae*. The Caucus and its members offer three important perspectives:

First, they include many leading scholars with expertise in the structural and institutional dynamics underlying persistent racial ex lusion in the United States.

Second, they bring many years of collective experience in formulating policies that promote racial equity.

Third, their work and research give them special insight into the importance of achieving and maintaining desegregation

---

[1] The members of the Caucus include *inter alios* the following: Andrew Barlow (Visiting Professor of Sociology, University of California at Berkeley), Ian Haney López (Professor of Law, University of California at Berkeley), Maya Wiley (Director, Center for Social Inclusion), Philip Tegeler (Executive Director, Poverty & Race Research Action Council), Myron Orfield (Professor, University of Minnesota), Andrew Grant-Thomas (Deputy Director, The Kirwan Institute for the Study of Race and Ethnicity), Eva Jefferson Paterson (Director, The Equal Justice Society), john a. powell (Professor of Law and Executive Director of the Kirwan Institute, The Ohio State University), The Kirwan Institute for the Study of Race and Ethnicity, The Center for Social Inclusion, and The Equal Justice Society.

Pursuant to Supreme Court Rule 37.6, the Caucus for Structural Equity affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

and integration as means of ameliorating the entrenched patterns of marginalization resulting from segregation.

SUMMARY OF ARGUMENT

In *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), in words that are as true today as they were then, this Court said, "[E]ducation is perhaps the most important function of state and local governments." The Court then held:

> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. [*Id.*]

This Court concluded "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." 347 U.S. at 494.

This Court's decision in *Brown* marked the constitutional apotheosis of a social truth: racial segregation engenders the marginalization of racial minorities.

The Seattle and Jefferson County school cases present the important question of whether school districts' limited use of race-based student assignment plans to preserve integration violates the Equal Protection Clause of the Fourteenth Amendment. The answer to this question is that these voluntary plans do not. Such a violation can only be found if the words of *Brown* and its progeny are misread to reject race-conscious student assignment *per se* in the absence of *de jure* segregation, as petitioners, their *Amici*, and the Government urge; and if this Court's decisions from *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), through *Grutter v. Bollinger*, 539 U.S. 306 (2003), are misapplied to prohibit the voluntary desegregation of public schools.

This Court's decisions have long recognized the evils of segregation and the benefits of integration. At the time of *Brown*, social science had amassed significant and persuasive evidence in support of this Court's decision. Since *Brown*, the evidence has grown even stronger. There is no

question that segregation debilitates minorities and whites, and that integration remains crucial to fostering and preserving bedrock aspects of equal opportunity as well as the democratic principles on which this country is built.

Accordingly, the foregoing truths give rise to certain fundamental principles that ought to guide this Court's decision in these cases:

1. Racial inequality is perpetuated by the interaction of numerous institutions, and does not require purposeful racism or malicious state action to continue. These dynamics, undisturbed, will persist because they operate in a vicious, reinforcing circle of causation.

2. The effort to achieve and preserve racial integration in public schools is a justifiable intervention into structural arrangements that perpetuate racial inequality.

3. Efforts by democratically elected school boards to eradicate segregation and achieve or preserve integration should be applauded rather than subjected to constitutional reproach. Rather than visiting a harm on any individual or group of students, school boards striving to promote integration seek to avert the damage done to all students by segregated institutions.

This Court should therefore affirm the decisions of the Courts of Appeals in these cases.

ARGUMENT

I. INTEGRATION IS NECESSARY TO BREAK DOWN RACIAL INEQUALITY, AND RACE-CONSCIOUS MEANS ARE NECESSARY TO ACHIEVE INTEGRATION.

A. This Court Has Held That Racially Segregated Schools Are Inherently Harmful.

It is simply bedrock law that separate is not equal in public education. In ringing language, Chief Justice Warren pronounced in *Brown v. Board of Educ.*, that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." 347 U.S. 483, 495 (1954). Significantly, as Chief

Justice Warren observed, although the pernicious impact of segregation is *greater* when legally compelled, segregation even without the sanction of law is harmful to school children and civic life generally. In *Brown* the Court quoted with approval the finding of the lower court: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law." 347 U.S. at 494. The harm of segregation is greater with the sanction of law, but it is still destructive, even absent law's imprimatur.

This Court then observed: "Today, education is perhaps the most important function of state and local governments." *Id.* at 493. Elaborating on this the Court described several critical roles that education serves in our society. First, the Court specified that an adequate education forms the cornerstone for self-reliance in a market economy: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Second, proper education plays an essential role in acculturating new citizens to the values and shared responsibilities of a democratic society: "It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Finally, education prepares each child to contribute to the collective good of the country: "It is required in the performance of our most basic public responsibilities, even service in the armed forces." For all of these reasons, our society appropriately places an extraordinarily high value on integrated schooling. As Chief Justice Warren insisted in *Brown*, public education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. at 493.

Conversely, school segregation is malevolent and destructive of the life chances of children, their acculturation to democratic values, and their ability to develop into contributing members of society. Although this Court has limited the authority of the federal judiciary to remedy the

harm of segregation, this in no way undermines the finding in *Brown* that segregated schooling is inherently harmful. Moreover, as we discuss in Section II of this brief, since that decision the weight of authority has become even greater. Section II of this brief will also review modern social science on the causes and persistence of segregation and explain how the integration plans advanced by the Seattle and Jefferson County School Boards are designed to disrupt these dynamics. The present section, however, focuses first on the constitutionality of voluntary efforts by local governments and school districts to use limited race-conscious means in pursuing integration.

B. This Court's Decisions In *Brown I*, *Brown II* And Their Progeny Do Not Command An End To All Racial Classifications, But Instead Make Clear That Race-Conscious Means Are Essential To The Elimination of Segregation And The Integration Of Schools.

Petitioners and the Solicitor General ignore *Brown's* central finding that racial *segregation* is inherently harmful, and instead assert that this landmark case reduces to the proposition that racial *classification* is inherently harmful. To that end, the Government's lawyer argues that *Brown's* command reduces to one phrase, selectively culled from *Brown II*: "achiev[ing] a system of determining admission to the public schools on a nonracial basis." (Brief for the United States as *Amicus Curiae* Supporting Petitioner in No. 05-908, p. 6.).

While there is and will continue to be some contestation over the scope and implications of the *Brown I* and *II* decisions, it is clear that Petitioners and the Solicitor General argue for an interpretation that is far too narrow.[2]

---

[2] The anti-classification principle is better seen as an outgrowth of the political struggles over *Brown's* implementation rather than the basis of the *Brown* decision itself. *See* Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 Harv. L. Rev. 1470 (2004) for a richly nuanced account of the competing values that have shaped our equal protection tradition.

Tellingly, these very same characterizations of *Brown* were offered in the 1960s and early 1970s by recalcitrant local jurisdictions that similarly sought to undermine school integration. In response to these efforts, this Court made it clear that such an overly narrow and decontextualized reading of *Brown* is inappropriate. More specifically, this Court explicitly considered and rejected claims that the Constitution is colorblind in a manner that forbids school districts from adopting race-conscious strategies to achieve integration.

Beginning almost immediately in the wake of *Brown I*, various jurisdictions, not all of them southern, declared that the Constitution did not demand integration but only prohibited the use of racial classifications in student assignment policies. For instance, on remand from *Brown I*, the district court in *Briggs v. Elliott* declared that the Constitution "does not require integration. It merely forbids discrimination." 132 F. Supp. 776, 777 (E.D.S.C. 1955). From there, it was only a short step for courts to move from the claim that the Constitution did not mandate integration to the insistence that it affirmatively prohibited efforts to achieve integration through race-conscious means. *See, e.g., Randall v. Sumpter Sch. Dist. No. 2*, 241 F. Supp. 787, 789 (E.C.S.C. 1965) (holding that the Constitution is colorblind and should no more be violated to attempt integration than to preserve segregation); *Bradley v. Sch. Bd. of City of Richmond*, 345 F.2d 310, 316 (4th Cir. 1964), *vacated on other grounds*, 382 U.S. 103 (1965) and *Gilliam v. Sch. Bd. of Hopewell*, 345 F.2d 325, 327 (4th Cir. 1965), *vacated on other grounds*, 382 U.S. 103 (1965) (holding that permissive transfers of minorities granted because of their race are unlawful) *citing Goss v. Bd. of Educ. of City of Knoxville, Tennessee*, 373 U.S. 683, 687 (1963). According to these once formal segregationists turned devotees of colorblindness, the Constitution forbids any state use of race, whether to segregate or to integrate.

The effort to fashion a colorblind constraint on racial integration efforts was opposed by a number of lower courts and eventually resoundingly rejected by the Supreme Court. By responding in this manner, the lower courts and this Court recognized the essential importance of context in evaluating race-conscious educational policies. Race-conscious

school board policies designed to maintain segregation were constitutionally forbidden. Race-conscious school board policies designed to foster integration and promote educational equality were embraced and the school boards pursuing such policies were given deference and latitude. In *United States v. Jefferson County Bd. of Educ.*, Judge John Minor Wisdom of the Fifth Circuit offered the most comprehensive rebuttal of the effort to construe *Brown* as simply proscribing all race-conscious school policies:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. 372 F.2d 836, 876 (5th Cir. 1966)

Wisdom recognized that the constitutional significance of colorblindness has to be measured in terms of the uses of race ostensibly proscribed. Where the goal is integration, color-conscious means are not only constitutional but necessary: "disestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation *must necessarily be based on race.*" *Id.* at 877 (emphasis added). Other lower courts echoed this position on the necessity of race-conscious measures to achieving desegregation and integration. *See, e.g., Wanner v. County Sch. Bd. of Arlington County, Virginia*, 357 F.2d 452, 454-55 (4th Cir. 1966) ("It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve 'consideration of race.'"); *Offermann v. Nitkowski*, 248 F. Supp. 129, 131 (W.D.N.Y. 1965) ("[T]he Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race and a proper effort to eliminate racial imbalance in a school

system."); *Taylor v. Bd. of Educ. of City Sch. Dist. of the City of New Rochelle*, 191 F. Supp. 181, 196 (S.D.N.Y. 1961) ("The Constitution is not this colorblind.").

Consistent with these opinions of courts below, this Court expressly and repeatedly recognized that desegregation could not occur in the absence of race-conscious measures. In *North Carolina State Bd. of Educ. v. Swann*, this Court stated:

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems. 402 U.S. 43, 46 (1971)

In *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971), parents of school children in Clarke County, Georgia challenged a desegregation program on the ground that the assignment of children based on race violated both the Equal Protection Clause of the Fourteenth Amendment and Title IV of the Civil Rights Act of 1964. This Court responded:

> We reject these contentions.
>
> The Clarke County Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines. To have done otherwise would have severely hampered the board's ability to deal effectively with the task at hand. School boards that operated dual school systems are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board*, 391 U.S. 430, 437-438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968). In this remedial process, steps will

> almost invariably require that students be assigned "differently because of their race." . . . [Citations omitted.] Any other approach would freeze the status quo that is the very target of all desegregation processes. 402 U.S. at 41

See also, Green v. County Sch. Bd. of New Kent County, Virginia, 391 U.S. 430, 437 (1968).

Thus, this Court's decisions have previously dealt with and rejected the very argument petitioners and their *amici* raise here. *Brown* does not stand for the narrow proposition that race-conscious measures are forbidden in the assignment of students. It is not just that the petitioners and the Solicitor General misrepresent the holdings in *Brown I* and *Brown II* – they also ignore this Court's decisions since recognizing that school boards need to use limited race-conscious means if they are to achieve and preserve integration, and also specifically rejecting a colorblind restriction on such efforts.

C. This Court Has Recognized And Approved The Right And Power Of School Authorities Voluntarily To Desegregate Through Race-Conscious Measures Even In The Absence Of A *De Jure* Constitutional Violation.

Petitioners, the government, and their *amici* suggest that even if school boards are permitted to use limited race-conscious measures, such measures can only be used to remedy *de jure* segregation. To the contrary, this Court has repeatedly expressed approval of race-conscious voluntary school integration efforts at the K-12 level. Over 35 years ago, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), a unanimous Court clearly distinguished voluntary desegregation undertaken by duly constituted public officials from mandatory court-ordered desegregation. In doing so, the Court acknowledged that the powers and discretion afforded school officials are much greater than those of federal judges:

> Remedial judicial authority does not put judges automatically in the shoes of school authorities

> whose powers are plenary. Judicial authority enters only when local authority defaults.
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. [401 U.S. at 16.]

The Court's remarks reflect the generally understood view that the Fourteenth Amendment is not considered by this Court to be a bar on voluntary efforts to desegregate.

The Court unanimously reiterated this position in *North Carolina State Bd. of Educ. v. Swann*:

> We observed in *Swann, supra,* 402 U.S., at 16, 91 S.Ct., at 1276, that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements. 402 U.S. 43, 45-46 (1971)

Thus, this Court has expressly recognized the right and power of school districts to do exactly what Seattle and Louisville have done here. Since *Swann*, members of this Court have indicated their view that this position remains firm. The same year that this Court decided *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), then-Justice William Rehnquist rejected a request to enjoin a race-conscious desegregation plan ordered by the California Supreme Court for the city of Los Angeles. *Bustop v. Bd. of Educ. of the City of Los Angeles*, 439 U.S. 1380, 1382-83 (1978). In doing so, Justice Rehnquist

rejected the "novel" argument that parents and school children have a "federal right" to be free from race-conscious assignment plans not mandated by the Fourteenth Amendment to the United States Constitution. In doing so, Justice Rehnquist recognized that state actors have the authority to pursue race-conscious student assignment plans even in the absence of a Fourteenth Amendment violation:

> While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action." [439 U.S. at 1382-83.]

Four years later, in *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457 (1982), this Court struck down a state referendum that effectively banned desegregative student busing. The referendum specifically targeted the Seattle School Board's voluntary race-conscious busing program. By invalidating this ban on voluntary busing aimed at *de facto* racial segregation, the Court reaffirmed the understanding that "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process." 458 U.S. at 472. With the recognition that the "educational decisionmaking process" was "firmly committed to the local board's discretion," this Court agreed with the courts below that the "initiative [impermissibly] removes from local school boards their existing authority, and in large part their capability, to enact programs designed to desegregate schools." 458 U.S. at 466.

Justice Powell, who authored the dissent in this matter, also acknowledged that school boards are empowered to pursue voluntarily race-conscious integration measures:

> As a former school board member for many years, I accept the privilege of a dissenting Justice to add a personal note. In my view, the local

> school board – responsible to the people of the district it serves – *is* the best qualified agency of a state government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program. *Id.* at 501, ftnt. 17.

Notably, this decision was rendered four years after Justice Powell wrote the plurality opinion in *Bakke*. Whereas petitioners and the Solicitor General argue that the analytical framework for considering affirmative action programs ought to be applied to voluntary race-conscious school desegregation, Justice Powell tellingly declined to assert the same in *Washington*.

II. THE HARM, CAUSES, AND CONSEQUENCES OF SEGREGATION ARE KNOWABLE AND WITHIN THE COGNIZANCE OF LOCAL SCHOOL BOARDS TO ADDRESS.

A. Local School Boards May Intervene To Disrupt The Processes That Produce Segregation And Cumulative Racialized Disadvantage.

As every frustrated parent, teacher or principal (judge, doctor or social worker) knows, institutional opportunities and outcomes are shaped, often dramatically, by inputs beyond the control of particular institutional actors. So historical legacies, neighborhood dynamics, family resources, and government policies like *No Child Left Behind* do a great deal to shape educational outcomes, but schools exert little direct influence over any of them. Substantial research literature makes clear that in the case of pervasive racial segregation in the nation's K-12 schools the effects are especially harmful, both for students and for our society as a whole. But if school districts can do little unilaterally to shape most of the processes that feed segregation, they nonetheless ought to be able to

use the few, modest tools within their grasp to disrupt the dynamic of segregation before it reaches its predictable conclusion within the school themselves. The use of race as one element in student assignment plans is an indispensable means to that end. A great deal hinges on this Court's willingness to uphold its use.

School segregation is the result of a dynamic and cumulative process, not a static and episodic one. We cannot adequately understand the process, or the production of durable racial inequality, more generally, only by examining singular discriminatory episodes or by looking at the practices and procedures of a single institution. In confronting racial inequality we must similarly account for multiple, intersecting, and often mutually reinforcing advantages and disadvantages and develop corresponding response strategies.

At the group level, racial and ethnic minorities are trapped by cumulative disadvantages, much of it surely unintended but nonetheless predictable and knowable. For example, housing discrimination constrains many black and Hispanic youth to attend high-poverty schools.[3] Children in these schools are much less likely than their affluent peers to attend college, and more likely to drop out of school or complete their education in a correctional facility.[4] All three outcomes reduce the labor market options these young adults are likely to have, with grave implications for their chances to secure health and retirement benefits.[5] It follows that in order to fully understand

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[3] Lisa Robinson and Andrew Grant-Thomas, *Barriers to Housing – Race, Place and Home: A Civil Rights and Metropolitan Opportunity Agenda*, The Civil Rights Project at Harvard University, Cambridge, MA (September 2004), available online at http://www.civilrightsproject.harvard.edu/research/metro/barriers_housing.php.

[4] Johanna Wald and Daniel J. Losen, *Defining and redirecting a school-to-prison pipeline*, The Civil Rights Project at Harvard University, Cambridge, MA (2003), available online at http://www.civilrightsproject.harvard.edu/research/pipeline03/FramingPaper.pdf.

[5] Robert M. Hauser, Solon S. Simmons, and Devah Pager, "High School Dropout, Race-Ethnicity, and Social Background from the 1970s

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why so many elderly African Americans and Hispanics live at or below the poverty line, we not only must retrace their life-long relationship to the labor market, but also their relationship to the housing market, and to the educational and criminal justice systems.

The production of racial inequality is largely cumulative in three distinct but related respects, all of them readily apparent in the context of school segregation.[6] First, advantage and disadvantage have cross-generational causes and effects. Consider current racial gaps in wealth. In 2000, non-Hispanic white households enjoyed a median net worth of $79,400, *eight times* the net worth of Hispanic households and *ten times* the net worth of African American households.[7] Even at similar levels of income, huge gaps remain.[8] Most of the wealth gap owes to equally enormous racial differences in the intergenerational transfer of wealth, the roots of which we find mainly in historical public and private sector policies and practices that created wealth for whites and denied it to nonwhites.[9] For example, the key initiatives of the New Deal and Fair Deal era, including Social Security, Unemployment Insurance, and the G.I.

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to the 1990s," *Dropouts in America: Confronting the Graduation Rate Crisis*, Harvard Education Press, Cambridge, MA (2004) (Gary Orfield, Ed.).

[6] Rebecca M. Blank, "Tracing the Economic Impact of Cumulative Discrimination," *American Economic Review*, 95.2, 99-103 (2005).

[7] Shawna Orzechowski and Peter Sepiella, "Net Worth and Asset Ownership of Households: 1998 and 2000," *Current Population Reports*, 70-88 (U.S. Census Bureau: May 2003), available at http://www.census.gov/prod/2003pubs/p70-88.pdf.

[8] Thomas M. Shapiro, *The hidden cost of being African American: how wealth perpetuates inequality*, Oxford University Press, New York 47-56, 69 (2004).

[9] Dalton Conley, *Being Black, Living in the Red: Race, Wealth, and Social Policy in America*, University of California Press, Berkeley, CA (1999), and Thomas M. Shapiro, *The hidden cost of being African American: how wealth perpetuates inequality*, Oxford University Press, New York (2004).

Bill, all but excluded African Americans from their benefits.[10] As a result, African Americans whose parents came of age in the 1940s and 1950s will receive less than one-tenth the inheritance of their white peers.[11]

Racial inequality accumulates across social arenas as well. Outcomes in one domain, whether favorable or unfavorable, shape outcomes in other domains. For example, fifty years of research on "neighborhood effects" documents the ways that social opportunities and outcomes cluster spatially in an intricate, but nonetheless intelligible web of reciprocal causation.[12] Because public infrastructure and basic services like transportation, education, public safety, and recreation are funded largely by local tax revenues, residents in poor municipalities are taxed at higher rates than those in more affluent areas for similar services – or, they receive lesser services for the taxes they pay.[13] Childhood obesity rates escalate in low-income neighborhoods as fear of crime and the lack of playgrounds and parks in poor areas keeps children indoors.[14] Segregation and unequal access to health care mean that racial minorities receive less and worse health

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[10] Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*, W.W. Norton & Co., New York (2005).

[11] Thomas M. Shapiro, *The hidden cost of being African American: how wealth perpetuates inequality*, Oxford University Press, New York, 69 (2004).

[12] Margery Austin Turner and Dolores Acevedo-Garcia. "Why Housing Mobility? The Research Evidence Today," *PRRAC Newsletter* (January/February 2005).

[13] Myron Orfield, *Metropolitics: a regional agenda for community and stability*, The Brookings Institute, Washington, D.C., and The Lincoln Institute of Land Policy, Cambridge, MA (1997 rev. ed. 1998).

[14] Press Release: "Obesity Still a Major Problem," U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (April 14, 2006), available at http://www.cdc.gov/nchs/pressroom/06facts/obesity03_04.htm (refers to *Prevalence of Overweight Among Children and Adolescents*).

care than whites do, exacerbating health disparities.[15] Health difficulties in turn undermine student academic performance.[16] Employment, health, wealth, crime and safety, delinquency and risky behavior, educational achievement, recreation – neighborhood residence has implications for them all.

Finally, inequality also arises from interactions within a single social domain over time. Thus, a poor work history in one's young adult years will likely hamper one's ability to secure future employment, get promotions, and earn high wages.[17] A student judged precocious in elementary and middle school is more likely to be placed in college-prep classes in high school, making her a more appealing college admissions candidate.[18] Offers of admission with generous financial aid packages in turn will make it more likely that she attends college and graduates on time.[19]

We could add many other examples of cumulative causation across generations, across domains, and within domains, but none would be more compelling or more exemplary of the structural and institutional dynamics underlying persistent racial exclusion in the United States than the case of school segregation. More than five decades after *Brown* the nation's public schools remain extremely segregated by race and class, with most urban African American and many Hispanic students isolated

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[15] David R. Williams and Chiquita Collins, "Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health," 116 *Public Health Reports*, 404, 405 (Sept./Oct. 2001).

[16] Richard Rothstein, *Class and Schools: Using Social, Economic, and Educational Reform to Close the Black-White Achievement Gap*, Teachers College Press, New York (2004).

[17] William Julius Wilson, "When Work Disappears: The World of the New Urban Poor," Vintage Books, New York (1996).

[18] Jeannie Oakes, "Keeping Track: How schools structure inequality," Yale University Press, New Haven (1985).

[19] Alberto Cabrera and Stephen LaNasa, "On the Path to College: Three Critical Tasks Facing America's Disadvantaged," *Research in Higher Education*, 42(2), 119-141 (2001).

from real educational opportunity in poor school districts. Jefferson County's and Seattle's limited use of race-based student assignment plans reflects the school boards' appreciation of these dynamics and represent modest, efficient, and necessary efforts to address them.

B. The Harm, Causes, And Consequences Of Segregation Are Known And Specifiable.

A range of historical and contemporary policies, practices and collective decisions combine to create racial segregation in K-12 schools, constraining access to quality public education for many African American and Hispanic students. Because children typically attend schools close to home, the racial makeup of residential neighborhoods is the most important determinant of the racial composition of the schools within them. Levels of residential and school segregation from whites are very highly correlated for blacks, Hispanics, and Asian Americans.[20] As residential neighborhoods in the United States are substantially segregated by race, so too are schools to the extent that they employ localized attendance policies.[21] This pattern did not arise by accident or personal choice alone, but through government policies and private discrimination that has never been effectively disestablished.[22]

i. Historical Factors Producing Segregation.

The discriminatory housing policies and widespread practices that created and maintain segregation in both

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[20] Lisa Robinson and Andrew Grant-Thomas, *Barriers to Housing – Race, Place, and Home: A Civil Rights and Metropolitan Opportunity Agenda*, The Civil Rights Project at Harvard University, Cambridge, MA (September 2004), available online at http://www.civilrightsproject.harvard.edu/research/metro/barriers_housing.php.

[21] Nancy A. Denton and Douglass S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, Harvard University Press, Cambridge, MA (1993).

[22] Sheryl Cashin, *The Failures of Integration*, Public Affairs (2004).

the North and South have been amply documented. The FHA and VA mortgage programs that allowed many Americans to buy their first homes served virtually only white applicants.[23] Private developers openly proclaimed that their new tract homes were to be sold to whites only.[24] Racial covenants, requiring white homeowners to sell their homes to whites, were commonly attached to deeds in the North and South.[25] Discrimination by realtors and lenders, including "block busting," hastened the rapid segregation of urban neighborhoods.[26]

Racially discriminatory public housing policies, urban renewal and slum clearance exacerbated patterns of racial concentration in cities.[27] By the 1950s, the racial character of the movement of people out of the cities and into the suburbs was well enough understood to be given the name "white flight."[28] Newly created and racially segregated white suburbs also benefited from local property tax policies. This funding formula created a significant funding gap between suburban and urban school districts during the 1950s, a gap that persists today.[29] The combination of racially discriminatory public policy and private discrimination

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[23] Richard Thompson Ford, "The Boundaries of Race: Political Geography in Legal Analysis," 107 *Harvard Law Review* 8 (1994); Kevin Fox Gotham, "Urban Space, Restrictive Covenants and the Origins of Racial Residential Segregation in a U.S. City, 1900-1950," *International Journal of Urban and Regional Research* 24.3 (2000).

[24] David L. Kirp, John P. Dwyer, and Larry A. Rosenthal, *Our Town: Race, Housing, and the Soul of Surburbia*, Rutgers University Press, New Brunswick, NJ (1995).

[25] Evan McKenzie, *Privatopia: Homeowner Associations, and the Rise of Residential Private Government*, Yale University Press, New Haven, CT (1996).

[26] John Yinger, "Housing Discrimination Is Still Worth Worrying About," *Housing Policy Debate*, 9, 893-927 (1998).

[27] Sheryl Cashin, *The Failures of Integration*, Public Affairs (2004).

[28] William Frey, "Central City White Flight: Racial and Nonracial Causes," *American Sociological Review*, 44, 452-448 (1979).

[29] Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States*, Oxford University Press, New York (1985).

produced entrenched patterns of residential segregation and resource disparities, laying the foundation for segregated and unequal school systems today.

ii. The Historical Legacy and Contemporary Factors Maintaining School Segregation.

For a time, the civil rights victories of the 1950s and 1960s and a more accepting turn in racial attitudes ushered promising trends in housing and school desegregation. The Fair Housing Act helped expand housing opportunities for African Americans. District-level school desegregation policies in the 1970s and 1980s, often court-mandated but sometimes voluntary, made a significant contribution towards remedying racial inequities in public education.[30] Unfortunately, new trends have undermined these gains over the last twenty years.[31] The historical patterns, many of which have a legacy of discriminatory policy, and new, facially race-neutral policies and practices now interact to reinforce segregation in our society and our classrooms. Today, in many cities, we must refer not simply to segregated schools, but to entire school districts mired in poverty, social isolation, and their ill effects.

Because we finance public education systems primarily through local taxes, schools reflect the widely differing economic and social circumstances of their neighborhoods.[32] Residential segregation itself affects employment opportunities, health care, and economic status in many

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[30] Amy Stuart Wells and Robert L. Crain, "Perpetuation Theory and the Long-Term Effects of School Desegregation," *Review of Educational Research*, 64:4, 531-555 (1994).

[31] Gary Orfield and Chungmei Lee, "Brown at 50: King's Dream or Plessy's Nightmare?" Harvard Civil Rights Project, Cambridge, MA (2004).

[32] Raquel Fernandez and Richard Rogerson, "Income Distribution, Communities, and Quality of Public Education," *The Quarterly Journal of Economics*, 111(1), 135-164 (1996).

ways.[33] For example, by shaping the range and quality of institutions to which we have access, neighborhoods also help determine the composition of our social networks. "It's not just what you know, it's also who you know," and most workers find their jobs through their informal networks.[34] Indeed, at least one in three job changers finds new work without conducting an active search. As one pair of network researchers puts it, "almost by definition job changes made without searching tend to be mediated by social networks."[35]

The segregative effects of new, facially race-neutral policies have been profound. Fragmented local governments and fragmented school districts in metropolitan areas enable municipalities to enact parochial policies, such as exclusionary zoning, that ensure residential segregation. For example, suburban housing and land use policies that promote larger lot development depress the growth of suburban rental housing, increase housing costs and limit the influx of African American and Latino households.[36] Federal and state subsidized housing also contribute to racial segregation, clustering subsidized housing in inner city communities of color.[37] In addition, housing discrimination by realtors, lenders and landlords

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[33] H.J. Holzer, "The spatial mismatch hypothesis: what has the evidence shown?" *Urban Studies*, 28, 118 (1991).

[34] James Elliot, "Social Isolation and Labor Market Insulation: Network and Neighborhood Effects on Less-Educated Urban Workers," *The Sociological Quarterly*, 40, 199-216 (1999).

[35] Peter Marsden and Elizabeth Gorman, "Social Networks, Job Changes and Recruitment," *Sourcebook on Labor Markets: Evolving Structures and Processes*, Plenum Press, New York (2001) (Ivar Berg and Arne L. Kalleberg, Eds.).

[36] Rolf Pendall, "Local Land Use Regulations and the Chain of Exclusion," *Journal of the American Planning Association*, 66, 125-142 (2000).

[37] Lance Freeman, "Siting Affordable Housing: Location and Neighborhood Trends of Low Income Housing Tax Credit Developments in the 1990's," Brookings Institute (2004), available online at http://www.brookings.edu/urban/publications/20040405_Freeman.htm.

remains prevalent.[38] Racial steering by realtors and predatory or discriminatory mortgage lending constrain housing opportunities, and therefore educational opportunities, for people of color.[39]

As a result of these trends a growing number of students of color attend schools that lack adequate resources and are segregated by both race (African American and Hispanic) and class (poor). The racial differences in circumstances are staggering and demand redress. Half of all African American students in the United States attend a central city school district, compared to only one in six White students.[40] At the national level, roughly two in three white or black students would have to transfer for metropolitan school districts to become fully integrated. While neighborhood segregation declined slightly during the 1990s, school segregation actually increased. Whereas the typical African American child attends a school in which seven in ten students are poor, the typical white student attends a school in which three in ten peers are poor.[41]

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[38] John Yinger, "Housing Discrimination Is Still Worth Worrying About," *Housing Policy Debate*, 9, 893-927 (1998).

[39] HUD Publications:"Discrimination in Metropolitan Housing Markets: National Results from Phase 1, Phase 2, and Phase 3 of the Housing Discrimination Study (HDS)" (June 2004).

[40] Christopher Swanson, "Who Graduates? Who Doesn't? A Statistical Portrait of Public High School Graduation, Class Of 2001," Education Policy Center, The Urban Institute (February 25, 2004), available online at http://www.urban.org/UploadedPDF/410934_WhoGraduates.pdf.

[41] John Logan, "Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000," Lewis Mumford Center for Comparative Urban and Regional Research (March 29, 2002), available online at http://mumford.albany.edu/census/SchoolPop/SPReport/page1.html.

iii. The Impact of Segregated Schools on Students of Color and Society.

Like segregation in housing, segregation in schools concentrates poverty for African Americans and Latinos. Both racial segregation and concentrated poverty in turn relate to school opportunities and achievement levels.[42] High-poverty schools are very likely to be poorly funded schools marked by large, sometimes overcrowded classes; weak curricula; insufficiently trained teachers and high teacher turnover; low standardized test scores; high grade retention and drop-out rates; and low rates of parental involvement.[43] Students in these schools manifest more health problems and express greater concern about their personal safety than do their peers in more affluent schools. They are less likely to be introduced to college "gateway" classes such as algebra and geometry by the eighth grade and are more likely to be tracked into lower level courses that do not prepare or qualify them for college.[44] The poverty of many Latino families, combined

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[42] Gary Orfield and Susan Eaton, "Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education," New Press, New York (1996) and "Quality Counts '98: The Urban Challenge," *Education Week*, 6 (January 8, 1998), Stephen Schellenberg, "Concentration of Poverty and Ongoing Need for Title I," *Hard Work for Good Schools: Facts Not Fads in Title I Reform.* Cambridge, MA. The Civil Rights Project, Harvard University, Cambridge, MA (1999) (Gary Orfield and Elizabeth DeBray, Eds.).

[43] See references above and Linda Darling-Hammond, "Recruiting Teachers for the 21st Century: The Foundation for Educational Equity," *Journal of Negro Education*, 68, 254, 279 (2000) and Eric A. Hanushek, *et al.*, "Do Higher Salaries Buy Better Teachers?" Paper Presented at the Annual Meeting of the American Economic Association (January 3-5, 1999) and Richard D. Kahlenberg, "Helping Children Move from Bad Schools to Good Ones," The Century Foundation (June 15, 2006).

[44] Rand Corporation Study as cited by R. Sanders and W. Holt, "Still separate and unequal: Public education more than 40 years after Brown," *In Motion Magazine* (October 20, 1997), available online at http://www.inmotionmagazine.com/forty.html; D. Y. Ford and J. J. Harris, III, "Perceptions and attitudes of Black students toward school, achievement and other educational variables," *Child Development*, 67, 1141-

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with their comparative unfamiliarity with college-going processes, means that the lack of information, guidance and other resources associated with high-poverty schools may be especially harmful for this group.[45]

Research has found that the poverty of a school, far more than the poverty status of individual students, determines educational outcomes, and that impoverished students do better when they live in middle-class neighborhoods and/or attend more affluent schools.[46] Conversely, a substantial body of research indicates that students educated in integrated environments fare better than their segregated peers.[47] Given the strong linkage between racial and economic segregation in public schools, it would be nearly impossible to support socioeconomic integration without also supporting racial integration.

1152 (1996). C. Adelman, *Answers in the tool box: Academic intensity, attendance patterns and bachelor's degree attainment*, U.S. Department of Education, Office of Educational Research, Washington, D.C. (1999), available online at www.ed.gov/pubs/Toolbox.

[45] L. G. Tornatzky, R. Cutler, and J. Lee, *College knowledge: What Latino parents need to know and why they don't know it*, Tomas Rivera Policy Institute, Claremont, CA (2002); P. Gándara, *Capturing Latino students in the academic pipeline*, California Policy Seminar Brief Series, 10(3), University of California Latino/Latina Policy Research Program, Berkeley, CA (1998).

[46] Stephen J. Schellenberg. "Concentration of Poverty and Ongoing Need for Title I," *Hard Work for Good Schools: Facts not Fads in Title I Reform*, The Civil Rights Project, Harvard University, Cambridge, MA 130, 137 (1999) (Gary Orfield and Elizabeth DeBray, Eds.).

[47] Claude S. Fischer *et al.*, *Inequality by Design: Cracking the Bell Curve Myth*, Princeton University Press, Princeton, N.J. 83-84 (1996), and Jomills H. Braddock, II and James M. McPartland, "How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers," *Journal of Social Issues*, 43, 5-39 (1987), and Amy Stuart Wells and Robert L. Crain, "Perpetuation Theory and the Long-Term Effects of School Desegregation," *Review of Educational Research*, 64:4, 531-555 (1994), and Eric Camburn, *American Journal of Education*, 98:4 (August 1990).

Desegregated schooling also promotes intergenerational gains for racial minorities. One study concludes that "improving economic and educational opportunities for one generation of minority individuals raises the socioeconomic status of the next generation, so that those who follow are more apt to begin school at the same starting point as their non-minority classmates."[48] By offering low-income minority children access to more developed social networks than isolated and resource-poor institutions can typically provide,[49] desegregated settings can help minority students to develop a more robust set of personal educational and professional expectations than they otherwise might.[50]

In the United States, each successively higher education level is associated with greater earning power. Over the last 25 years the gaps in lifetime earnings between high school dropouts and graduates, and between high school and college graduates, have only widened.[51] Higher levels of educational attainment are associated with greater labor force participation rates and a lower probability of unemployment.[52] The gap in employment rates between college and high school graduates has grown

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[48] William T. Trent, "Outcomes of School Desegregation: Findings from Longitudinal Research," *Journal of Negro Education*, 66:255 (1997).

[49] Amy Stuart Wells, "The Consequence of School Desegregation: The Mismatch Between the Research and the Rationale," 28 Hastings Const. LQ 771, 786 (2001).

[50] Michael Kurlaender and John T. Yun, "Is Diversity a Compelling Educational Interest? Evidence from Metropolitan Louisville," The Civil Rights Project, Harvard University, Cambridge, MA (1999), summary available online at http://www.diversityweb.org/Digest/W01/louisville.html.

[51] J. C. Day and E.C. Newburger, "The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings," U.S. Census Bureau (July 2002), available online at http://www.census.gov/prod/2002pubs/p23-210.pdf.

[52] U.S. Census Bureau educational attainment and employment data from the 2004 Current Population Survey online at http://www.census.gov/population/socdemo/education/cps2004/tab05a-01.pdf.

steadily as well.[53] Research studies have also described a strong relationship between a person's education level and her health status: the lower the educational level achieved, the higher the mortality rate and rates of morbidity for diseases such as cancer and heart disease.[54]

Integrated schools also confer significant societal benefits. Diverse educational settings contribute to all students' ability to participate in a pluralistic society, an important goal in our diversifying society and global economy. Whites' proximity to blacks in schools, workplaces, and neighborhoods increases their chances of forming inter-racial friendships, and some recent work suggests that "students who attend more diverse schools have higher comfort levels with members of racial groups different than their own, an increased sense of civic engagement and a greater desire to live and work in multiracial settings relative to their more segregated peers."[55] White students in relatively integrated settings display greater tolerance of their black peers than do those in more segregated settings.

A growing body of work suggests that desegregated experiences during childhood equip people with the tools they will need to successfully negotiate a society and world becoming ever more multiracial, multiethnic, and multicultural. The educational inequities produced by segregation today threaten to deprive our nation of much of its next generation of economic, political and social leaders,

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[53] Joint Economic Committee Study: "Investment in Education: Private and Public Returns," United States Congress (January 2000), available online at http://www.house.gov/jec/educ.htm.

[54] Center for the Advancement of Health: "Life Lessons: Studying Education's Effect on Health," 7:12 (December 2002), available online at http://www.cfah.org/factsoflife/vol7no12.cfm.

[55] Gary Orfield and Chungmei Lee, "Brown at 50: King's Dream or Plessy's Nightmare?" Harvard Civil Rights Project, Cambridge, MA (2004).

and of informed citizens capable of holding those leaders accountable.

iv. School Segregation, Housing Segregation, and the Cycle of Disadvantage.

The issues of residential and school segregation are deeply entwined, both because perceptions of school quality so powerfully influence parents' residential choices, and because children typically attend schools close to home. Segregated housing patterns fuel segregated classrooms and disparate educational outcomes. In turn, low quality public schools reinforce segregated housing patterns due to the strong correlation between housing prices and public school quality.[56] The quality of education is the most important factor driving many White families out of urban school districts.[57] The result of these patterns is a downward spiral of continued White flight, flight of higher income families and racial and economic segregation in our urban school districts. In short, school segregation is both an important outcome and a crucial source of residential segregation.[58]

Unless pointed and deliberate steps are taken to disrupt it, the costly feedback loop generated by segregated schools and neighborhoods will only increase the

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[56] Sarah Max, "School, What Is It Good For? When it comes to home prices, school matters. Buyers will pay a premium to live near top schools," *CNN.com* (August 27, 2004), available online at http://money.cnn.com/2004/08/27/real_estate/buying_selling/schools/ and David Brasington and Donald R. Haurin, "Educational Outcomes and House Values: A Test of the Value Added Approach," *Journal of Regional Science*, 46, 245-268 (2006).

[57] Elena Irwin Bayoh and Timothy Haab, "Determinants of Residential Location Choice: How Important are Local Public Goods in Attracting Homeowners to Central City Locations?" *Journal of Regional Science*, 46:1, 97-120 (February 2006).

[58] Nancy Denton, "The Persistence of Segregation: Links Between Residential Segregation and School Segregation," *In Pursuit of a Dream Deferred. Linking Housing & Education Policy*, Peter Lang Publishing Inc., New York, NY, ch. 4 (2001).

social isolation suffered by many students of color. The societal implications of this are severe, with entire generations of young black and Hispanic Americans unprepared for the future. As noted by Dr. Gary Orfield of the Harvard Civil Rights Project:

> When an entire racial or ethnic group experiences consistently high dropout rates, these problems can deeply damage the community, its families, its social structure, and its institutions.[59]

The new racial re-segregation in education, and the vast inequities that flow from it, pose a direct challenge to the commitment to eradicating educational segregation and inequality articulated in *Brown*. In this case, two school districts have taken modest steps to address the problem. We know from many studies that integrated schools enhance educational opportunities for minority children and increase the quality of education for all students. When white children and children of color attend the same schools, everyone benefits. Our challenge is not simply to take the steps necessary to assure that all children have equal access to a high-quality education, but also to recognize the new dynamics of racial segregation today and move to permit competent, thoughtful intervention. School districts, concerned about squandering gains made during years in which their systems sought to maintain desegregated schools, are responding to troubling re-segregation trends with voluntary plans designed to alter the fundamental institutional dynamics of housing, transportation, zoning, and education in ways that account for specified, predictable, yet often unintentional institutional interactions. This Court should provide these districts leave to intervene in a process that, undisrupted, will continue to perpetuate racialized inequality to the detriment of our national fabric.

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[59] Gary Orfield, Ed., *Dropouts in America: Confronting the Graduation Rate Crisis*, Harvard Education Press, Cambridge, MA, 2 (2004).

C. Where Racial Harms Are Institutionally Produced, Democratically Elected And Locally Accountable School Districts Are The Most Appropriate Institutional Actor For Responding To School Segregation.

As this Court reiterated in *Grutter*, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause" because "[n]ot every decision influenced by race is equally objectionable." *Grutter v. Bollinger,* 539 U.S. 306, 327 (2003). Therefore, Courts must "carefully examin[e] the importance and the sincerity of the government's reasons for using race in a particular context." *Id.* The context here is that duly constituted local authorities, accountable to the citizenry, have voluntarily chosen to counteract segregation and ameliorate its pernicious effects by making student assignments based on race under strictly limited circumstances. As shown, *supra,* the pernicious effects of segregation and the beneficial effects of integration are beyond question, both as a matter of law and as a matter of social science.

In this context, the issue is not the power of a federal court to compel race-based action by a school district, but whether a federal court should interfere with and prevent a local authority from realizing the benefits of curtailing segregation and promoting integration. Although the intricate patterns of societal discrimination may be too amorphous a concept of injury for courts to manage, local government is certainly permitted to take cognizance of such injuries and respond with carefully measured actions.

Courts have long deferred to the professional judgment of local school districts to determine the educational policies that best suit the needs of the children within each school district. *See,* e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges."); *Freeman v. Pitts*, 503 U.S. 467, 489 (1992); *Bd. of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 248 (1991). In this

Court's estimation, local control encourages the responsiveness of local school boards to those whom they serve, *Freeman*, 503 U.S. at 490, community support for and confidence in the public school system, *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974), and "experimentation, innovation, and a healthy competition for educational excellence." *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1974). The policies of the Jefferson County Public Schools and the Seattle Public Schools are designed to serve these interests.

Over the past several decades, the Jefferson County Public School system has carefully refined its student assignment plan to meet both legal mandates and the needs and interests of its community. As a democratically-elected body, the Jefferson County Board of Education is accountable to its constituents and motivated to maintain their support. For this reason, it periodically commissions surveys of its students, graduates, parents, teachers, and other members of the community to determine their attitudes and preferences about the JCPS. The Jefferson County School board has further explained that integrated schools result in improved student education and community support for public schools because the plan has enabled the board to reach the difficult goal of maintaining a system of racially integrated schools in a county with a long history of segregation and a presently segregated housing market.

Similarly, the experience of the Seattle Public Schools reflects continued experimentation with voluntary racial integration plans. The Seattle Public Schools have a long history of voluntary efforts to integrate its schools. The assignment plan at issue is the latest, and most minimal, of these efforts. In contrast to earlier plans, the current plan does not mandate a particular racial balance or require assignment to a particular school because of race. In addition, the Plan was to be reviewed annually by the school board.

The moderateness of their efforts should not blind us to the importance of the work these school boards mean to do. Board members recognize that the structural dynamics

of segregation, rooted in our nation's history and fuelled by an interactive set of contemporary policies and practices, will not yield to wishful thinking. Nor will the myriad harms that segregation promotes. School boards alone cannot dismantle the machinery of segregation, but through the voluntary use of race-conscious measures they can mitigate its severity and the severity of its effects. Fifty years of robust case law, the national interest and the social and educational welfare of all our students demand that they be allowed to do so.

CONCLUSION

On the basis of the foregoing arguments and authorities, the Caucus for Structural Equity urges this Court to affirm the decisions of the lower courts.

Dated: October 10, 2006. Respectfully submitted,

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PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF HISTORIANS OF THE CIVIL RIGHTS ERA WILLIAM H. CHAFE, DAVISON DOUGLAS, CHARLES PAYNE, TOMIKO BROWN-NAGIN, KENNETH MACK, RISA GOLUBOFF, KEVIN KRUSE AND MATT LASSITER AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are historians and law professors who specialize in U.S. civil rights history, including the desegregation of American elementary, middle, and high schools. In this brief, amici provide the Court with an overview of the historical context in which the school assignment policies under challenge have been developed to assist the Court in resolving the issues presented.

Amici include William H. Chafe, Dean of the Faculty of Arts and Sciences, Vice Provost for Undergraduate Education, and Alice Mary Baldwin Professor of History at Duke University; Davison Douglas, Arthur B. Hanson Professor of Law at the William & Mary College of Law; Charles Payne, Director, Department of African and African American Studies and Professor of History at Duke University; Tomiko Brown-Nagin, Professor of Law and History and F. Palmer Weber Research Professor at the University of Virginia; Risa Goluboff, Associate Professor of Law at the University of Virginia School of Law; Kevin Kruse, Associate Professor of History at Princeton University; and Matt Lassiter, Associate Professor of History at the University of Michigan.[2]

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[1] Pursuant to Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici curiae and their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

[2] Institutional affiliations are provided for purposes of identification only. The views expressed in this brief are those of the individual amici and do not reflect the views of the institutions at which they teach.

SUMMARY OF ARGUMENT

At issue is whether politically accountable school boards have the discretion to adopt plans that encourage the development of racially integrated schools. Public school boards in Seattle and Jefferson County, Kentucky ("the school boards") have adopted such policies to combat racial isolation – the disproportionate absence or presence of students of a given race in a particular school. Responding to widespread public support for pursuing the educational benefits that flow from reducing racial isolation, the school boards developed the school assignment policies under challenge here ("the policies"). Amici submit that the policies, which recognize school children's race as one of many factors considered in school assignments, should be understood in the context of the nation's development of universal public education and the long struggle to overcome the legacy of racially segregated schools. The policies are fully consistent with the Court's education and school desegregation jurisprudence, which has emphasized the importance of local, politically accountable control of schools and of states' roles as laboratories of social experimentation in the field of education.

The historical circumstances from which the polices emerged must inform the Court's assessment of whether they pass strict scrutiny because "context matters" when interpreting the Equal Protection Clause. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). The school boards formulated the policies in view of the nation's long history of educational discrimination against African Americans and widespread resistance to the desegregation mandate issued by the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954).

For decades, the Supreme Court, in tandem with the lower federal courts, imposed school desegregation on white

communities in which resistance to *Brown* ran deep. Since the era of initial resistance to *Brown*, however, "there has been a massive and continuing movement of the American public from overwhelming acceptance of the principle of segregated schooling . . . toward acceptance of the principle of integrated schooling." Howard Schuman *et al.*, Racial Attitudes in America 103 (1997). This evolution in thinking is an outgrowth, in part, of the desegregation of schools and public accommodations accomplished by the Supreme Court and the U.S. Congress. *See id.* at 197 (noting that those who have experienced integrated social spaces are more likely to support integrated schools). More than 90 percent of Americans now support the goal of school integration. *See id.* at 126, 246-249.

The policies demonstrate that citizens in Jefferson County, Seattle, and the many other districts in which voluntary school desegregation programs are in place no longer require judicial intervention to strive for *Brown*'s ideal of equality in education. Across the country, many local communities now embrace the value of racially mixed student bodies of their own accord.

It would be ironic, indeed perverse, if the Court were to quash the democratic consensus in support of school desegregation that now exists in local communities throughout the nation. For that consensus is an outgrowth of the Court's own jurisprudence. The school boards' voluntary efforts to achieve racially diverse student bodies mark the success of the Court's effort to implement *Brown*, the decision that constitutional scholars and legal historians widely view as one the Court's finest achievements.[3] After

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[3] *See, e.g.*, Jack M. Balkin, *Brown v. Board of Education*: A Critical Introduction, in What *Brown v. Board of Education* Should Have Said 185-200 (Jack M. Balkin ed., 2001) (*Brown* "is the single most honored opinion in the Supreme Court's corpus"); Morton J.

the public has internalized the ideals for which *Brown* stands, a decision by the Court calling into question voluntary public initiatives in support of integrated schools would undermine one of its greatest legacies.

The following overview of the nation's transition away from segregated education illuminates the relationship between the Supreme Court, in its role as expositor of constitutional norms, and societal acceptance of the principle of equality in education. Within this context, the policies should be understood as constitutionally permissible attempts to combat racial isolation and fulfill *Brown*'s promise.

ARGUMENT

I. The Voluntary School Assignment Policies At Issue Are Local Responses To The Struggle Against Racial Segregation And Reflect The Historical Role Of Public Schools As Engines Of Democracy And Opportunity.

The policies challenged here are consistent with the responsibility of public schools to prepare "students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982). When they function properly, public schools do more than teach pupils to read, write, and figure: they equip students with the skills necessary to participate as informed voters in our democracy, socialize young people to live in an

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Horwitz, The Warren Court and the Pursuit of Justice 15 (1998) (describing *Brown* as "perhaps the most important judgment ever handed down by an American Supreme Court"); J. Harvie Wilkinson III, From *Brown* to *Bakke*: The Supreme Court and School Integration: 1954-1978 6 (1979) (describing *Brown* as maybe "the most important political, social and legal event in America's twentieth-century history").

increasingly diverse nation, and teach them to treat those of different backgrounds with respect. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests.") (quotation marks and citation omitted); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (recognizing "public schools as an assimilative force by which diverse and conflicting elements in our society are brought together on a broad but common ground") (quotation marks omitted).

The Court has "acknowledged that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" *Pico*, 457 U.S. at 864 (quoting *Ambach*, 441 U.S. at 76-77); *see also Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."). The policies aim to prepare Jefferson County and Seattle students to function in our increasingly diverse society, and are faithful to the goals and purposes of American public schools.

A. The Development Of Universal Public Education In America.

Although the Framers did not include any provisions relating directly to public education in the Constitution, they understood from the nation's earliest days that the democratic republic could not survive without an informed, educated citizenry. Thus, Thomas Jefferson proposed that the Virginia legislature pass a "Bill for the More General Diffusion of Knowledge," which would have established a system of

public schools in the commonwealth; on three occasions between 1779 and 1817, the legislature rejected the bill. *See* Thomas Jefferson and Education in a Republic 22-23 (Charles Flinn Arrowood ed., 1930).[4] Jefferson lamented the "snail-paced gait" in educational progress, *see* School: The Story of American Public Education 25 (Sarah Mondale and Sarah B. Patton eds., 2001) ("Mondale & Patton"), but Virginia's failure to develop free, public education for its citizens was typical of the states in the 17th and into the 18th centuries. Indeed, "free public education was virtually nonexistent in the late 18th century. . . . Even at the time of adoption of the Fourteenth Amendment, education in Southern States was still primarily in private hands, and the movement toward free public schools supported by general taxation had not taken hold." *Wallace v. Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring).

In the North, tireless efforts to establish systems of "common" schools on the part of reformers like Horace Mann yielded some fruit. By 1860, approximately two-thirds of northern white children attended some type of school. Davison M. Douglas, Jim Crow Moves North: The Battle Over Northern School Segregation, 1865-1954 60 (2005). But the situation for black children was far more bleak. During the antebellum era, many northern states either excluded blacks altogether from the common schools or else

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[4] Jefferson also proposed spending federal funds "to the great purposes of public education." Donald Warren, To Enforce Education 26 (1974). Other leaders of the time, including Benjamin Rush and Noah Webster, recognized that the new democracy required an effective education system, and advocated the use of public funds to support one. *See* Allen Hansen, Liberalism and American Education in the 18th Century 48-64 (1965); *see also* Richard W. Riley, *The Role of the Federal Government in Education – Supporting a National Desire for Support for State and Local Education*, 17 St. Louis U. Pub. L. Rev. 29, 31 (1997).

relegated them to inferior, racially separate schools. *See id.* at 12-60. Moreover, in much of the antebellum South, educating blacks constituted a criminal offense. *See generally* Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society 1780-1860 196-97 (1983).

The doors of educational opportunity opened ever so slightly to black Americans during the era of Reconstruction. Some northern states, including Indiana and Illinois, permitted black children to attend public schools for the first time. *See id.* at 65-68. In 1865, Congress created the Freedmen's Bureau, which founded schools for freed blacks. The Bureau played a role in establishing or supporting 4,300 schools, including various colleges and universities. *See* Marvin H. Lett, Grutter, Gratz *and Affirmative Action: Why No "Original" Thought?*, 1 Stan. J. Civ. Rts. & Civ. Liberties 417, 435-36 (2005). At the same time, the readmission of several southern states in Reconstruction was contingent on their adoption of constitutional provisions requiring the development of public education systems. *See* Mondale & Patton at 47. Nevertheless, the process of creating free, publicly supported education for all Americans yielded few early dividends, and universal education remained elusive in the post-Civil War era.

By the turn of the twentieth century, however, there had been explosive growth in the development of "common" schools. Expenditures on public schools rose from $69 million in 1870 to $147 million in 1890, and enrollment increased from 7.6 million to 12.7 million in the same timeframe. *See* Mondale & Patton at 58. The number of students enrolled in public high schools doubled every decade from 1890 to 1930. *See id.* at 64. All states had established universal free education systems by the middle of the twentieth century.

But African Americans could not attend these schools on the same basis as whites. Public schools throughout much of the nation were *de jure* segregated by race until the Court found this practice unconstitutional in *Brown v. Board of Education*. The *Brown* Court recognized the crucial role schools play in transforming children into citizens, and that a unitary society could not be produced by a divided school system:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education . . . demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

347 U.S. at 493. *Brown* constituted an unprecedented turning point in the nation's constitutional, political, and educational history.

B. Evolution From Resistance To *Brown v. Board Of Education* To Desegregated Schools.

Brown precipitated a period of massive, often violent, resistance that recalled the era of Civil War and Reconstruction in nineteenth-century America. A bewildering number and variety of public and private individuals and organizations opposed *Brown*. In 1956, 101 U.S. Representatives signed the "Southern Manifesto," a declaration that *Brown* constituted a "clear abuse of judicial

powers" and commended "those states which have declared their intention to resist integration by any lawful means." Jack Bass, Unlikely Heroes 65 (1981); *see also* Jack Greenberg, Crusaders in the Courts 213-14 (1994). Other congressmen proposed bills attacking the Supreme Court and threatening to strip it of jurisdiction over matters relating to "states' rights." Greenberg at 214.

The governors and legislatures of most former Confederate states united in defiance of *Brown*, promising to use every "legal means" to preserve segregated schools. The legislatures met in special sessions and passed a plethora of laws designed to thwart integration. *See* Michael J. Klarman, From Jim Crow to Civil Rights 330-334 (2004); Bass at 117-118. These acts included pupil placement laws, laws suspending compulsory school attendance, and laws nominally "privatizing" the public schools. Of these devices, the pupil placement laws represented the greatest impediment to desegregation. Facially neutral, these laws nevertheless discriminated against black students who wished to attend desegregated schools, requiring them to undergo a burdensome application process that included intelligence and psychological testing. *See* Klarman at 329-333; Bass at 118.

Civic groups also played a pivotal role in the resistance. White citizens' councils, often described as an "up-town" or "buttoned-down" Ku Klux Klan, led the effort to thwart *Brown*. *See* Neil McMillen, The Citizens Council: Organized Resistance to the Second Reconstruction vii-viii, 11 (1971). The councils often included business, civic, and religious leaders. They exhorted whites to oppose *Brown* and threatened blacks who supported desegregation with economic reprisals. *See id.* at 208-211; John Dittmer, Local People: The Struggle for Civil Rights in Mississippi 46-49, 59-60 (1994). Worst of all, whites violently resisted school desegregation in many cities – pummeling blacks who

attempted to break the color line with fists, sticks, knives, and bricks. Some of the most sustained and shocking episodes of violence occurred in Little Rock (1957), New Orleans (1960), and Boston (1974). *See* Klarman at 326-329; Bass at 126-135; Ronald P. Formisano, Boston Against Busing 1-3, 75-82 (2004). For opponents of racial equality, *Brown* was an instance of judicial overreaching that could be nullified in the court of public opinion or by state legislators. *See* Bass at 117-118, 128-135.

The Court responded to the opposition's vilification in decisions that asserted the Court's supremacy and its obligation to interpret the Constitution and demand compliance with its edicts. In *Cooper v. Aaron*, the Court mandated compliance with *Brown* in the face of Governor Orval Faubus's use of the state militia – with the full backing of the state legislature and local white parents and students – to block desegregation of the Little Rock, Arkansas schools. 358 U.S. 1, 16-18 (1958). The Court answered the question whether the district court in Little Rock could delay desegregation in the face of "extreme public hostility" with a resounding no. *Id.* at 12. Quoting Chief Justice John Marshall's proclamation in *Marbury v. Madison* that "it is emphatically the province . . . of the judicial department to say what the law is," 5 U.S. (1 Cranch) 137, 177 (1803), the unanimous *Cooper* Court held that *Brown* could neither be "nullified openly and directly" by state officials, "nor nullified indirectly by them through evasive schemes for segregation." 358 U.S. at 17-18.

The Court expanded on *Cooper*'s principle of judicial supremacy by mandating compliance with *Brown* during the 1960s and 1970s. In a series of cases, the Court rejected school board plans that delayed, impeded, or resulted in only

token desegregation.[5] To speed the desegregation of Southern schools, the Court endorsed the pairing and clustering of non-contiguous school zones and approved the use of busing where necessary to achieve integration. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26-30 (1971). And the Court made clear that *Brown*'s mandate of integrated, unified school systems was not applicable only in the South, expanding the reach of its desegregation jurisprudence to schools nationwide. *See, e.g., Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208-09 (1973) (finding that intentional segregation by school board in one portion of Denver school system created prima facie case of unlawful segregation in other parts and shifted burden to authorities to prove that segregation was not unlawful).

Implemented through the lower federal courts and coupled with federal executive and legislative branch actions, the Court's desegregation jurisprudence broke Jim Crow's chokehold on the nation's public schools. *See* Brian K. Landsberg, Enforcing Civil Rights 139-141 (1997) (discussing how Department of Heath, Education, and Welfare regulations implementing title VI of the Civil Rights Act of 1964 advanced school desegregation); Bass at 253-255, 264. By 1976, 37% of African American students in the South attended majority white schools; virtually none had done so in 1954. *See* Gary Orfield and Chungmei Lee,

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[5] *See, e.g., Green v. New Kent Cty.*, 391 U.S. 430, 437-38 (1968) (holding that school boards had affirmative duty to desegregate and finding ineffective freedom-of-choice plans unconstitutional); *Monroe v. Bd. of Comm'rs of City of Jackson, Tenn.*, 391 U.S. 450, 459-60 (1968) (rejecting desegregation plan that delayed transition to unitary system); *Griffin v. Cty. School Bd. of Prince Edward Cty.*, 377 U.S. 218, 231-32 (1964) (holding that closing public schools while supporting private schools for whites constituted equal protection violation).

Brown at 50: King's Dream or Plessy's Nightmare? 19 (The Civil Rights Project, Harvard University 2004). The Court and other branches of the federal government had brought about a second Reconstruction of the public schools.

C. Retrenchment And The Return Of Racial Isolation.

In the last two decades, the trend toward diverse schools that began with *Brown* has been reversed. During this period, the incidence of racial isolation has increased in school districts across the country. *See* Erica Frankenberg and Chungmei Lee, Race in American Public Schools: Rapidly Resegregrating School Districts 3-4 (The Civil Rights Project, Harvard University 2002); *see also* Gary Orfield and Susan E. Eaton, Dismantling Desegregation: The Quiet Reversal of *Brown v. Board of Education* 53-55 (1996); Gary Orfield and John T. Yun, Resegregation in American Schools 5-6 (The Civil Rights Project, Harvard University 1999). Students' exposure to peers of other races has declined throughout the nation, and the South, in particular – which saw the greatest strides towards integration after *Brown* – has since 1986 experienced some of the most rapid re-segregation of school districts. *See* Frankenberg & Lee at 4; Orfield & Eaton at 53.

Conditions in the South are illustrative of this pattern of backsliding. In 1954, only .001% of black students in the South attended majority white schools. *See* School Resegregation: Must the South Turn Back? 29 (John Charles Boger and Gary Orfield eds., 2005). Following *Brown*, the number of African American students attending majority white schools in the South steadily increased to about 2% in 1964, 37% in 1976, and 43% in 1986. *Id.* In recent years, however, the number of black students attending majority white schools has steadily dropped – to 39% in 1991, 37% in 1994, 35% in 1996, 33% in 1998, and 30% in 2001. *See id;*

see also Orfield & Lee at 19. The reasons for this pattern vary from state to state, but the overall resegregative trend is clear.

Against the backdrop of increasing racial isolation in public schools, and in recognition of the educational benefits that racially diverse schools produce, local school boards in various states have adopted voluntary policies designed to reduce the likelihood that students attend racially isolated schools. It is in this context that we examine the local experiences in Jefferson County and Seattle that gave rise to the policies under challenge here.

II. The Policies Reflect A Democratic Consensus In Support Of Quality, Integrated Schools After Years Of Discrimination And Resistance To Integration In Jefferson County And Seattle.

A. Discrimination And Desegregation In Jefferson County.

As in so many other areas, it took federal court action to integrate the dual school systems in Louisville and Jefferson County, Kentucky. Kentucky was slow to establish schools for African American students; for example, Jefferson County did not have a public high school for blacks until well into the twentieth century. Denied adequate state support, African American leaders built religious and other private schools for the education of their children. *See* Omer Carmichael and James Weldon, The Louisville Story 40-41 (1957); Frank L. McVey, The Gates Open Slowly: A History of Education in Kentucky 146-151 (1949); R.B. Atwood, *Financing Schools for Negro Children from State School Funds in Kentucky*, 8 J. of Negro Edu. No. 4, 660-663 (Oct. 1939); Scott Cummings, *Race Relations and Public Policy in Louisville*, 27 J. of Black Studies No. 5, 615, 637 (May 1997).

Jim Crow maintained a tight hold on the public schools that eventually were established for African Americans in Kentucky. By statute, Kentucky required "each school board [to] maintain separate schools for the white and colored children residing in the district." *See* U.S. Commission on Civil Rights, School Desegregation in Louisville, Kentucky 56 (1976) ("U.S. Commission"). The City of Louisville and Jefferson County maintained separate school systems, with race and class marking the boundary between the city and suburban systems. Blacks predominated in the relatively poor city system; whites predominated in the wealthier, suburban system. The blacks who might have attended county schools were bused out; prior to 1956, the county paid the city to accept black students at Central High School in Louisville. *See id.* at 1. Schools for African Americans were uniformly inferior to schools for whites, with black schools receiving lower than average per pupil and capital expenditures. *See* C.H. Parrish, *The Education of Negroes in Kentucky*, 16 J. of Negro Edu. No. 3, 355-360 (Summer 1947); Atwood at 663-664. The dual systems ended their compulsory segregation policies during the 1956-1957 school year. *See* U.S. Commission at 56.

But racially isolated schools remained. The freedom-of-choice and geographic zoning plans put into place in Louisville and Jefferson County after the end of formal segregation resulted in only token desegregation. Assignment, transfer, busing, and site selection policies kept the races apart in the schools. *Id.* at 17, 57-63. Racial isolation steadily increased in Louisville in the decades following the school system's token integration, reaching a ten-year high during the 1971-72 school year. In that year, 51 of 67 schools in Louisville were characterized by extreme racial isolation, with either a 90-100% white majority or a 90-100% black majority. *See* Commission on Human

Rights, Commonwealth of Kentucky, Louisville Retreats to Segregation 2-11 (1972).

Meaningful desegregation occurred in Louisville and Jefferson County as a result of efforts by the U.S. Department of Health, Education, and Welfare and the Court's decisions in *Green*, 391 U.S. at 430, and *Swann*, 402 U.S. at 1. *See* U.S. Commission at 55-66. The process began in 1975, after the U.S. District Court for the Western District of Kentucky, at the direction of the Sixth Circuit Court of Appeals, issued a decision merging the city and suburban schools systems and instituting a busing program to disperse black and white students to racially mixed schools. *See* U.S. Commission at 73-79, 83-89; *see also Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson Cty.*, 489 F.2d. 925, 930-32 (6th Cir. 1973); *Hampton v. Jefferson Cty. Bd. of Educ.*, 72 F. Supp. 2d 753, 757-764 (W.D. Ky. 1999) (recounting history of school desegregation litigation).

Local whites initially resisted the court's desegregation order, sometimes violently. A journalist for Louisville's *Courier-Journal* described the situation in 1975:

> When a federal court . . . ordered Jefferson County Public Schools to stop the segregation of Black and White students, it lit a powder keg of emotions. Those emotions exploded that summer with a ferocity that shook the town . . . . The constant blast of auto horns. The sight of angry mobs silhouetted by fires in the streets. The pungent order of tear gas. The gnawing anxiety as we wondered what would happen.

Cummings at 638 (quoting M. Wines, *Busing: Five Years Later*, Courier-Journal, May 12, 1980, p. 1) (quotation marks omitted). Crowds of white protesters hurled epithets and

pelted with eggs the buses that brought African American students from inner-city schools to white suburban ones. White hostility and violence toward blacks reached such a fever pitch that the National Guard was called in. *See* Marcus Wohlsen, *Busing's Legacy*, Courier-Journal, Sept. 4, 2005, at 1A. Student enrollment in private and parochial schools increased, as did enrollment in the school districts surrounding Jefferson County that were not a part of the desegregation order. *See* Cummings at 638.

Over time, however, community attitudes changed and Jefferson County's school system achieved the distinction of having one of the nation's lowest rates of racial isolation. In 2000, the federal district court dissolved the 25 year old desegregation decree, after concluding that the school board had undertaken a good-faith effort to eliminate segregation and noting that Jefferson County's desegregation program was "nationally acknowledged as one of the most thorough and successful desegregation plans in the nation." *Hampton v. Jefferson Cty. Bd. of Educ.*, 102 F. Supp. 2d 358, 369-70 (W.D. Ky. 2000). In 2004, on the fiftieth anniversary of *Brown*, Harvard University researchers cited Kentucky schools as the most integrated in the nation. This was due in large part to Jefferson County's city-suburban desegregation plan, which was called a "model" for the rest of the nation. *See* Chris Kenning, *Brown v. Board of Education; Louisville Schools Lead in Integration*, Courier-Journal, May 16, 2004, at 1A.

A critical element in the success of the Jefferson County school desegregation program is overwhelming parental support for officials' efforts to maintain racially diverse schools in spite of the termination of court supervision of the system. *Id.* While it was court-ordered school desegregation that inspired the gradual transformation in racial attitudes that accounts for widespread citizen support for the school board and its race-sensitive pupil

assignment policy, today a substantial majority of Jefferson County citizens supports the goal of achieving racially integrated schools in the absence of judicial oversight. A survey conducted in 2000 by the University of Kentucky found that 67% of parents believe that a school's enrollment should reflect the overall racial diversity of the school district. *See* Sam Dillon, *Schools' Efforts on Race Await Justices' Ruling*, N.Y. Times, June 24, 2006.[6]

Likewise, a comprehensive 2001 study by Harvard University's Civil Rights Project showed that a large majority of Jefferson County citizens preferred to continue school desegregation efforts, coupled with school choice. Diversity Challenged: Evidence on the Impact of Affirmative Action 115-17 (Gary Orfield and Michal Kurlaender eds., 2001). Only 3% of Jefferson County high school graduates disagreed with the statement that "it is important for my long term success in life that schools have students from different races and backgrounds in the same schools." *See id.* Moreover, roughly 85% of high school seniors surveyed anonymously in Louisville – both black and white – reported that, due to their experience in integrated schools, they had learned much about each other, they were comfortable discussing issues across racial lines, and they felt well equipped to live and work in a diverse society. *See* Gary Orfield, *Everyone Benefits From Diversity*, Hartford Courant, Nov. 30, 2003.

Plainly, the citizens of Jefferson County have come to embrace integrated education. This shift in public attitudes is the legacy of *Brown* and its progeny.

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[6] Indeed, Teddy B. Gordon, counsel for petitioner, ran for election to the Jefferson County School Board in 2004, campaigning on a promise to dismantle the district's desegregation policies. *Id.* The voters of Jefferson County soundly rejected this platform, and Mr. Gordon finished the race in last place. *Id.*

B. Discrimination And Desegregation In Seattle.

The Seattle schools have never been subject to court-ordered desegregation, but school officials have instituted racially sensitive policies to avert litigation premised on Seattle's history of school and residential discrimination. *See* Laura Kohn, Priority Shift: The Fate of Mandatory Busing for School Desegregation in Seattle and the Nation 22-23, 31 (1996). Though Seattle is physically far removed from the Deep South, the city's schools were segregated by official practice and custom until, under threat of litigation, efforts were made in the 1960s and 1970s to combat racial isolation. *See* Quintard Taylor, *The Civil Rights Movement in the American West: Black Protest in Seattle, 1960-1970*, 80 J. of Negro Hist. No. 1, 1, 8 (Winter 1995). Racial isolation in the schools was a consequence of widespread residential segregation in the city, including racially restrictive covenants, which resulted in African American confinement to Seattle's central district. *See id.* at 5-8; *see also Seattle School Dist. No. 1 v. State*, 473 F. Supp. 996, 1001 (1979) (discussing relationship between segregated housing and schools in Seattle).

During the 1960s, civil rights advocates challenged the customs and practices that limited African Americans to the central district. Blacks staged protests for an open housing ordinance in 1963. The protests were turned back by violence that shocked many Seattle citizens. Opponents fired shotguns, burned crosses, and threw incendiary devices onto porches to express their disdain for black access to white neighborhoods. *See* Taylor, 80 J. of Negro Hist. No. 1, at 6. The violent resistance saw success when citizens rejected an open housing ordinance that was placed on the ballot in 1964. Seattle finally passed an open housing ordinance in 1968, and by 1970, blacks were less concentrated in the central district. *See id.* at 7-8.

Despite this progress, housing segregation continued to affect Seattle neighborhoods, resulting in continued school segregation. *See* Kohn at 22. The predominantly black schools suffered from overcrowding and were taxed by the costly, special needs of their students, many of whom were from impoverished backgrounds and required supplemental instruction. *See* Frank Hanawalt and Robert L. Williams, The History of Desegregation in Seattle Public Schools 6-7 (Seattle Public Schools 1981).

Eager to realize *Brown*'s promise in Seattle's schools, civil rights activists and other community members pressed for school desegregation during the 1950s, 1960s, and 1970s. *See id.* at 5-7. They found a receptive audience in the school board and among many members of the community, in part because of Supreme Court rulings that made clear that *Brown*'s mandate applied in areas such as Seattle where there had been no history of *de jure* school segregation. *See Keyes*, 413 U.S. at 189 (discussing standards for imposing school desegregation in Northern and Western areas where segregation had been perpetuated by practice and custom rather than by law); *see also Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 456-58 (1979) (establishing presumption of causal relationship between post-1954 racial imbalance and pre-1954 intentional school segregation); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537-38 (1979) (same). The Seattle school board first instituted a voluntary transfer program in 1963; the program dispersed African American students from overcrowded schools in the central district to schools in outlying areas. *See* Taylor at 8; Hanawalt & Williams at 11-14. Thereafter, the board implemented other voluntary desegregation programs with significant community support. "Citizens' councils" and a desegregation task force submitted recommendations, many of which were incorporated into the board's desegregation policies. *See* Larry Collister, A Narrative Account of the Development of Desegregation Goals for the Seattle School

District, 1970-1975 2, 4, 6, 8, 15 (Seattle Public Schools 1975).

In 1978, after years of voluntary school desegregation efforts had failed to eliminate the system's racial imbalances, the board adopted a mandatory desegregation program. The program, called the Seattle Plan, featured student reassignment, busing, and pairing and clustering of schools. *See* Collister at 2; Thomas W. Pullman and Stephen N. Graham, *Measuring the Implementation of Racial Balance Under Formal Constraints*, 4 Educ. Eval. & Policy Stud. No. 1, 109 (Spring 1982); Kohn at 25; Hanawalt & Williams at 35-37. As was true of Seattle's voluntary school desegregation efforts, the Seattle Plan was developed and implemented with significant community input. City residents commented on the plan at meetings held throughout the city, making recommendations that were incorporated by the school board. *See* Hanawalt & Williams at 34.

The Seattle Plan nevertheless spawned fierce resistance. Opponents promoted a state-wide ballot initiative designed to prohibit school districts from reassigning students from neighborhood schools for purposes of achieving desegregation. *See id.* at 41. The initiative passed by a large margin, *see* Kohn at 25, but it was nullified by the Supreme Court in 1982, *see Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 470 (1982) (holding that initiative denied blacks equal protection of the laws by "using the racial nature of a decision to determine the [governmental] decisionmaking process" and thus imposing unique and substantial burdens on blacks in the political process).

In the years following the *Washington* decision, the Seattle school board turned to school choice policies to ameliorate racial isolation in its schools, garnering widespread support for its efforts, including support from the business community. *See* Kohn at 26, 30. Indeed, the board

turned to school choice as a tool for desegregation as a result of consultation with community members. The board found that many citizens who were proponents of racial balance nevertheless had criticisms of the Seattle Plan, primarily relating to the cost, complexity, and negative effects of its busing component. *See id.* The board responded by reformulating its policies to de-emphasize busing, "rigid desegregation guidelines and mandatory assignments." Kohn at 33; *see also Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 426 F.3d 1162, 1168-69 (9th Cir. 2005) (en banc) (discussing recent history of school board's attempts to diversify schools).

Although data on the percentage of Seattle residents who favor the goal of multiracial schools has not been collected in recent years, the Seattle school board has continued to conduct community outreach in order to confirm that the school assignment policies it develops reflect the priorities of the community. In the mid-to-late 1990s, for example, the school board conducted a series of community forums and focus group sessions designed to solicit input from parents and ensure community support. *See, e.g.*, Jt. App., No. 05-908, at 85-a, 121-a.

The race-sensitive school choice policy that is now before the Court is an outgrowth of the school board's continued community outreach and its effort to realize the promise of *Brown* in Seattle's multiracial environment. *See* Kohn at 33; *Parents Involved in Community Schools* at 1168-69. The board strives for racial diversity not because it is compelled by court order to do so, but because of the value it places on diverse learning environments. Public support for the goal of multiracial schools is a reflection of the slow but steady adoption of the values articulated by the *Brown* Court.

C. The Public Support For Quality, Integrated Education In Jefferson County And Seattle Is Consistent With National Public Opinion.

Although Americans continue to debate the most effective means for combating racial isolation in education, a growing consensus has emerged on the desirability of integrated schools. More than 90% of Americans support racially integrated public schools. *See* Schuman at 126, 246-249. Public approval of integration policies has increased steadily over the years. *See id.* We do not mean to suggest that majority approval can justify an otherwise unconstitutional policy; it plainly cannot. *See Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736-37 (1964) ("[C]onstitutional rights can hardly be infringed simply because a majority of the people choose that it be."). But in light of the value the Court consistently has placed on local-level social experimentation and local control of education, the widespread public embrace of *Brown*'s promise of equal educational opportunity should inform the Court's assessment of the policies challenged here.

III. The Policies Are A Logical Outgrowth Of The Court's Education And School Desegregation Jurisprudence.

The policies reflect the will of the citizens of Jefferson County and Seattle, but they also are logical outgrowths of the Court's education and school desegregation jurisprudence. This precedent repeatedly has emphasized the value of local-level experimentation in the area of education and elected officials' discretion over educational policy matters. *See Swann*, 402 U.S. at 16 ("School authorities are traditionally charged with broad power to formulate and implement educational policy . . . ."). Indeed, the Court has repeatedly called states "laboratories"

for experimentation in the area of education. *See, e.g., San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (noting "[s]tate's freedom to 'serve as a laboratory and try novel social and economic experiments'" and stating that "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education") (citation omitted).

In the instant cases, local officials have determined that the policies are necessary to combat racial isolation in and improve their public schools. The school boards are uniquely positioned to make such judgments and the Court should be reluctant to overrule these elected officials' conclusions about how best to manage public schools.

A. The Court Has Consistently Recognized The Importance Of Local Control Of Education And Deference To Local Educational Experimentation.

As the Court has "long observed, 'local autonomy of school districts is a vital national tradition,'" *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (quoting *Dayton*, 433 U.S. at 410), because "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs," *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248 (1991). Thus, "responsibility for day-to-day administration of the public schools is best placed at a local level [because] . . . [a]t this level, citizens who have the greatest stake in the school system can have meaningful input in the schools and tailor the education provided in those schools to their own interests . . . ." Denise A. Hartman, *Constitutional Responsibility to Provide a System of Free Public Schools*, 33 Syracuse J. Int'l L. & Com. 95, 113 (2005); *see also Freeman*, 503 U.S. at 490. ("Where control lies, so too does responsibility."). Put differently, "local

control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence." *Milliken v. Bradley*, 418 U.S. 717, 742 (1974) (quotation marks and citation omitted).

The Court has emphasized that local control over educational policy is important not only to vest authority in officials who are politically accountable to their communities, but also to foster community support for schools and eliminate bureaucratic obstacles that may delay responses to educational problems that arise. *See Milliken*, 418 U.S. at 741-42 ("[L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."). Positive educational outcomes for students are made possible by the responsive school governance and increased community support that result from local control of schools.

Of course, the principle of local autonomy in education is not a talisman that can be invoked to fend off every Equal Protection challenge, and judicial intervention will be necessary where local control produces invidious discrimination. But where, as here, the outcomes of local control dovetail so closely with the normative values set forth in *Brown*, it would be profoundly ironic for the Court to intervene with a heavy hand and invalidate the local initiatives at issue.

B. Consistent With The Historical Purpose Of K-12 Education, The Policies Reflect The School Boards' Determination That All Students Benefit From Diverse Learning Environments.

The policies do not establish fixed racial quotas or render school assignments solely on the basis of race, but they do take race into account as a secondary factor in some school assignments. They do so to combat the risk that students in Jefferson County and Seattle will attend increasingly racially isolated schools, as they would if officials ignored race entirely. Further, the policies are intended to improve the performance of schools district-wide and to encourage community support for the school systems.

As the courts below acknowledged, the policies were implemented based in part on evidence that racially diverse schools delivered advantages to all students, regardless of race. *See Parents Involved in Community Schools*, 426 F.3d at 1174-75 (noting that district relied on "social science research clearly and consistently show[ing] that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more inclusive experience for all citizens"); *McFarland v. Jefferson Cty. Public Schools*, 330 F. Supp. 2d 834, 853 (W.D. Ky. 2004) ("Several [school board] witnesses testified that, in a racially integrated learning environment, students learn tolerance towards others from different races, develop relationships across racial lines and relinquish racial stereotypes."). The school boards' decisions were well founded: reliable studies have shown that racially integrated schools benefit students both educationally and socially. *See generally* Michal Kurlaender and J. Ma, Educational Benefits of Racially and Ethnically Diverse Schools (The Civil Rights Project, Harvard University 2003).

Recently, in recognizing the importance of diversity in higher education, the Court observed that it had "repeatedly acknowledged the overriding importance of preparing students for work and citizenship," and described "education as pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society." *Grutter*, 539 U.S. at 331 (quotation marks and citation omitted). The reasons that make diversity a valid goal in the context of graduate education are even more compelling in the context of elementary and secondary education, because children in grammar and high schools are more impressionable than the older students who attend colleges and graduate schools. *See Comfort*, 418 F.3d at 15-16 (noting "significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages" and detailing expert testimony that "[i]t is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking").

C. The Policies Are Lawful, De Minimis Efforts To Reform Education Similar To Voluntary Desegregation Programs Repeatedly Upheld By The Federal Courts.

This Court and other courts have repeatedly endorsed educational programs that have taken account of race as one factor in school assignment. Thus, in *Freeman v. Pitts*, the Court noted with approval a program, described as a "marked success," in which students of any race were permitted to transfer to a school in which their race represented less than 50% of the student population. 503 U.S. at 479. Moreover, the federal courts repeatedly have approved school desegregation decrees containing de minimis and often voluntary pupil integration policies such as majority-to-minority transfer programs. *See Swann*, 402 U.S. at 26-27; *Keyes*, 413 U.S. at 241 (Powell, J., concurring in part and

dissenting in part); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *Little Rock School Dist. v. North Little Rock School Dist.*, 109 F.3d 514 (8th Cir. 1997); *Little Rock School Dist. v. Pulaski Cty. Special School Dist. No. 1*, 83 F.3d 1013 (8th Cir. 1996); *Stell v. Savannah-Chatham Cty. Bd. of Educ.*, 888 F.2d 82 (11th Cir. 1989); *United States v. Texas Educ. Agency*, 679 F.2d 1104 (5th Cir. 1982); *United States v. Bd. of Educ. of Waterbury, Conn.*, 560 F.2d 1103 (2d Cir. 1977); *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975).

Similarly, just as the Sixth and Ninth Circuits did in the cases at issue here, the First, Second, and Fourth Circuits have all approved school district policies that acknowledged and recognized students' race without making it a primary, dispositive factor in school assignments. *See Comfort v. Lynn School Comm.*, 418 F.3d 1, 27 (1st Cir. 2005) (approving program that acknowledged students' races in permitting "desegregative" transfers);[7] *Brewer v. West Irondequoit Central School Dist.*, 212 F.3d 738, 753 (2d Cir. 2000) (concluding that reducing racial isolation is a constitutionally permissible goal and that "there is no more effective means of achieving that goal than to base decisions on race"); *Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521, 543-44 (4th Cir. 1986) (approving voluntary integration plan that contained "majority-minority" transfer plan that acknowledged students' races in permitting desegregative transfers).

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[7] Like the programs at issue here, the policy upheld in *Comfort* was "a local experiment, pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent," 418 F.3d at 29 (Boudin, C.J., concurring), and which used "race as an express criterion to permit transfers where they are consistent with maintaining schools with a racial mix of students, and to limit transfers where they would increase racial imbalance within the school system beyond certain predetermined limits." *Id.* at 27-28 (Boudin, C.J., concurring).

Like these other race-sensitive programs, the policies here were voluntarily adopted by popularly elected school boards for the benefit of all students, and in response to local support for integrated schools. As such, they should be upheld as consistent with the Court's historic endorsement of local experimentation and control of schools and the vision of educational equality announced in *Brown*.

CONCLUSION

For the foregoing reasons, the decisions of the courts of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE CIVIL RIGHTS CLINIC AT HOWARD UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae are faculty members at Howard University School of Law, supervising attorneys and student attorneys of the Civil Rights Clinic at the Law School, and faculty members at law schools throughout the country. While Howard University is usually regarded as one of the historically black colleges and universities, the truth is, both at the university and law school level, Howard has always been one of the most racially integrated higher education institutions in the United States. In fact, at its founding in 1867, Howard University was designed to educate blacks *and* whites in an integrated setting. Today, Howard has achieved a racial and ethnic diversity in student body and faculty consistent with its mission that the benefits of higher education "should be made available to all persons, without regard to distinctions of race, sex, creed, or nationality."[1] It is from that integrated perspective that we submit this brief in support of the Respondent school boards in order to respectfully urge this Honorable Court to continue the great work of racial integration begun by *Brown v. Board of Education,* 347 U.S. 483 (1954), and affirm the decisions of the Sixth and Ninth Circuit Courts, finding that the school boards' narrowly tailored race-conscious transfer policies serve the compelling state interest of diversity in primary and secondary education.[2]

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[1] Rayford W. Logan, Howard University, The First Hundred Years 1867-1967 i (1969).

[2] Amicus, Howard University School of Law, recognizes that some individuals might find the arguments herein contradictory because Howard is a predominantly black institution. However, amicus' arguments are consistent with its current and historical mission for several reasons. First, institutions such as Howard came into existence not to foster segregation, but rather to remedy the lack of opportunity that was available to minorities elsewhere. Second, the development of successful black institutions serve to combat the negative perceptions that are

Seventy-one years ago Charles Hamilton Houston, a former law professor and Dean at Howard law school, conceived of a legal strategy dedicated to the proposition that the social violence of racial segregation could never be reconciled with the constitutional imperative of equality before the law. Between 1930 and 1954, Houston recruited, trained and nurtured a cadre of Howard law students, professors and lawyers who, under the leadership of the NAACP Legal Defense and Education Fund, (LDF) systematically litigated the dismantling of the constitutional, intellectual and moral foundations of the pernicious separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896). Though Houston, the founder, did not live to see the fulfillment of his strategy, in 1954 this Court, at the urging of one of Houston's original protégés, then LDF Chief Counsel Thurgood Marshall, issued the decision in *Brown* and set this country on a path to racial integration.

Now, the present companion cases have raised the question whether the use of race by a school district as one factor to voluntarily achieve an integrated student body violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We find ourselves at a critical moment that will determine whether we grant public school districts the irreplaceable tool they need to construct an environment for children to associate with peers of all backgrounds, or deny children the opportunity to internalize at an early age what Judge Kozinski of the United States Court of Appeals for the Ninth Circuit called the "live-and-let-live spirit that is the essence of the American experience." *Parents Involves In Community Schools v. Seattle School District, No. 1*, 426 F.3d 1162, 1195 (9th Cir. 2005).

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otherwise directed toward minorities. Third, contrary to popular misconception, Howard has always been open to and enrolled students from all races and ethnicities. Finally, as noted above, in comparison to most historically white institutions, Howard has always been and today remains wholly integrated.

But in a larger sense, though these companion cases do not directly challenge the plain holding of *Brown* that separate is inherently unequal, they do place before the Court the question whether *Brown* will continue as a viable precedent, and whether *Brown*'s fundamental goal of meaningful racial integration and diversity in primary and secondary schools will remain a valued public good. It is, therefore, fitting that, as this Court once again takes up the unfinished work of racial integration, it not just consider its own opinion in *Brown*, but that it also revisit the arguments and goals of *Brown*'s founding attorneys, who fifty-two years ago first made it possible for the Court to open the door of equal educational facilities and opportunities for all students.

For *amici curiae*, the present companion cases come to this: Voluntary school integration plans are consistent with the vision of *Brown*'s founders, represent the natural evolution and necessary continuation of this Court's *Brown* opinion, and stand as the last best chance of achieving meaningful school integration. Petitioners' very challenge to these plans unmistakably demonstrates that *Brown*'s goals and purposes have yet to be fulfilled. We are here today asking that this Court renew its commitment to the great task of racial integration by denying Petitioners' claims, and upholding the decisions of the Sixth and Ninth Circuit courts of appeals.

SUMMARY OF ARGUMENT

Two years ago, this country celebrated the 50th anniversary of one of the most important cases in the nation's jurisprudential and political history: *Brown v. Board of Education*, 347 U.S. 483 (1954). *Brown* did nothing less than recall the nation to its founding principle of constitutional equality by forbidding states from segregating public education on the basis of race. Although *Brown*'s holding spoke most directly to the elimination of *de jure* racial segregation in public school education, in the minds of both the founders

and this Court, its ambitions were greater: *Brown* promised actual meaningful social integration.

By emphasizing the importance of education and the role it plays in good citizenry, this Court's decision in *Brown* contemplated actual, effective integration of public schools, not merely the removal of *de jure* segregation. Beginning with *Brown*, the Court recognized that equal educational opportunities should be available for all children, no matter their race, and that equal educational opportunities could only be achieved by eliminating inferior, racially identifiable schools. Subsequent to *Brown*, this Court consistently recognized the goals of not just eliminating *de jure* segregation but promoting meaningful school integration. *See, e.g., Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. New Kent Co.*, 391 U.S. 430 (1968). In the Court's own words, integration "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.' These benefits are 'important and laudable.'" *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

And yet, in the years following *Brown*, integration plans achieved limited and halting success, such that even more than fifty years later it is difficult to claim with any seriousness that as a society we have achieved *Brown*'s promise of meaningful public school integration. To the contrary, in recent years, this country has experienced a dramatic trend toward resegregation. Voluntary integration plans are the one encouraging corrective to that trend, and the last best chance to achieving *Brown*'s promise. But, without the conscious use of race as one of multiple factors to achieve that goal, public schools districts will find themselves, as did Respondent, the Seattle Board of Education, falling back into re-segregation. If, as this Court held in *Grutter*, 539 U.S. at 325, diversity in education is a compelling state interest, then the voluntary use of race by local school boards as one of

multiple factors to achieve that interest is constitutionally permissible.

Fifty-two years ago, this Court rejected segregation by state action; today it must decide whether it will embrace integration by state action.

I. THE COURT'S DECISION IN *BROWN* CONTEMPLATED ACTUAL, EFFECTIVE INTEGRATION OF PUBLIC SCHOOLS, NOT MERELY THE ABROGATION OF *DE JURE* SEGREGATION.

Brown was a watershed in the long struggle to realize the principles upon which this country was founded. It was the fruit of a legal campaign undertaken by the Howard University School of Law, its Dean, Charles Hamilton Houston, his most famous student, Thurgood Marshall and the pioneering lawyers of the NAACP Legal Defense Fund. The task they undertook was a reshaping of American society as profound as the reshaping accomplished by the Constitution itself. As the late Justice Thurgood Marshall remarked on the Bicentennial of the Constitution, ". . . the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making." Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1, 5 (1987). If our Court and profession have anything of which to be proud, it is that *Brown* is one of the great transformations of our nation's Constitutional life, and is "of our own making."

One of the earliest steps in our legal racial transformation was initiated by Charles Houston in 1937 when he filed a suit to compel the University of Missouri to admit a black applicant to its law school. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). It was the beginning of a fight for "identical quality and quantity of educational opportunity [for] all citizens regardless of race, color or creed." Charles

Hamilton Houston *as quoted in* Genna Rae McNeil, *Groundwork* 134 (1983). The final objective, however, was not just an "equalization" of the sort contemplated by *Plessy*:

> "[E]quality of education is not enough. There can be no true equality under a segregated system. No segregation operates fairly on a minority group unless it is a dominant minority. . . . The American Negro is not a dominant minority; therefore he must fight for complete elimination of segregation as his ultimate goal."

Id. Hence, the founders'[3] seventeen year struggle to bring *Brown* to fruition was not merely a struggle to prohibit Jim Crow's system of inequality. Their endeavor was to replace it with something better.

The ultimate aspiration of *Brown* and subsequent school desegregation litigation was for black and white children to finally sit together, learn together, and grow up together in the public schools. If it could achieve this end, these children would build the foundation for a society in which black and white Americans who, although born of different circumstance and subjected to different legal constructs, could ultimately participate in citizenship, as well as employment, housing and society, as equals. The Court's decision in *Brown* and subsequent cases courageously embraced this aspiration and took a giant step toward bringing the "miracle" of our Constitution to life. *See* Marshall, *supra*, at 5.

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[3] This brief shall refer to Howard University School of Law, Charles Hamilton Houston, Thurgood Marshall, NAACP Legal Defense Fund and their clients collectively as "the Founders." Amicus deems such a reference appropriate, as it was only through the concerted effort of these individuals that the issues in *Brown* and its progeny were brought before this Court. Moreover, it was their efforts, analyses and perspectives that drove and molded the Court's jurisprudence at every stage.

A. *Brown* Culminated a Long, Strategic Campaign for Integration and This Court Has Long Endorsed That Goal.

The Founders began their battle against segregation in education with an attack on its presence in state university law schools. In deciding for the petitioners, the *Brown* Court relied on four of these foundational cases, *Gaines*, 305 U.S. 337 (holding that a state that provides legal education to whites within its borders, must provide the same for blacks within its borders); *Sipuel v. Bd. of Regents of Univ. of Oklahoma*, 332 U.S. 631 (1948) (holding that a state is required to provide a legal education to black students if it does so for white students); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that a state has not fulfilled its Equal Protection obligation to black students by providing a separate law school); and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (holding that black students must be treated equally once admitted). In the context of graduate schools, the patent thesis was that separate could never be equal because of the differential prestige and any number of other intangible benefits that follow from attending the "preferred" or "white" school. Consequently, the Court in *Sweatt* held in favor of the plaintiffs, stressing the importance of a school's reputation and other "qualities which are incapable of objective measurement but which make for greatness in a law school." 339 U.S. at 634. These qualities have a significant effect on the educational opportunities and position enjoyed by students.

Relying on and analogizing to *Sweatt*, the Court in *Brown* extended its reasoning to primary and secondary schools declaring that, "[s]uch considerations apply with added force to children in grade and high schools." *Brown*, 347 U.S. at 494. Thus, from the first day that a child enters public school to the final day that they might depart with a law or medical degree, the Court recognized that access to the intangible is

often the most determinative factor in shaping their opportunity to learn life's most important lessons.

The appellants' and amicus briefs in *Brown* and Thurgood Marshall's opinions after he ascended to the Court further demonstrate that the final goal of comprehensive integration was always paramount. Implicitly demanding integration, the appellant's brief declared,

> [R]acial segregation injures infant appellants in denying them the opportunity available to all other racial groups to learn to live, work and cooperate with children representative of approximately 90% of the population of the society in which they live; . . . develop citizenship skills; and to adjust themselves personally and socially in a setting comprising a cross-section of the dominant population.

Brief for Appellants, *Brown*, 347 U.S 483, 1952 WL 47265 at 9. Educators agreed saying, "We cannot give separate training to two segments of society and then expect that some magic will merge the individuals from these segments into equal citizens having equal opportunities." Brief of the American Federation of Teachers as Amicus Curiae, *Brown*, 347 U.S 483, 1952 WL 82043 at 8. Still appealing for the realization of this goal twenty years after *Brown*, Marshall warned, "[u]nless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

From the beginning, this Court endorsed integration, both as a remedy to a constitutional violation and a societal imperative. To begin with, *Brown* recognized a distinction between the constitutional violation perpetrated by discriminatory laws, on the one hand, and the harms incident to segregated schooling on the other. The analysis had two distinct parts: first, *de jure* segregation in the public schools deprives the minorities of the equal protection of the laws, *Brown*, 347 U.S. at 495, and second, "[s]egregation of white

and colored children in public schools has a detrimental effect upon the colored children." *Id.* at 494 (internal citation omitted). Moreover, it is important to note that the Court also recognized that segregation itself created an injury, regardless of whether it occurred as a result of a constitutional violation, but of course, the constitutional violation exacerbated that injury. As the Court wrote, "[t]he impact is *greater* when it has the sanction of law." *Id.* at 494 (emphasis added). Thus, although the Court in *Brown* recognized that *de jure* segregation created a constitutional harm that must be remedied, it also recognized that segregation, regardless of cause, could and did harm blacks.

In *Brown* and its progeny, the Court was explicit in concluding that the remedy to the injury must be more than the mere abrogation of the discriminatory law, but requires actual integration. Although the Court has consistently used phrases such as creating a "unitary system," eliminating "vestiges of discrimination root and branch," and eliminating "racially identifiable" schools, at their heart these have been a requirement that the schools integrate and a recognition of the value in such action. For instance, the facts upon which the Court relied in finding against the school board in *Green* demonstrate its endorsement of integration. Despite having made its schools available to all students, the Court found against the board because "[n]ot a single white child has chosen to attend [the black school] and . . . 85% of the Negro children in the system still attend the all-Negro . . . school." 391 U.S. at 442. The duty to produce schools that were integrated in contrast to this fell "squarely on the School Board" and was not a "burden" to be placed on "children and their parents" *Id.* at 442-43. Thus, it was of no accord that the board had repealed or eliminated its discriminatory laws. "[T]he fact that . . . the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has" remedied its constitutional violation and harm. *Id.* at 437.

The school board's duty was to make "meaningful and immediate progress toward" integration. *Id.* at 437, 442-43.

In *Swann,* the Court likewise encouraged school boards to pursue integration on their own, writing that "in order to prepare students to live in a pluralistic society [school boards might decide that] each school should have a prescribed ratio of Negro to white students. . ." 402 U.S. at 16. In the same school district that is before this Court today, this Court, referring to its long struggle to achieve integration, formerly declared,

> When [the societal] environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children for citizenship in our pluralistic society while, we may hope, teaching members of the racial majority to live in harmony and mutual respect" with children of minority heritage.

Washington v. Seattle Sch. Dist. No.1, 458 U.S. 457, 472-73 (1983) (internal citations omitted). In short, whether it is a demand in regard to remedying a constitutional violation or simply wisdom in regard to how schools should best respond to the harms of segregation, this Court has repeatedly endorsed integration as a precious goal.

B. The Necessity of Integration Can Be No Greater Than in Education Because of This Court's Repeated Recognition of the Correlation Between Access to Educational Opportunities and Effective Citizenship

1. *Public Education and Its Relationship to Citizenship Is of Paramount Importance to Both Our Society and Individual Citizens.*

In this Court's earliest attempts to define the role of public education in our country, it wrote that the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). It holds this importance because "education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). In *Plyler v. Doe*, the Court again recognized that the education we deliver in our public schools lies at the very heart of national interests, as our schools are "vital civic institution[s] for the preservation of a democratic system of government." 457 U.S. 202, 221 (1982) (citing *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

Most important to the instant case, the Court in *Brown*, in what may be its most famous lines, framed its decision and its own duty to finally intervene in segregation based on the importance of education to society and to the individual to which equal education had been denied. Addressing the societal interest, the Court wrote:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of educa

> tion to our democratic society. It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship.

Brown, 347 U.S. at 493.

However, the Court likewise recognized the personal interest of the individual in education and its relationship to citizenship and later opportunities. Equal educational opportunities, of course, are required for the individual if he or she is to have an equal opportunity to take advantage of citizenship. *Id.* Moreover, on a more basic level, education is the "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.* at 493-94. These ideas have carried forward in the Court's jurisprudence. As it later wrote, without education, individuals are not "prepare[d] . . . to be self-reliant and self-sufficient participants in society." *Plyer*, 457 U.S. at 222

2. *Racial Isolation in Education Undermines* Brown's *Focus on Fully Opening Citizenship and Society to All Our Nation's Members.*

a. Our National Interests Require That Everyone Has Equal Access to the Same, Singular Path of Citizen-ship Through Education.

Our national interests not only require that we educate our citizens so that they might participate in and preserve our democratic system, but in so far as individuals have a personal right in that education and the fruits of citizenship, so too must their access to citizenship be equal. As the Founders, *amicus*, the Court, and history have shown us, equal citizenship simply cannot be obtained when school systems are racially isolated.

As the Appellants in *Brown* argued, "our public school systems have grown and improved as an American institution. And in every community it is obvious that children of all levels of culture, educability, and achievement must be accounted for within the same system." Reply Brief of Appellants, *Brown II*, 349 U.S. 294 (1955), 1954 WL 45730 13. Our teachers, who through experience and expertise know far better than we, reached the same conclusion. In *Brown*, the American Federation of Teachers wrote "[w]e cannot give separate training to two segments of society and then expect that some magic will merge the individual from these segments into equal citizens having equal opportunities." Brief of American Federation of Teachers, Brown, 347 U.S. 483, 1952 WL 82043. This Court has likewise adopted similar reasoning and wisdom in subsequent decisions. As the Court recently wrote in *Grutter*, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. Thus, an education system that provides differential access to civic life is inimical to our national unity and progress.[4]

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[4] Although the facts in *Plyler* presented disparities of a different degree because immigrant children were completely denied an education, the principle behind the Court's statements are analogous. There the Court stated that "education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." 457 U.S. at 221.

b. Our National Interest in Equal Citizenship Cannot Be Obtained in Racially Isolated or Segregated Schools, Which Often Threaten to Reduce Minority Students to Second Class Citizenship.

When racial isolation and segregation unfortunately occur, unequal access to citizenship and education almost necessarily follow. The primary practical result and possibly the greatest evil of racial segregation in the south was a system of superior and inferior schools. The existence of such schools, and their concomitant perpetuation of dual paths to citizenship, was foremost in the Court's motivation to prohibit segregated schooling. The Court realized that meaningful and equal citizenship could not be effectuated within tiered school systems, where some schools are superior and some are inferior. Such a system inevitably leads to two levels of citizenship: first class and second class.

When *Brown* came before the Court, superior white schools and inferior black schools were the dominant state of affairs. Most notably, the facts of the companion cases that comprised *Brown* demonstrated gross inequalities between white and black schools and the resulting serious effects on black children. *See Brown v. Bd. of Educ. of Topeka*, 98 F. Supp. 797 (D.C. Kan. 1951); *Briggs v. Elliott*, 103 F. Supp. 920 (E.D. S.C. 1952); *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952); *Davis v. Co. Sch. Bd.*, 103 F.Supp. 337 (E.D. Va. 1952). Although the Court's decision did not rest on these facts, as it ultimately held "separate" was inherently unequal, the facts of these cases demonstrate a practical reality: so long as separation occurs, our society will exercise a license to treat blacks unequally. Sixty years of experience following *Plessy* proved that a system of "separate but equal" will operate only in theory and will produce no level of equality.

Because of this past, predominantly black schools are perceived as inferior no matter how equal they might be in other measurable aspects. Thus, even once school systems had eliminated "whites only" or "blacks only" schools and had equalized resources, the Court remained concerned with whether a school was racially identifiable. *See, e.g., Swann*, 402 U.S. at 18-19. Among other things, the Court would query whether the a school was perceived as a "black" or "white" school, because so long as such a perception persisted, whites would not attend a "black" school and the schools were apt to become unequal if they were not already. *See, e.g., United States v. Lowndes County Bd. Of Educ.*, 878 F.2d 1301, 1306 (11th Cir. 1989) (assessing whether there was sufficient perception of a school as "black" to cause whites to not attend it). In addition, despite the Court's sensitivity and concern for these issues, the Court has likewise seen "black" schools lead to "black" districts, from which whites have fled for the same reasons. *See, e.g., Freeman v. Pitts*, 503 U.S. 467 (1992); *Milliken*, 418 U.S. 717. In short, the Court knew and history has shown that racially isolated or identifiable schools, even when not *de jure*, threaten equal educational opportunities for blacks and the goals of *Brown*.

The Court and the founders, moreover, demonstrated that the harm to blacks was not merely unequal facilities, instruction, and resources, but rather was an indelible harm that operated to shrink blacks' overall life opportunities, including the basic rights to participate in society and citizenship equally. Describing the overall restrictions that segregation placed on blacks, the Founders stated, "[w]hat is achieved educationally and culturally, we now know to be largely the result of opportunity and environment." 1954 WL 45730, 12-13. Similarly, the Court in *Brown*, recounting previous higher education decisions, found that even with all tangible factors being equal a racially isolated learning environment restricts a black student's "ability to study, to engage in

discussions and exchange views with other students, and, in general, to learn his profession." *Brown*, 347 U.S. at 493-494 (citing *McLaurin*, 339 U.S. at 641). The Court concluded that elementary school minority school children were also disadvantaged in these respects, if not more so than college students. Moreover, at this "pivotal" point in minority children's development, racial isolation spawns feelings of "inferiority as to their status in the community" at large, "affect[ing] their hearts and minds in a way unlikely ever to be undone." *Id.* Even the Kansas District Court that found that segregation was not legally objectionable could not deny the manner in which racial isolation limits black students to fundamentally different opportunities, finding:

> [s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.

Id. at 494.

Thus, if Brown is correct that education "is the very foundation of good citizenship," "awaken[s] the child to cultural values," and allows a child to "adjust normally to his environment," *Brown*, 347 U.S. at 493, 494, the above inequality, harm, and deprivation of the intangible aspects of education can have no other effect than to impose second class citizenship on minorities.

Again, the fact that the schools in the instant case are not racially isolated under the sanction of law does not then mean that these harms are not a threat or that *Brown's* promise has

been achieved. In fact, that wide isolation exists after all the courts' remedial efforts is evidence that *Brown's* struggle to eliminate racial stigma and the relevance of racial identifiability has not been achieved and that the harms of isolation persist. To conclude, as the Petitioners do (Petr's Br. at 31), that the racial isolation is not seriously problematic because the isolation is not *de jure* or intentional is to be as blind to reality as the majority was in *Plessy* when it wrote "the underlying fallacy of the plaintiff's argument [is] the assumption that the enforced separation of the races stamps the colored race with a badge of inferiority." 163 U.S. at 551. The majority simply denied the harm that the Court in *Brown* made manifest fifty years later. Just as "[e]veryone kn[ew in *Plessy*] that the statute in question had its origins in the purpose . . . to exclude colored people from coaches occupied by or assigned to white persons," so too do we know that inequality and stigma continue to proceed hand-in-hand with racial isolation due to a myriad of factors, including those discussed above. *Id.*, at 557.

II. THE COURT'S LONGSTANDING DEFERENCE TO SCHOOL DISTRICTS IN REMEDYING THE HARMS OF RACIAL ISOLATION IS NECESSARY TO ACHIEVE THE UNFINISHED PROMISE OF *BROWN*.

By compelling the use of race to integrate schools, the decisions in *Brown* and subsequent cases achieved resounding success at times. Although integration was essentially non-existent in the years immediately following *Brown*, after the Court announced affirmative desegregative obligations on the part of school districts in *Green* and Congress created financial consequences for the failure to desegregate in the Civil Rights Act of 1964, the southern states began a rapid process of desegregation. *See* Gary Orfield and Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, 9 (Jan. 2006), *available at* http://www.civil

rightsproject.harvard. edu (hereinafter *Racial Transformation*). Throughout the 1970's and into the mid 1980's, this progress in desegregation continued both regionally and nationally. *Id.* at 31.

The Court was clearly the first to act and a driving force in desegregation, but ironically its first instructions regarding desegregation placed the obligation, discretion and flexibility in the hands of school districts. In *Brown II*, the Court wrote that the "primary responsibility for elucidating, assessing, and solving th[e] problems" of desegregation rested with "school authorities." 349 U.S. at 299. The Court continued to adhere to this principle throughout its desegregation jurisprudence. *See, e.g., Green*, 391 U.S. at 437-38 (placing the duty of desegregation on school boards); *Milliken*, 418 U.S. at 744 (expressing concern over depriving schools of local control). As years of court supervision passed, however, the Court became increasingly concerned with its role in monitoring and constraining local control of school operations. Thus, rather than continued coercion of school districts, the Court indicated that the time was coming for lower courts to withdraw from these cases. For example, the Court emphasized in *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995), that "local autonomy of local school districts is a vital national tradition" and "a district court must strive to restore state and local authorities to the control of [their] school system." *See also Bd. of Educ. of Oklahoma City Public Schs. v. Dowell*, 498 U.S. 237, 247-48 (1991) (indicating desegregation decrees "are not intended to operate in perpetuity" and focusing on "necessary concern[s] for the important values of local control of public school systems").

Unfortunately, as the courts began effectuating this withdraw in the late 1980's, our nation's public schools began experiencing dramatic resegregation, which has continued to the point that the level of segregation today is similar to that which existed when the schools initially began efforts to desegregate. *See Racial Transformation, supra*, at 31. This

trend is most startling in our urban school districts where a majority of schools are almost exclusively attended by students of color and predominantly by students of the lowest income levels. These schools are the most racially isolated in the nation, with "more than half of the nation's African American and Latino students attending public schools in which at least three-quarters" of their peers are of color. Nancy Kober, *A Public Education Primer: Basic (and Sometimes Surprising) Facts about the U.S. Education System* 7 (Center on Education Policy 2006). Tragically, it is not only the segregation in schools that has reemerged but also the inequality that has always accompanied it. These same urban minority students are "much more likely than white students to attend high-poverty schools." *Id.* at 6. Moreover, these schools have:

> higher percentages of students who speak a language other than English at home, deteriorating facilities, higher rates of poverty among students, low teacher salaries compared to their suburban counterparts, lower quality teachers . . . larger overall student bodies, substantially higher percentages of minority students, and higher percentages of students who were eligible for free or reduced lunch.

Michael Selmi, *Race in the City: The Triumph of Diversity and the Loss of Integration*, 22 J.L. & Pol. 49, 70-71 (2006).

Due to constitutional constraints, the federal courts conclude they no longer have the power to intervene to alleviate segregation and inequality. Yet the courts' options are far more constrained than those of school districts. Again, since *Brown*, the Court has emphasized that wide authority and discretion rests with school boards as to these matters. Most important, the Court has indicated that school boards can take more action to desegregate than the courts themselves could otherwise compel. For instance, the Court in *Swann* wrote,

> [s]chool authorities are traditionally charged with broad power to formulate and implement educational policy

> and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court.

402 U.S. at 16. Similarly, when addressing a ballot initiative that would prohibit integrative busing in Seattle, this Court noted that the power to address the racial problem in the schools was within the proper power of the local school board and should not have been abrogated. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982).

If *Brown's* promise and purpose is to live on, the Court should continue to take this same deferential approach toward schools districts. That segregation and inequality have emerged in a manner eerily reminiscent of the conditions that existed at the time of *Brown* is borne out by extensive data. That since *Brown* the Court has largely left the solution to these problems to local authorities is borne out by the Court's own language above. *See also Jenkins*, 515 U.S. at 89 (reiterating that one of only two "ultimate inquir[ies]" in desegregation cases is whether the district has acted in "good faith" commitment to desegregation). The only question now is simply whether the Court will ironically stand in the way of *Brown's* continuation or whether it will allow school districts to continue the work that the Court itself compelled of them for years.

III. VOLUNTARY SCHOOL INTEGRATION PLANS ARE VALUABLE AND NECESSARY TO ACHIEVING *BROWN*'S PROMISE.

One clear lesson we have learned from the half-century of attempting to meaningfully enforce *Brown* is that school integration does not occur by benign neglect or happy accident.

Left alone to follow segregated housing patterns, school districts will resegregate. *See Racial Transformation, supra*, at 31. But, in the face of evidence that history seems to be rapidly marching backwards, one encouraging development stands as a potential corrective to the resegregation trend: In recent years, educators, communities, and institutions of higher education have voluntarily pursued racially and ethnically integrated learning environments. *See Looking to the Future: Voluntary K-12 School Integration, A Manual for Parents, Educators, and Advocates* at 20-25 (2005), *available at* http:// www.civilrightsproject.harvard.edu/resources/manual/deseg_manual.php [hereinafter *Looking to the Future*]. With-out a court mandate to desegregate, school districts around the country are using voluntary integration plans to combat the affects of segregation on the child, the classroom, and society at-large. *Id.* at 16, 20-25. These voluntary efforts have come about because communities recognize the educational and social value of integration. *Id* at 15-19, 20.[5]

A. Integration Plans Offer Educational, Occupational and Societal Benefits for Black and White Children.

Extensive research continues to prove the educational, occupational, and societal benefits to *all* students—minority and white—from racially diverse schools. *Looking to the Future, supra,* at 17-19.[6] Positive interactions with students of

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[5] *See also* Derek Black, *The Case For The New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. Rev. 923 (2002) (detailing the extensive research and data establishing the tangible benefits of integration for all students in primary and secondary schools).

[6] *See also* Heidi McGlothlin & Melanie Killen, *Intergroup Attitudes of European American Children Attending Ethnically Homogeneous Schools*, 77 Child Development 1375-1386 (September/October 2006) (showing that white grade school and high school children attending segregated schools are more likely to develop biased attitudes toward members of other races); Carl Bankston, III & Stephen J. Caldas, *The American School*

other races and ethnicities in integrated environments promote cross-racial understanding and dialogue, higher scores on achievement tests, lower dropout rates, access to broader social networks of resources, and higher aspirations. *Id.*, at

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Dilemma: Race and Scholastic Performance, 38 Soc. Q. 423, 428 (1997) (showing racially integrated settings are linked to improved achievement for black high school students); Jomills Henry Braddock, II & James M. McPartland, *The Social and Academic Consequences of School Desegregation, in Equity and Choice* 5, 63-68 (1988) (showing both long and short term consequences of racially diverse primary and secondary schools and colleges, including improved race relations, increased academic achievement, and preparation for diverse work settings); Marvin P. Dawkins & Jomills Henry Braddock, II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. Negro Educ. 394, 397-400 (1994) (reviewing studies showing that black students from majority white elementary and secondary schools are more likely to persist at majority white colleges, have higher job expectations, move into integrated neighborhoods, acquire jobs, major in scientific or technical fields, and work in desegregated work environments); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 Ohio St. L.J. 733 (1998) (providing social science evidence supporting the theory that racial diversity promotes educational benefits in primary and secondary schools and in higher education); Mathtech, Inc., *The Outcomes of Diversity in Higher Education, in Mid-Year Report Prepared for Office of Educational Research and Improvement*, VII-4 to VII-7 (1998) (concluding that racial diversity has positive effects on student cognitive growth, interaction in the diverse work environment, and breaking down racial stereotypes); Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in Handbook of Research on Multicultural Education* 597 [hereinafter Handbook] (James A. Banks ed., 1995) (providing an overview of the social science evidence, both positive and negative, behind the value of diversity in primary and secondary education); Robert E. Slavin, *Cooperative Learning and Intergroup Relations*, in Handbook, supra, 628, 632 (showing that cooperative learning in racially diverse primary and secondary schools can improve racial attitudes and academic achievement among all students); Robert E. Slavin, *Effects of Biracial Learning Teams on Cross-Racial Friendships*, 71 J. Educ. Psychol. 381, 386 (1979) (showing the long term positive effects of interracial cooperative learning).

17-19.[7] Long-term benefits include a racially diverse society, reduced racial stereotypes, workplace preparation, increased civic engagement and a desire to live in integrated settings. *Id.* at 18.[8] Endorsing *Brown*'s idea of integration, this Court recently recognized the long-term benefits of educational diversity in higher education in *Grutter* when it noted that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" 539 U.S. at 330 (internal citations omitted). These benefits are even greater for children in elementary and secondary schools, and accrue to *all* children. Rather than "separate children in a way that harms both those excluded from better schools and white students in those schools who are not being prepared for success in multiracial communities and workplaces of the future," integration brings them together for the benefit of all children and society. *Racial Transformation*, *supra*, at 4.

B. A Substantial Number of School Districts Have Adopted Voluntary Integration Plans.

Recognizing their educational, occupational and societal benefits, in recent years a substantial number of school districts have actively investigated and implemented voluntary

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[7] *See e.g.* Jomills Henry Braddock, II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 Phi Delta Kappan 259, 260-61 (Dec. 1984) (discussing several studies that show white and black students who attend desegregated schools are more likely to attend diverse colleges as adults, live in integrated neighborhoods, work in diverse firms, and have friends of another racial group).

[8] *See also* Jomills Henry Braddock, II & James McPartland, *Social-Psychological Processes That Perpetuate Racial Segregation: The Relationship Be-tween School and Employment Desegregation*, 19 J. Black Stud. 267, 283-84 (1989) (suggesting that high school desegregation promotes positive perceptions and social contacts among blacks and whites).

integration plans. These plans use a variety of strategies "to encourage racial integration and to produce the kinds of educational benefits that flow from integrated learning" environments. *Looking to the Future, supra*, at 20. The most common strategies include, among others, attendance zones, student transfers, magnet schools, school choice, and inter-district transfer programs. *Id.* at 20-24. To date, about seventeen percent of public school students attend "schools of choice" or public schools chosen by their parents. *See A Public Education Primer, supra,* at 4. Two of the most popular types of school choice programs include magnet schools, which have specialized curricula designed to attract students of diverse racial and ethnic backgrounds, and charter schools, which are publicly funded schools governed by a group under a charter. Today, over two million public school students attend magnet schools. *Looking to the Future, supra* at 22.

C. The United States Department of Education Has Endorsed Voluntary School Integration Plans.

The recognition of the salutary value of voluntary integration plans is not confined to individual public school districts but has also been promoted by the United States Department of Education through its Magnet Schools Assistance Program (MSAP). *See Id.*, at 22. MSAP provides grants to "assist in the desegregation of public schools by supporting the elimination, reduction, and prevention of minority group isolation in elementary and secondary schools with substantial numbers of minority group students." U.S. Dept. of Educ., Magnet Schools Assistance, *available at* http://www.edu.gov/programs/magnet/index.html. Nation-wide, school districts are taking advantage of MSAP by following in the footsteps of New Jersey's Montclair Magnet System, a system "dedicated to becoming the national role model for public integrated education." Montclair Magnet System, Historical Perspective, *available at* http://www.montclair.k12.nj.us/

district/magnet/history.cfm. A pioneer in the magnet school model, Montclair's school choice system was originally implemented in 1977 as a voluntary desegregation plan; today it is know for its "positive impact on the community." *See id.* Most recently, Montclair's educational system was selected by the U.S. Department of Education as one of the six best magnet systems in the country. *See* http:// www. montclair. k12.nj.us.district/magnet/index.cfm.

D. Federal Courts, Including this Court, Have Recognized the Value of Voluntary School Integration Plans.

This Court has recently recognized the benefits of integration. In *Grutter*, 539 U.S. at 330, the Court found that the University Of Michigan Law School has a "compelling interest in a diverse student body," and that race was one important factor in that diversity. Such diversity

> "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand person of different races.' These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.
>
> ....
>
> These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

Id. (internal citations omitted)

To be sure, *Grutter*'s holding that diversity is a compelling state interest spoke specifically to higher education. However, nothing in this Court's opinion indicates that its recognition of the benefits of diversity in universities and graduate schools are somehow inapplicable to primary and secondary

public schools. The *Brown* Court originally noted, as *Grutter* later came to reinforce, that factors "incapable of objective measurement," including the ability of students of different racial backgrounds to "study [and] engage in discussions and exchange views with other students," contributed to the quality of law and graduate schools, and that, rather than being inapplicable, "[s]uch considerations appl[ied] with added force to children in grade and high schools." *Brown*, 347 U.S. at 493-94.

Similarly, for decades, federal courts have consistently noted the benefits of integration and the recognition of local school authorities to voluntarily remedy the harms of *de facto* segregation or racial isolation. *See Parents Ass'n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574, 581 n.9 (2d. Cir. 1984) (school boards may take otherwise "constitutionally suspect measures to counteract the perceived problem of accelerated white flight"); *Clark v. Bd. of Educ. of Little Rock*, 705 F.2d 265, 271 (8th Cir. 1983) ("Although the possibility of white flight and consequent resegregation cannot justify a school board's failure to comply with a court order to end segregation, it may be taken into account in an attempt to promote integration."); *Johnson v. Bd. of Educ. of Chicago*, 604 F.2d 504, 518 (7th Cir. 1979), *vacated and remanded on other grounds*, 457 U.S. 52 (1982) ("[T]he absence of a constitutional duty on the part of the school authorities to establish racially-based enrollments does not preclude the Board from prescribing a racial balance to remedy the segregative impact of demographic change."); *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 61 (6th Cir. 1966) ("Although boards of education have no constitutional obligation to relieve against racial imbalance which they did not cause or create, . . . it is not unconstitutional for them to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm.")).

IV. ALLOWING SCHOOL DISTRICTS TO USE RACE-CONSCIOUS MEASURES IS THE LAST BEST CHANCE OF ACHIEVING *BROWN*'S PROMISE.

While the trend toward voluntary integration is a welcome development, the threat of school segregation is neither obsolete nor speculative. *Racial Transformation*, *supra*, at 4. School segregation is increasing nationally, regionally and in individual school districts due to residential segregation, concentrated levels of poverty, and repeals of desegregation plans beginning in the 1990s with this Court. *Id.* at 37. Moreover, no public school district has ever succeeded in integrating its schools without consciously using race as a tool. In light of that real-world experience, race-conscious measures stand as the last best chance of realizing *Brown*'s promise of equal education and opportunity for all.

A. Narrowly Tailored Race-Consciousness Is an Irreplaceable Tool in Voluntary School Integration Plans.

This Court validated the use of race or race-conscious measures to achieve integration in *Grutter* where it found that "diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. At this point, in addition to the Sixth and Ninth Circuits, the Third Circuit has also applied *Grutter*'s holding to primary and secondary education. In *Comfort v. Lynn Sch. Cmty.*, 418 F.3d 1 (1st Cir. 2005) *cert. denied*, 126 S. Ct. 798 (2005), the First Circuit upheld a race conscious student transfer policy that provided students with an opportunity to attend another school within the district if doing so either reduced racial isolation or improved racial diversity.

As the courts below noted, the race-conscious policies adopted in Seattle and Louisville are permissible because they are narrowly tailored to serve the compelling interest of

diversity. Like the law school in *Grutter*, the Seattle and Louisville schools "consider[] race as one factor among many" in assigning students to schools. *Grutter*, 534 U.S. at 340. Furthermore, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Id.* at 339. This Court observed in *Grutter*,

> "The District Court took the Law School to task for failing to consider race-neutral alternatives such as 'using a lottery system' or 'decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores.' But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."

Id. at 340. Similarly, using alternatives such as a lottery system, or attempting to integrate by socio-economic status, would not ensure diversity in the public schools in Seattle and Louisville.

In the Louisville case, for example, the district court found that narrow-tailoring did not require the school district to attempt to integrate using a lottery system, noting that "[s]uch a system . . . would require a 'dramatic sacrifice' in student choice, geographic convenience and program specialization." *McFarland v. Jefferson Co. Bd. of Educ.*, 330 F. Supp. 2d 834, 861 (W.D. Ky. 2005). The Ninth Circuit also addressed the possibility of a lottery system for the Seattle school district, and observed that it would not serve the goal of integration because

> [d]istrict patterns [in Seattle] indicate that more people choose schools close to home. That would mean that the pool of applicants would be skewed in favor of the demographic of the surrounding residential area. That is, the applicant pool for the north area oversubscribed high schools would have a higher concentration of white students and the applicant pool for the south area oversubscribed high school would have a higher concentration of nonwhite students. Thus, random sampling from

> such a racially skewed pool would produce a racially skewed student body.

Parents, 426 F.3d at 1190. The court also pointed out that the Seattle school board had considered achieving integration by using poverty as a proxy for race, but determined that such a method may be ineffective and would have adverse effects. *Id.* at 1188-89. Since integrated schools will not be attained without these race-conscious methods, the paramount vision conceived in *Brown* will not be realized if they are disallowed.

B. Upholding Race-Conscious Measures in Voluntary Integration Plans Would Keep Faith with *Brown*; Denying them Would Break with *Brown*'s Promise of Full, Equal, and Integrated Educational Opportunities for All.

"History," wrote the poet Byron, "with all her volumes vast, hath but one page."[9] This page of our national history of school integration is not new. Both as a matter of constitutional jurisprudence and historical fact, this Court once before faced the choice to permit in primary and secondary school education that which it had already endorsed in higher education. With the present companion cases, the Court now confronts, in the wake of its 2003 *Grutter* decision, virtually the exact same legal landscape the 1954 *Brown* court faced in the wake of its 1950 decision in *Sweatt*. Just as *Grutter* endorsed the judgment that *integration* is vital in the law school classroom, *Sweatt* established that *segregation* was unsupportable there. 339 U.S. at 629. Just as the *Brown* court extended the holding in *Sweatt* to primary and secondary education, so too this Court should extend *Grutter*'s holding in exactly the same way. Perhaps the remarkable

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[9] George Gordon Noel Byron, Lord Byron, Childe Harold's Pilgrimage, Canto iv, stanza 108, *in The Complete Poetical Works of Lord Byron, Volume 2* (Jerome J. McGann ed.) (1981).

factual parallel between the *Sweatt* and *Brown* decisions and *Grutter* and the present companion cases can be dismissed as mere precedential serendipity, but as a matter of constitutional jurisprudence the point comes to this: *Sweatt* is to *Brown* what *Grutter* is to the present companion cases. To uphold the decisions of the lower courts in these cases would be to keep faith with *Brown*. To reverse would be to break with its promise of full, equal, and integrated educational opportunities for all.

CONCLUSION

In 1954, this Court in *Brown* courageously set the nation on a path toward racial integration. In the more than fifty years since, the path has been neither straight nor easy and, for all of *Brown*'s successes, the truth is here and now we find ourselves at a critical point where we will either continue on the path to school integration or turn back toward resegregation. Narrowly-tailored, race-conscious voluntary integration is consistent with the vision of the founding litigators who first envisioned *Brown*, represents the natural evolution of this Court's *Brown* opinion, and stands as the last best chance of achieving *Brown*'s fundamental goal of meaningful and effective public school integration. We pray this Court not break faith with *Brown*, but instead reaffirm its promise, and uphold the decisions of the circuit courts to give local school boards the irreplaceable race-conscious tools they need to continue voluntarily integrating their schools.

Respectfully submitted,

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APPENDIX

APPENDIX

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND
NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth and Sixth Circuit**

BRIEF OF THE COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION, & IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) AND UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND (UEAALDF) IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Whether the Court should apply the strict scrutiny test to a student assignment plan in the public schools that considers race where the plan can apply to all races and where there is no competitive consideration of the students to whom the plan applies?

Whether a local school board may consider race in the assignment of students to the public schools in its district in order to further the goal of assuring the racial integration of the schools in the district?

Whether the provisions of the student assignment plans of the Seattle and Jefferson County School Boards that consider the race of students are proper under the Fourteenth Amendment?

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On Writ of Certiorari to the United States Court of Appeals for the Ninth and Sixth Circuit

BRIEF OF THE COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION, & IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) AND UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND (UEAALDF) IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

On Friday, March 24, 2006, thousands of Latina/o high school and middle school students ignored the warnings and

threats of principals, police and parents, scaled chain link fences, broke through locked gates and climbed over formidable barricades to march through the streets of Los Angeles asserting their right to equal treatment in this society. Police and television helicopters whirling overhead recorded the high-spirited throngs of youth experiencing their first taste of freedom and dignity. Mass opposition to draconian anti-immigrant laws was sweeping across the nation.[1]

The Latina/o and immigrant communities of Los Angeles, inspired by the courage of the youth, took over downtown Los Angeles on the very next day. On Saturday, March 25, 2006, Los Angeles became the home of the largest civil rights march and rally in the history of this nation. During the next two months the new civil rights movement, born out of the struggle for immigrant rights, but, like all civil rights movements, fueled by an unconquerable human desire for freedom, equality and unbreakable social bonds, came to life all over this nation.

The Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) played a key role in organizing and leading this new civil rights movement. We come before this Court now to speak for every Latina/o, black, Asian, other minority and white activist of the new civil rights movement. We stand intransigently and proudly for affirmative action, integration and immigrant rights.

Struggle teaches people how to fight and what is worth fighting for. Since our founding in 1995, BAMN's experience of organizing mass action in defense of affirmative action, integration and immigrant rights has taught a new genera-

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person, other than amici, their members and counsel, made any contribution for the preparation or submission of this brief.

tion of young leaders what we must do to defend and expand civil rights.

On April 1, 2003, BAMN spearheaded the march and rally at the Supreme Court that occurred on the day that this Court heard the two University of Michigan affirmative action cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*. Over 50,000 young people of all races came to Washington on that day to express their unswerving commitment to save *Brown v. Board of Education*. The April 1, 2003 March on Washington gave young people the experience of learning that when you stand and fight, you can win.

Not by coincidence, hundreds of BAMN Los Angeles high school students experienced their first walkout two weeks before the mass high school walkouts. On March 7, 2006, BAMN students left many of Los Angeles' premier magnet schools to attend a Los Angeles Superior Court hearing and become intervenor-defendants in defense of the Los Angeles Unified School District (LAUSD) desegregation, magnet school and busing plan in *American Civil Rights Foundation v. Los Angeles Unified School District*. A central premise of BAMN, which is to unite the struggle for black and Latina/o equality and freedom, was expressed in action and in the courtroom on that day. All of the students who are now defendant-intervenors in the LAUSD case were instrumental in leading the mass high school actions in the spring of 2006 and continue to build the new civil rights movement to this day.

BAMN has an immediate and direct interest in the outcome of these cases. BAMN students are actively participating in the fight to win integrated, equal, quality education for all young people in this nation. The ability of the LAUSD and other school districts to achieve any measure of integration will be directly affected by the outcome of these cases. But BAMN's interest in these cases goes beyond their immediate practical impact on LAUSD and other districts' desegregation

and affirmative action programs. While the great majority of Americans support integration and equality, there are very few voices in America determined to stand against the justifications and excuses for growing segregation and inequality. Since the continuation of all desegregation policies hangs in the balance in the cases before the Court, as with *Plessy* and *Brown* in the past, it is essential that the voice of those that stand intransigently for integration and will never submit to segregation be heard in these proceedings. Our nation's aspirations and our laws must cohere.

The second amicus is United for Equality and Affirmative Action Legal Defense Fund (UEAALDF). Formed in 1997 as a civil rights legal coalition after the anti-affirmative action lawsuits *Grutter v. Bollinger* and *Gratz v. Bollinger* were filed against the University of Michigan, UEAALDF, representing several civil rights organizations and 41 current and potential University of Michigan Law School students, attained intervener status in *Grutter* and litigated all the way up to this Court. In 2004, UEAALDF successfully represented hundreds of pro-integration students, parents and school employees as intervenor-defendants in *Avila v. Berkeley Unified School District* in defense of the integration plan in Berkeley, California.

In Detroit, Michigan, UEAALDF represented thousands of public school students, teachers, parents and community activists in the fight to restore Detroit citizens' democratic right to vote for their school board. UEAALDF is also representing black and progressive white voters in Michigan who were defrauded in a racially-targeted voter fraud scheme perpetrated by the "Michigan Civil Rights Initiative" in their petition-gathering drive to reach the November 2006 ballot with Measure 06-2, which, if passed and implemented, would ban affirmative action.

In Los Angeles, UEAALDF is intervening to defend voluntary school integration in *American Civil Rights Foundation*

v. Los Angeles Unified School District. The American Civil Rights Foundation has initiated a new suit against the Berkeley Unified School District's voluntary integration plan, and UEAALDF is continuing its defense of integration in the Berkeley public schools. Through its legal work, UEAALDF is committed to making this nation's commitment to democracy and equality living and breathing principles, not lifeless abstractions.

INTRODUCTION

America cannot and will not hold together if the most basic and modest policies for integrating our schools and our society are banned by law. The petitioners in these cases invite the Court to follow in the footsteps of the dishonest and arrogant majority in *Plessy v. Ferguson*, 163 U.S. 537 (1896) by concocting a legal basis for accelerating and institutionalizing growing segregation and inequality. This is a road we must not go down.

The racial and ethnic makeup of America has changed significantly in the last three decades. In a short time, we will become a majority-minority nation. The question before this Court is how we respond to this completely new development in our nation's history. We are now a society that is at once increasingly multiracial and diverse—and increasingly segregated. As Americans, we pride ourselves on having become more integrated and tolerant. At the same time, Latina/o and black people are treated as second-class citizens. Our children are increasingly educated in separate and unequal schools.

Hurricane Katrina showed every American how much racism and inequality shape governmental policies and how detrimental this can be for our whole nation. Forming and following a coherent social policy that can address the growing inequality and segregation of our nation—and at the same time seem fair and beneficial to the vast majority of Americans—can sometimes be difficult. These cases, how-

ever, are easy. Upholding *Brown v. Board of Education* is immensely popular. The Louisville and Seattle school desegregation plans have longstanding and far-reaching popular support. In Louisville, a majority-white school district, 82 percent of people of all races support the plan.[2]

Hundreds of other school districts in the nation rely on similar desegregation plans to integrate some or all of their schools. Urban magnet school programs, the crown jewels of big-city public education, are based on common-sense integrationist policies similar to those utilized by the Louisville and Seattle plans.

Achieving integration in education requires conscious action. Breaking down the racial divide caused by residential segregation requires a plan. The modest plans employed by the Louisville and Seattle school districts are proof that in this nation, in both the North and the South, integrated education can be sustained and even protected against segregationist attacks. This Court must uphold the Louisville and Seattle desegregation plans if integrated education—the promise of *Brown v. Board of Education*—is to be sustained in this nation.

SUMMARY OF ARGUMENT

In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court declared that separate schools could never be equal schools because the social stigma of racism affected the hearts and minds of black children in ways that might never be undone. For the same reason, in *Keyes v. Denver School District No. 1*, 414 U.S. 883 (1973), this Court held that segregation inherently harmed the education of black and Latina/o children even if the school district did not openly declare that it was segregating its students. Finally, in *Swann*

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[2] USA Today, "Race is Still Part of Equation for Equal Education," June 19, 2006.

v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971), the Court again declared segregation unlawful and declared that a local school board had the authority, if not the obligation, to take racially-conscious measures in order to remedy the effects of segregation, whatever had caused that segregation.

The question is whether this Court will honor the promises of equality in *Brown*, *Keyes*, and *Swann*. The school districts in the cases now before the Court did no more—and in fact far less—than this Court said was permissible in *Swann*. Specifically, they adopted modest, racially-conscious student assignment plans to assure that the schools in Seattle and Jefferson County did not mirror the segregation in the neighborhoods of those districts.

The petitioners have presented no basis for asserting strict scrutiny, as the classifications at issue confer no preferences and in fact may burden all races at various times. Similarly, the petitioners have presented no reason that the Equal Protection Clause allows law schools to take measures to achieve diversity for a few students in elite institutions, but denies that right to the secondary and elementary schools, which educate the population as a whole. Moreover, as racial diversity was the sole need for diversity that was not achieved by the normal procedures of the school boards, there is no reason that the plans could not focus on that crucial form of diversity.

Finally, the amici assert that the petitioners, in their attempt to justify their opposition to modest measures to desegregate the schools, have asked this Court to adopt principles that derive not from *Brown*, but from *Plessy*. As set forth below, these principles, which are adopted by the dissenters in the Ninth Circuit, have been justifiably rejected by this Court from *Brown* forward.

ARGUMENT

THE COURT SHOULD REAFFIRM THE NATION'S COMMITMENT TO THE INTEGRATION OF THE PUBLIC SCHOOLS AS THE ONLY WAY TO ACHIEVE EQUAL EDUCATION FOR THE NATION'S FAST-GROWING AND DIVERSE MINORITY POPULATIONS.

A. *Brown* rightly held that separate can never be equal.

Fifty years ago, this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) struck down the legal fiction of "separate but equal"—one of the great lies of American history—and won this Court enormous authority and prestige within this nation and throughout the world.

Striking that blow against America's Jim Crow system of relegating black people and other minorities to second-class status breathed life into America's long-standing rhetorical commitment to democracy for people striving for freedom in newly-emerging nations around the world. In the United States, *Brown* came to symbolize a determination to make democracy, freedom and equality a reality for each and every one of its citizens. For millions of black and Latina/o people, many of whom had sacrificed dearly to fight in World War II, the *Brown* decision signaled that America could be a nation based on hope rather than hypocrisy.

The simple, straightforward honesty of the *Brown* decision is what made it so powerful. In carefully-chosen words, *Brown* declared that *all* forms of segregation were harmful to black students and that *all* separate education was inherently unequal education:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually

> interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn. . . .
>
> * * * *
>
> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are by reason of the segregation deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Brown, supra, 347 U.S. at 494-495(internal punctuation omitted).

The *Brown* Court reached this conclusion by beginning with the recognition that education included far more than the opportunity to acquire certain specific skills:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening a child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id., 347 U.S. at 494-495.

Before *Brown*, the Court had held that segregated law and graduate schools were inherently inferior because they lacked "those qualities which are incapable of objective measurement, but which make for a great law [or graduate] school."

Sweatt v. Painter, 339 U.S. 629 (1950) and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). In *Brown*, the Court held that "...the same considerations apply with added force to children in grade and high schools." *Brown*, *supra*, 347 U.S. at 493-494.

The Court then moved to the central point of its analysis. Precisely because of racism, separate had never been equal in terms of the resources allocated to white and black schools. But the Court passed that obvious point and assumed that material resources could be made equal. Even so, the Court held, separate schools were not equal because of the effect that separation had on students:

> To separate [elementary and secondary students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Id., at 494.

With an eye to the explicit segregation of the South *and* to the open but not explicit segregation in the North, the Court declared that *all* forms of segregation were inherently harmful to the education of black children and that the impact of segregation was ". . . greater when it had the sanction of law." *Id.*, 347 U.S. at 494. *Brown's* recognition that separate can never be equal entered the public consciousness.

In 1973, when the Court considered its first case from a Northern city, it made clear that it *meant* that segregation harmed black students regardless of whether the local authorities openly announced their intent to segregate the schools or disguised their intent by professing equality while locating schools in particular neighborhoods, drawing unfair district lines, using discriminatory assignment plans and other measures to segregate the schools. *Keyes, supra.*

In *Keyes*, the Court drew a distinction between *de jure* and *de facto* segregation, with the former defined by proof that the school board intended to create a segregated system. Sensing that that distinction could be used—which it later was—to limit desegregation in the North, Justices Powell and Douglas declared that the Court should hold that black (and Latina/o) children were harmed by separate education whatever the source of the segregation. As they recognized, segregation is an everyday fact of life for black and Latina/o students attending separate and inferior schools. Confronting the facts of separate and unequal education on a daily basis, those students do not make fine distinctions as to what caused that segregation:

> If a Negro child perceives his separation as discriminatory and invidious, he is not, in a society a hundred years removed from slavery, going to make fine distinctions about the source of a particular separation.

Id, 414 U.S. at 230 n 14 (Powell, J, concurring).[3]

Conceding to opposition to desegregation in the North, the Court's majority never adopted Justices Powell and Douglas's view that segregated schools unlawfully deprived black students of an equal education whenever action by any state agency had aided, abetted or supported that segregation. But even so, the Court unanimously continued its recognition that both *de jure* and *de facto* segregation were harmful and that local school authorities had the authority, if not the Constitutional obligation, to take racially-conscious measures

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[3] See also Justice Douglas's comments in concurrence:

> Where a State forces, aids, or abets or helps create a racial 'neighborhood,' it is a travesty of justice to treat the neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.

Keyes, supra, 414 U.S. at 215-216 (Douglas, J, concurring).

to assure that the schools reflected the racial composition of the communities in which they were located:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Swann, *supra*, 402 U.S. at 16 (1971).

B. Separate cannot be equal today.

Brown's recognition that ending segregation is essential to achieving equality remains absolutely true today. One need only read the continuing barrage of attacks on urban schools, which combine just criticisms with rank prejudice, to realize that the racial stigma of separate education remains—and the need for integration to erase that stigma and to assure equality also remains.

Brown's mandate is both more important and more complex today. Instead of a national public school population that is over 80 percent white, only 58 percent of today's public school students are white. That percentage is declining and will continue to decline due to demographic changes in the nation as a whole. Gary Orfield and Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project, January 2006, at 8.

At the same time, segregation is *increasing* for *all* minorities in almost *every* area of the country:

CHANGES IN SEGREGATION 1991-2003 BY REGION

Changes in Black Segregation

% Black in 90-100% Minority Schools

Region	1991-1992	2003-2004
West	26%	30%
Border	33%	42%
Midwest	40%	46%
South	26%	32%
Northeast	50%	51%

Changes in Latina/o Segregation

% Latina/o in 90-100% Minority Schools

Region	1991-1992	2003-2004
West	30%	39%
Border	11%	16%
Midwest	21%	25%
South	39%	40%
Northeast	46%	44%

Source: Gary Orfield and Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project, January 2006, at 10-11.

In a nation that is far more urban than it was in 1954, the tensions caused by an increasingly large *and* increasingly segregated minority population create the potential for

explosions far greater than those that rocked the country in the 1960s.

What is needed to prevent those explosions is a new national policy for equality, including a new national policy for school desegregation.

Obviously, this case cannot serve as the vehicle for determining such a policy. But if this case cannot solve the school crisis, it can make it far worse. The Seattle and Jefferson County school boards have adopted modest policies that promise only modest gains in integration. If even those plans are set aside, there will be no models for the future, no plans that will stem the tide of segregation, and no relief for the rising tension.

A house divided against itself cannot stand. To begin reuniting this house, the amici ask this Court to sustain the Seattle and Jefferson County plans in full.

C. The School Boards acted properly to prevent the segregation or resegregation of their districts.

As will be seen, the Seattle and Jefferson County School Boards did no more—and in fact far less—than what the Court said they could do in *Swann*. At its most basic level, this case tests whether what the Court declared was permissible in *Swann* is still permissible today.

In devising the plans that they implemented, the central fact confronting the Seattle and Jefferson County boards was the pattern of segregated housing that existed in those jurisdictions.[4]

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[4] The dissent below does not like the term "segregated housing" because, it says, "one can no more 'segregate' without a person doing the segregation than one can separate an egg without a cook." *Parents Involved*, 426 F. 3d at 1198 (Bea, J, dissenting). In fact, there were many "cooks" who separated the races over many years, usually with illegal acts

In Seattle, 70 percent of the population and 40 percent of the students were white—and a majority of the white students lived north of the city center. Conversely, 60 percent of the students were minorities and 84 percent of the black students, 74 percent of the Asian Americans, and 65 city center. *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162, 1166 (9th Cir. 2005) (en banc)

In Seattle, the students could choose the high school that they wanted to attend. From extensive past experience, the school board knew that at four of the city's ten high schools, there would be too many applications for the entering ninth grade class and that a high percentage of those applications would come from the neighborhood in which the particular school was located. The "free choice" system would result in the oversubscribed high schools having minority populations that ranged from 30 to 80 percent. Thus, the board adopted a racial tie-breaker that required the oversubscribed schools to select minority or white students as appropriate until the school obtained an entering ninth-grade class that was within 15 percent of the racial composition of the City. *Parents Involved, supra,* 426 F 3d at 1169-1171[5]

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and violence. As with many of the current opponents of *Brown*, the dissent below wants to ignore the reality of segregation by redefining terms so that it supposedly does not exist. All-white neighborhoods in cities with substantial minority populations are, according to the dissent's definition, not segregated—they simply reflect that people like to live among their "own kind."

[5] In Seattle, the student population is 60 percent minority and included substantial numbers of blacks, Latina/os and Asians. Thus, the 15 percent requirement meant that the four oversubscribed high schools had to have a minority population of 45 to 75 percent. *Parents Involved, supra,* 426 F 3d at 1169-1171.

In Jefferson County, the school district includes the city of Louisville and its suburbs. The district's students were now 34 percent black and 66 percent white, with only a small number of Latina/o or Asian students. The black students lived in the central city, while the white students lived in the suburbs. *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 839-840 (W.D. Ky. 2004), *aff'd* 416 F. 3d 513 (6th Cir. 2005).

Traditionally, the Jefferson County school board assigned students to schools based on geographic districts. As those districts led even more directly to a racial composition in the schools that replicated the segregated nature of housing, the board adopted a student assignment plan that required each school to be within approximately 15 percent of the racial composition of the entire district. *McFarland*, *supra*, 330 F. Supp. 2d 842.[6]

In terms of the housing patterns—and the need for racially conscious measures to overcome them—Seattle and Louisville County are like almost every other American city, with the exception that both still retain a population that is sufficiently diverse so that it is possible to achieve a racially-integrated system within the boundaries of a single district.

There is no specific evidence in the record as to the causes of the segregated housing patterns in Seattle and Jefferson County. As Professor Orfield and countless other authorities have stated, however:

> In most cities it is easy to show that housing segregation was initiated and institutionalized with massive official support [and] that most minority neighborhoods segre-

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[6] In Jefferson County (metropolitan Louisville), the overall student population was 34 percent black and 66 percent white, with no other minority having a significant number. The Jefferson County plan required each school to have between 15 and 50 percent black students. *McFarland*, *supra*, 330 F. Supp. 2d at 842.

> gated during the period of overt segregation policies remain segregated today.

Gary Orfield, *Dismantling Desegregation* (1996), at 297.

As Orfield states, these patterns, once established, simply continue in spite of the passage of non-discrimination statutes:

> Black fears of violence and intimidation in some white communities are still serious obstacles to housing choice. Whites and white realtors almost never look for housing in what are defined as minority communities, and real estate operations are often organized along racial lines. Minority brokers are seldom employed by white offices and rarely get listings in white areas unless racial transitions are already well under way. Because most people shop for housing in areas where they have knowledge of housing or have acquaintances, the fact that the history of segregation has given black and white families familiarity with separate sets of communities and fears about each other's neighborhoods tends to reinforce a self-perpetuating segregation.

Orfield, *supra*, at 298.[7]

As discussed above, Justices Powell and Douglas rightly held that patterns of segregated housing like those in Seattle and Louisville—which trace back to countless forms of state action in the past—should be sufficient to *require* school districts to take action to integrate their districts in order to

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[7] Orfield's conclusions are transparently obvious. In fact, Justice Powell and many others reached the same conclusion thirty years ago:

> The familiar root cause of segregated schools in all the bi-racial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public authorities.

Keyes, supra, 413 U.S. at 222-223 (Powell, J).

assure equal education to black and other minority students. *Keyes, supra*, 413 U.S. at 216-217 (Douglas, J, concurring) and 223-237 (Powell, J, concurring). But in this case, the issue is whether the districts *may* adopt such a plan in order to further a local school board's determination that the integration of the schools is vital for the entire community.

In *Bradley v. Milliken*, 418 U.S. 717, 741 (1974) this Court declared that "No single tradition in public education is more deeply rooted than local control over the operation of schools . . ." Similarly, in *Freeman v. Pitts*, 503 U.S. 467, 490 (1992), this Court declared that a desegregation decree should be dissolved in part in order to further the "vital national tradition" of "local autonomy" and control of the schools.

But if preserving "local autonomy" and control is a sufficient ground for limiting or dissolving desegregation decrees as in *Milliken* and *Pitts*, then it must be a sufficient ground for maintaining a local school district's desegregation efforts. If it were not, "local control" would simply be an excuse to be deployed where it could be used to maintain segregation.

In fact, for reasons beyond consistency and honesty, there are vital reasons that this Court should sustain local initiatives like those in Seattle and Jefferson County. With differing numbers of differing minorities in different areas of the country, there is a vital need for flexibility in order to achieve integration in each local area.

In Seattle, there is less racial segregation in housing--and more diversity in the number of racial groups that are present. The district therefore has the chance to preserve and further a deeper and richer level of integration than is possible in many cities.

Similarly, in Louisville, the district has the rare opportunity to assure that there is extensive integration between black and white students.

In other cities, the situation is less favorable, but racially-conscious plans can still take some steps towards preventing further segregation.

In Detroit, for example, where *Milliken* makes it impossible for the city or the suburbs to achieve any substantial integration, the Detroit school board gives "preference" to white and Asian students at some magnet schools in order to preserve a fig leaf of integration.

Similarly, in New York, suburban districts may adopt transfer policies that allow them to have a few black and Latina/o students in their districts. *Brewer v. West Irondequoit Cent. School Dist.*, 212 F. 3d 738 (2d Cir. 2000).

In Los Angeles, the students in the district are now 90 percent black and Latina/o. By using racially-conscious criteria, however, the district can maintain magnet schools that can assure some integration with white people, and even more integration between black people and Latina/os.

If this Court were to sustain either challenge here, it would have devastating effects on these and many other plans. By rejecting these challenges, the Court can at least prevent the destruction of numerous local initiatives and preserve some measure of actual integration in Seattle, in Louisville and in many other areas of the nation.

D. The petitioners have offered no basis for subjecting the school boards' plans to strict scrutiny.

The petitioners ask this Court to strike down the plans at issue because they want their children to attend a "neighborhood school."

Far more than once, this Court has confronted cases in which the cry of "neighborhood schools" was a convenient cover for not wanting to attend schools with any black students. Mobs burned buses in Boston and in Michigan not

because they objected to public transport, but because they objected to integration.

Even assuming *arguendo*, however, that there is not an ounce of prejudice in the petitioners' claimed desire to attend schools in their neighborhood, the petitioners have barely stated a cognizable interest, much less an interest that deserves strict scrutiny by this Court. There is no claim that parents or students have *ever* had an unfettered right to choose a particular public school in Seattle or particular classmates in Jefferson County. Nor is there a claim that the school boards assigned petitioners to schools that would provide them with an inadequate education. Indeed, there is little evidence in the record that the schools that they want to attend are in any sense better than the schools to which they have been assigned.

The entire claim is that the petitioners like one school more than another and that the project of assuring an integrated education to all students should take a back seat to *their* individual preferences.

If that is a cognizable interest—which is dubious—the petitioners state no basis for their assertion that this interest must be protected by strict scrutiny. Unlike in *Grutter*, there is no question of an alleged "preference" in a selective admission system that is based on what are said to be measures of merit. As there are no judgments on "merit," there is no stigma of rejection. Nor is there a claim that one race or another is disfavored by the system. Black students may be assigned to one school and white students to another in order to preserve some level of integration.

As Chief Judge Boudin of the First Circuit and Judge Kozinski of the Ninth Circuit held, these plans should not be reviewed under strict scrutiny at all. *Comfort v. Lynn School Committee*, 418 F. 3d 1, 28-29 (1st Cir. 2005)(Boudin, C.J., concurring), *cert. den.* ___ U.S. ___, 126 S. Ct. 798 (2005);

Parents Involved, supra, 426 F. 3d at 1194-1195 (Kozinski, J, concurring). Applying a standard of robust and realistic review, Judge Kozinski held as follows:

> Under this standard, I have no trouble finding the Seattle plan constitutional. Through their elected officials, the people of Seattle have adopted a plan that emphasizes school choice, yet tempers such choice somewhat in order to ensure that the schools reflect the city's population. Such stirring of the melting pot strikes me as eminently sensible.

Parents Involved, supra, 426 F. 3d at 1195 (Kozinski, J, concurring).

The Ninth Circuit majority rightly expressed considerable sympathy with this approach, *Parents Involved, supra*, 426 F. 3d at 1173 n. 12, and it is the standard that should be applied by this Court.

E. The petitioners wrongly claim that Grutter's recognition of diversity does not apply to elementary and secondary schools.

Just as *Grutter v. Bollinger*, 539 U.S. 244 (2003), recognized the benefits of racial diversity in a law school class, the same benefits obtain from the integration of a public high school or elementary school.

In *Brown* itself, this Court applied its past decisions on law and graduate schools to elementary and secondary education, holding that the need for equality in the intangible factors applied with "added force to children in grade and high schools." *Brown, supra*, 347 U.S. at 494.

In fact, it would be astounding if any court twisted the Equal Protection Clause in a manner that held that educational institutions had a right to assure a diverse learning environment for a few students in an elite law school but lacked the right to assure a similarly diverse environment for

the overwhelming number of students who attend public elementary and high schools. In addition to its rank elitism and its direct conflict with numerous decisions of this Court holding that public school students are entitled to freedoms like those described in *Grutter*, such a distinction ignores the simple fact that younger students can benefit more from racial integration, since their views of the world are not yet as formed as those of law and graduate students.

F. The petitioners wrongly assert that the public schools may not attempt to achieve racial diversity.

Having first said that *Grutter* does not apply at all to elementary and secondary schools, the petitioners, supported by the amicus brief filed by the Attorney General of the United States, next attempt to transfer *Grutter* to secondary schools without any attempt to account for the evident differences between an elite law school and a public high school (Seattle Pet. Br. at 29-30, 44-45; Br. of the United States in *Meredith*, at 13-15, 16-20).

In an elite school, the institution *selects* a small number of students from a large number of applicants. But in the public elementary and secondary schools in Seattle and Jefferson County, there is no selectivity. The school system and the individual schools have a statutory obligation to admit everyone. It would be pointless, stigmatizing, and educationally counterproductive to go through the fiction of a "holistic review" that supposedly determined what other elements of "diversity" a first or ninth grader might bring to a particular school. There is no suggestion in the record that the public schools of Seattle or of Jefferson County need to, or could, adopt a plan to achieve any form of diversity other than racial diversity.

The glaring defect in the normal student assignment policies is racial diversity—as it was in *Brown*—and the

school boards have properly adopted policies to deal with the *real* problem that they face.

G. The petitioners wrongly resurrect arguments from *Plessy v. Ferguson.*

Just as *Brown* occupies a place of high honor in our history, *Plessy* occupies a place of universal scorn.

In that case, the Court upheld a Louisiana statute requiring "separate but equal" accommodations for passengers on intrastate trains. *Plessy, supra.*, 163 U.S. at 551. Separate, of course, was never equal, but the soothing fiction of *Plessy* sanctioned the entire array of segregation laws in the South—laws that were consciously designed to uphold a system of white supremacy, a system which found its clearest expression in thousands of lynchings. See John Hope Franklin, *From Slavery to Freedom*, 3rd ed, at 338-343.

None of the parties or amici call for a return to that system. None support Plessy or a return of legal segregation. Yet if one reads the arguments of the petitioners and their supporters closely, their arguments come from *Plessy*. In a society where segregation exists, the views justifying that segregation recur from generation to generation.

Listen to the arguments of the petitioners and of the dissenters in the Ninth Circuit.

The Seattle petitioners assert that ". . . the educational benefits of racial diversity are far too uncertain to qualify as a compelling state interest. . ." (Seattle Pet. Br., at 35). Similarly, the dissenters in the Ninth Circuit assert that ". . . the evidence regarding the impact of desegregation on intergroup relations is generally held to be inconclusive and inconsistent." *Parents Involved, supra.*, 426 F.3d at 1206 (Bea, J, dissenting), citing *Grutter*, 539 U.S. at 364-365 (Thomas, J, dissenting).

That is, *Brown* was wrong, integration has achieved little, and so racial separation may be an acceptable option.

The dissenters then say *de facto* segregation *is* an acceptable option. In 1995, Justice Thomas claimed that separate schools did not necessarily lead to unequal schools—reviving the *Plessy* corpse. *Missouri v. Jenkins*, 515 U.S. 70, 120-123 (1995)(Thomas, J, concurring).[8] Citing Justice Thomas's words, the Ninth Circuit dissenters claim that the Seattle district's attempt to prevent racially-isolated schools ". . . . presents another racial stereotype, which assumes there is something wrong with a school that has a heavy nonwhite student body, or something better about a school that has a heavy white student body population." *Parents Involved*, 426 F. 3d at 1203-1204 (Bea, J, dissenting), citing *Jenkins*, 515 U.S. 70, 120-123 (1995)(Thomas, J, concurring).

Again, the argument is from *Plessy*. If separate is seen as unequal, it is only because ". . . the colored race chooses to put that construction upon it." *Plessy, supra*, 163 U.S. at 551.

But the dissenters then go even further. After a brief rhetorical nod to the history of discrimination, the dissenters state, ". . . it is only natural that people should sort themselves out in urban space along lines of race, as well as of religion and social class." Similarly, it is only "natural," they say,

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[8] Justice Thomas's exact words were as follows:

> "Racial isolation" itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.

Jenkins, 515 U.S. at 122.

Brown did not say that black students were inferior; it said that the stigma of racism made black students feel inferior.

that the "schools mirror their [residential] choices." *Parents Involved, supra*, 426 F.3d at 1219.

As *Plessy* said, separate facilities are in accord with the "established usages, customs, and traditions of the people. . ." *Plessy*, 169 U.S. at 550.

Even this, however, does not plumb the depths to which the dissenters have sunk. According to the dissenters, if *de facto* segregation is ever to change, it must come from the voluntary choices of individuals, not from "compulsory racial discrimination by the state." *Id*, at 1199, 1219. Or, as *Plessy* said:

> The argument [against the separate but equal law] also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by the enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.

Plessy, supra, 163 at 551.

As both the state in 1896 and the petitioners today are seeking a law to enforce *their* views of what customs should be, their professed belief in voluntary action is hypocritical. *Brown* recognized, however, that the law both reflects and can change popular customs—and the law can be used to provide support to what Lincoln called the better angels of our nature.

Again, *Brown* was right. In 1954, few thought that the "customs" of the South could change. But in part due to *Brown* and the decisions and laws that followed it, there is now only a tiny minority of white people who support a return to that system.

In adopting their desegregation plans, the school boards in Seattle and Jefferson County did as *Brown* did. They acted for equality—and they correctly assumed that they could, over time, both change the customs and keep and enlarge the majority that elected them.

In case after case, this Court had to order recalcitrant local officials to comply with their duty to desegregate the public schools. Today, however, the petitioners ask this Court to order local school boards to stop their efforts to desegregate.

Apart from the real consequences that would come from such an order, the symbolic value of such an order would be enormous. The same Court that once ordered integration would now be preventing integration. Every racist in the country would be heartened—and almost every black, Latina/o and other minority would be enraged.

The Court should not go down that path. By law, logic and justice, these are easy cases. Acting under the moral mandate of *Brown*, this Court should sustain the modest actions taken by democratically-elected boards to integrate the schools within their district.

CONCLUSION

For the reasons stated, the amici assert that the Court should affirm the decisions of the United States Court of Appeals for the Sixth and Ninth Circuits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE COLLABORATIVE OF CATHOLIC LEADERS AND ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

This amicus brief represents the views of the undersigned Collaborative of Catholic Leaders and Organizations who agree that the fundamental principles of Catholic Social Thought help illuminate the proper resolution of these two cases within the parameters of American constitutional law.[1] Catholic Social Thought offers a systematic and synthetic ethical framework that articulates the best hopes for the authentic development of the whole of humanity. It is from within this framework that Amici seek to cooperate in finding solutions to the outstanding problems of our time, one of which remains the segregation of our public schools. At the core of this effort lies a conviction that the just outcome of these cases will provide a rich opportunity for our democracy to better protect the dignity and basic rights of all members of society.

SUMMARY OF ARGUMENT

Amici share a religious principle that places the right to make choices about a child's education firmly in the hands of the parents. This is a right that the state must respect and promote, and that the family must not neglect or delegate. According to this principle, parents' authority over the selection of schools is nearly always anterior to all others – governmental or ecclesiastical. This emphasis upon parental primacy is consistent with state and federal constitutions and can help illuminate their implications. Not only is parental choice justified as a good in itself, it is consistent with the Catholic social principle of "subsidiarity" that locates

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[1] Pursuant to Supreme Court Rule 37.6, the Collaborative of Catholic Leaders affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

authority nearest the object of its exercise. This principle supports assignment plans that empower ordinary families to choose from all schools within their districts. This empowerment is a distinctly compelling interest of the just state.

Racial integration is a second distinctive value and compelling interest of the just state. Racial segregation of schools violates the dignity of the human person and detracts from the solidarity of communities. It is a plain and primary injustice.[2] Integration signals the end to segregation and the beginning of something beyond even desegregation – an attentiveness to the marginalized of society that fosters the authentic human development of *all* members of society.

The extension of parental choice to multitudes of ordinary families, coupled with the achievement of an integrated community within each of the districts' schools, is a step toward justice and a contribution to the common good. Viewing the record, and given our Catholic and American understanding of justice, we urge the Court to acknowledge as compelling the two interests fostered by respondents –

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[2] The Catholic Church and its bishops have issued many statements on racism. *See, e.g.*, U.S. Conference of Catholic Bishops, *Brothers and Sisters to Us: U.S. Bishops' Pastoral Letter on Racism in Our Day* (1979) (addressing the intersection of race and poverty); U.S. Conference of Catholic Bishops, *Love Thy Neighbor as Thyself: U.S. Catholic Bishops Speak out Against Racism in Our Day* (1979); Pontifical Commission of Justice and Peace, The Catholic Church, *The Church and Racism: Towards a More Fraternal Society* (1988) (denouncing institutionalized racism sanctioned by the constitution and laws of a country, for example, South Africa's former system of apartheid; spontaneous racism, as found in a nationalism that harms immigrants; and systemic racial prejudice such as anti-Semitism); Pontifical Commission of Justice and Peace, *The Church and Racism: An Introductory Update* (2001) (updating the 1988 report by the Pontifical Commission). *See also* Black Catholic Bishops of the United States, *What We Have Seen and Heard, Black Bishops' Pastoral Letter on Evangelization* (1984) (denouncing the subtle and masked racism that still festers within society).

parental choice and integration – pursued in a mutuality that is narrowly tailored to ameliorate two entrenched evils: the marginalization of the opportunity-poor family and the perpetuation of racial segregation.

In these cases, the Seattle School District ("Seattle") and the Jefferson County Board of Education ("JCPS") have carefully adopted broad measures to maximize parental choice in school selection, extending it to all urban families, rich and poor, save in the relatively unusual case in which a particular assignment would increase racial composition beyond certain broad limits. These major urban school districts strive to achieve a measure of racial integration by avoiding the traditional practice of student assignment based solely on residency, a practice whose foreseeable effect is to racially isolate more desirable schools from less desirable schools. Petitioners challenge the Seattle and JCPS plans, not because they deny choice, but because they place narrow limitations upon an expanded notion of parental choice in order to foster racial integration. In so doing, Petitioners are effectively asking Respondents to take meaningful choice away from the vast majority of families and to risk resegregation of the districts. This is a dilemma the Court need not countenance.

ARGUMENT

I. DISTRICTS' RACE-CONSCIOUS ASSIGNMENT PLANS MAXIMIZE PARENTAL CHOICE, WHICH IS A COMPELLING STATE INTEREST AND IS IN KEEPING WITH CATHOLIC SOCIAL THOUGHT.

A. Maximizing Parental Choice is a Compelling State Interest.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), this Court held that the "liberty" protected by the Due Process Clause

includes the right of parents to "establish a home and bring up children," and "to control the education of their own." *Id.* at 399. Three years later in *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1926), this Court upheld, "the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 434-35. It follows that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 435. Subsequent cases reaffirm this understanding of parental choice.[3]

More recently, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), this Court made a broad declaration of the constitutionality of "true private choice." *Id.* at 653. The State undertook a general, multifaceted approach to provide educational opportunities to the children and to facilitate parental choice. The only preference was for low-income families, who were given priority in obtaining vouchers. *Id.* Like the parents who wish to use a voucher to secure entry into a school, parents here should enjoy the right to choose where and from whom their child learns. Petitioners in *Zelman* drew upon *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), to remind the Court that it promised equal

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[3] *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility yield[s] to the right of parents to provide an equivalent education in a privately operated system."); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (upholding the "fundamental right of parents to make decisions concerning the care, custody, and control of their children").

educational opportunities for all American school children. But parental choice is not equitably distributed. For some, the promise has become a reality; for others who live in impoverished, segregated neighborhoods, it has been an illusion. *See* Kimberly J. Jenkins, *Private Choices, Public Consequences: Public Education Reform and Feminist Legal Theory*, 12 Wm. & Mary J. Women & L. 563, 566 (2006). The opportunity-rich family may either move to a neighborhood with a better school, or pay tuition at a private one. The opportunity-poor family may succumb to educational despair, disinvestment, and even failure.

Here, Respondent districts have decided, as a matter of good policy, to extend the practical enjoyment of this constitutional parental right to choose on an equal basis to all families.[4] In so doing, the government is providing the poor and working class parents with the means necessary to make their right a meaningful one. By employing race-conscious assignment plans, JCPS and Seattle are empowering parents with educational options they had not previously had, and from which they can now choose what is best for their child. In processes such as these, a very small number of parents will have their choices restrained. Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 Seton Hall L. Rev. 937, 942 (1993) (citing U.S. Department of Education, *Getting Started: How Can Choice Renew Your Public Schools* 19-24 (1992)); *see also* Constance Hawke, *The "Choice" for Urban School Districts: Open Enrollment or*

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[4] In its plan, the District rejected distinctly coercive alternative modes of integration specifically, "...because of the high value [it] places on parental and student choice." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F. 3d 1162, 1189 (2005) [hereinafter *Parents Involved*]. In *McFarland v. Jefferson County Public Schs.*, 330 F. Supp. 2d 834 (2006), Judge Heyburn emphasized that "choice may be the most significant element of the 2001 Plan," *id.* at 842, and then again, that a lottery system "would require a dramatic sacrifice in student choice." *Id.* at 860.

Desegregation?, 115 Educ. L. Rep. 609 (1997). But when maximized properly, parental choice leads to greater integration – at which point two compelling state interests mutually reinforce one another. In short, Seattle and JCPS have conscientiously converted what for the opportunity-poor had been a beautiful but empty constitutional right into a very practical public policy. Their two challenged assignment plans deserve to be defended in light of this commonly declared objective.

The posture of Petitioners, who clearly have honored choice in the past by their enthusiastic participation in it, is puzzling. Now among the few who are unsuccessfully exercising it, they effectively ask Respondents to offer race-neutral choice, with its predictable tendency to perpetuate racial segregation, which is no choice at all.

B. The Principles of Subsidiarity and the Preferential Option for the Poor Support Parental Choice.

According to Catholic Social Thought, the principle of subsidiarity holds that, in order to protect basic justice, government should undertake only those initiatives that exceed the capacities of individuals or private communities. U.S. Conference of Catholic Bishops, *Economic Justice for All* ¶124 (1986). By virtue of this principle, public authorities cannot and must not take away from families the functions that they can perform on their own or in free associations; instead it must positively favor and encourage as far as possible responsible initiative by families. In the conviction that the good of the family is an indispensable and essential value of the civil community, the state must do everything possible to ensure that families have all the aids – economic, social, educational, political and cultural – that they need in order to face all their responsibilities in a human way. Pope John Paul II, *Familiaris Consortio: On the*

Family ¶45 (1996). Respondents seek to provide these aids to more families—particularly the impoverished ones—by extending greater educational choices to them.

The moral test of a society is how it treats its most vulnerable and marginalized members. These members have the most urgent and even privileged moral claim on the conscience of the nation. This "preferential option for the poor" is not an adversarial slogan that pits one group or class against another. Rather it states that the deprivation and powerlessness of the vulnerable not only compromises their dignity, but wounds the whole community. U.S. Conference of Catholic Bishops, *Economic Justice for All, supra,* at ¶88.

The primary purpose of this special commitment to the poor is to empower them to become active participants in the life of society. The extent of the suffering of the disempowered is a measure of how far we are from being a true community of persons. A healthy community can be achieved only if those who are more influential because they have greater share of opportunities are responsible for the weaker and ready to share with them all they possess. *Id.* at ¶87-88; Pope John Paul II, *Sollicitudo Rei Socialis: On Social Concern* ¶39 (1987). Sound and just public policy decisions, including how to assign students to public schools, turn on how they affect the most marginalized.

In its 1979 pastoral letter on racism, the U.S. Conference of Catholic Bishops recognizes economic and racial oppression as interrelated forces that dehumanize our society. U.S. Conference of Catholic Bishops, *Brothers and Sisters to Us, supra*, at 1. As both the District Court and Ninth Circuit noted, concentrated poverty, which commonly coexists with segregated neighborhoods and schools, is much more likely to adversely affect black students than whites. Racially isolated schools experience much higher rates of poverty,

lower average test scores, lower levels of student achievement and less qualified staff. *McFarland*, 330 F. Supp. 2d at 854; *see also* Chester Hartman, *Double Exposure: Poverty and Race in America* (1997). In turn, the poverty level of schools influences the scores of all children, including those from more advantaged families. U.S. Department of Education, *Mapping Out the National Assessment of Title I: The Interim Report, 1996* (1996). Since public schools are intended to create a common preparation for citizens in an increasingly multiracial society, this inequality can have serious consequences. For these reasons, Seattle and JCPS hold out school integration as beneficial to their students and to their school systems as a whole. It equalizes educational opportunities and minimizes racial, class and geographic bifurcations. *McFarland*, 330 F. Supp. 2d at 854; *Parents Involved*, 426 F.3d at 1177.

C. The Common Good and Solidarity Balance the Larger Community's Needs with Individual Interests to Maximize Parental Choice.

Humans are social creatures that achieve fulfillment in community. With growing globalization and interdependence, the importance of pursuing the good of the whole community increases. U.S. Conference of Catholic Bishops, *Communities of Salt and Light: Reflections on the Social Mission of the Parish* 10 (1993). According to Catholic Social Thought, the "common good" is "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment." Second Vatican Council, *Gaudium et Spes: Pastoral Constitution on the Church in the Modern World* ¶26 (1965). The common good requires that all members of the state be entitled to share in it, although in different ways according to each one's tasks, merits, and

circumstances. Pope John XXIII, *Pacem in Terris: Peace on Earth* ¶56 (1963). Every social group is called to attend to the needs and legitimate aspirations of other groups, and even of the general welfare of the entire human family. Second Vatican Council, *supra*, at ¶26.

The state, in turn, is charged with ensuring the realization of the common good. Pope John XXIII, *Mater et Magistra: Christianity and Social Progress* ¶20 (1961). Every civil authority, including school districts, must create the conditions required for attaining humanity's complete good, while respecting the legitimate liberties of individuals, families, and subsidiaries. Pope Paul VI, *Octogesima Adveniens: A Call to Action on the Eightieth Anniversary of Rerum Novarum* ¶46 (1971). Justice and equity, however, may at times require the state to give more attention to the disempowered members of the community, since they are less able to defend their rights and to assert their legitimate claims. Pope John XXIII, *Pacem in Terris*, *supra*, at ¶56 Unless state authorities take suitable action with regard to economic, political, and cultural matters, inequalities between the citizens become more pronounced and entrenched. *Id.* at ¶63. In the cases before this Court, unless Respondent school districts are allowed to attend to the marginalized, parental choice will be diminished and the preferences of the few privileged will prevail. Rather, race-conscious assignment plans allow Seattle and JCPS to maximize choice by balancing the needs of the larger community with individual interests.

The common good Respondents foster is not forged at the expense of one race or one ethnic group as a means of assimilation.[5] Nor is it fostered without risk. Challenging

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[5] In his dissent in *Parents Involved*, Justice Bea mischaracterizes the nature of the common good as it unfolded in the United States. He claims that people

our nation's emphasis on individual freedom and merit through race-conscious desegregation plans may leave some whites feeling they are "victims." *Parents Involved,* 426 F.3d at 1206. But this is not a matter of simply diffusing unfairness—it is a matter of pursuing a common good that is defined by authentic human development for all. Integration is central to that common good and it requires concerted race-conscious efforts similar to those of Respondents on behalf of school districts across the nation.

Because all humankind make up one human family, the common good is realized in solidarity. Solidarity is not a feeling of vague compassion for or shallow distress at the misfortunes of others, but a firm and persevering determination to commit oneself to the common good, to the good of all and of each individual. Pope John Paul II, *Sollicitudo Rei Socialis*, *supra*, at ¶38. But a freedom that exalts the individual in an absolute way creates no place for solidarity. Pope John Paul II, *Evangelium Vitae: The Gospel of Life* ¶19 (1995). For this reason, the U.S. Catholic Bishops call for a move from devotion to independence to a commitment to human solidarity through an understanding of interdependence. U.S. Conference of Catholic Bishops, *Economic Justice for All, supra*, at ¶365.

Seattle and JCPS are aware of the potential effects race-conscious measures and burdens might have on the solidarity of their communities. For this reason, they have tailored their plans narrowly and have avoided undue harm. The

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voluntarily came to this great "melting pot" and were not told whether they were white or nonwhite or where to go to school based on their race. Rather, they set aside their differences and embraced "our common values." *Parents Involved*, 426 F.3d at 1199 (Bea, J. dissenting). But African-Americans did *not* come to this nation voluntarily, *were* told where to go to school, and were not asked to embrace "common" values, but to assimilate into the values of the dominant group.

Ninth Circuit found that under Seattle's plan, "the burden of not being allowed to attend one's preferred school is shared by all students equally." *Parents Involved*, 426 F.3d at 1191. Moreover, it is undisputed that the race-based tiebreaker does not uniformly benefit one race or group to the detriment of another. *Id.* at 1192.

II. DISTRICTS' RACE-CONSCIOUS ASSIGNMENT PLANS FOSTER INTEGRATION, WHICH IS A COMPELLING STATE INTEREST AND IS IN KEEPING WITH CATHOLIC SOCIAL THOUGHT.

A. Integration is a Compelling State Interest.

The compelling interest of the State in expanding choice is no less compelling simply because districts deploy it to remedy a racial segregation that was buttressed by its own assignment rules. Integration actually reinforces, not conflicts with, parental choice. As the court in *McFarland*, described it, there is a co-agency between parental choice and racial integration that works for the common good:

> [c]hoice and integrated schools, the Board believes, invest parents and students alike with a sense of participation and a positive stake in their schools . . . *McFarland*, 330 F. Supp. 2d at 854.

Moreover, this Court has expressly authorized school authorities to voluntarily employ race-based measures to desegregate the schools even absent a finding of *de jure* segregation.[6] In *Charlotte-Mecklenburg Board of Education v. Swann*, 402 U.S. 1, 16 (1971), this Court held that school

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[6] The distinction the United States wishes this Court to uphold between *de jure* and *de facto* segregation is untenable in the context of voluntary remediation. Brief for the United States as *Amicus Curiae* in Support of Petitioners, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908; *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915, p. 10 (filed Aug. 17, 2006) [hereinafter United States Brief].

authorities have broad power to consider race when formulating educational policy. *See also Green v. County School Bd. of New Kent Count, Virginia* , 391 U.S. 430, 437 (1968).

Both school districts try to balance choice and race-consciousness. In its 2001 plan, JCPS provides students numerous and varied choices among specialized schools and programs. Race is not "the defining feature" in student assignment, rather it is one possible factor that acts as a "plus" and is used in a limited way to promote the good of all students. *McFarland*, 330 F. Supp. 2d at 859, 861. Only a small number of elementary school students attend a school that is not one of their choices. *Id.* at 843-44. Through their 1998-99 open choice plan, Seattle also attempts to balance the goals of choice and racial diversity. *Parents Involved*, 426 F.3d at 1168. As Judge Kozinski writes in his concurrence, a plan that emphasizes school choice, yet tempers such choice to ensure that the schools reflect the city's population, is eminently sensible. *Id.* at 1194. Indeed, without race-conscious measures, spatial racism, as manifest in segregated housing and schools, will persist and the choices of opportunity-poor students will be frustrated. [7]

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[7] In his Pastoral Letter on Racism, *Dwell in My Love*, Francis Cardinal George, O.M.I., Archbishop of Chicago refers to spatial racism as patterns of metropolitan development in which some affluent whites create racially and economically segregated suburbs or gentrified areas of cities, leaving the poor – mainly African Americans and Hispanics isolated in deteriorated areas of the cities and older suburbs. Francis Cardinal George, *Dwell in My Love* 5-14 (2001). Experts have documented the devastating impact of this racial and economic isolation. *See, e.g.*, Glenn C. Loury, *The Anatomy of Racial Inequality* (2002). Myron Orfield, *Metro-Politics: A Regional Agenda for Community and Stability* (1998); Melvin Oliver and Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (1995); David Rusk, *Cities Without Suburbs* (1993); Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993); Gary Orfield and Carole

B. Integration Fosters the Dignity of the Human Person.

Because all human life is sacred, each human person is worthy of dignity. To be well-ordered and productive, society must act on the foundational principle that every human being is a person whose nature is endowed with intelligence and free will. Pope John XXIII, *Pacem in Terris*, *supra*, at ¶9. Justice and consideration of neighbor as another "self" preserves and nurtures this dignity, which transcends disability, poverty, age, lack of success, or race. U.S. Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response* ¶15 (1983). The right to all that is necessary for living an authentic life is universal and inviolable, including the right to an education. *Gaudium et Spes*, *supra*, at ¶26.

Segregation violates the dignity of the human person. The entrenched social structures in which humans live, work, and learn can impede the full realization of personhood.[8] Many policies and practices perpetuate the highly inequitable and dehumanizing realities of spatial and institutional arrangements that privilege whites over nonwhites and prevent society from realizing the kind of human community that is necessary for genuine human development and happiness. Harry J. Flynn, *In God's Image: Pastoral Letter on Racism* 19 (2003). Pope John Paul II argues that "to destroy such structures and replace them with more authentic forms of living in community is a task which demands courage and patience." *Centesimus Annus: On the Hundredth Anniversary of Rerum Novarum* ¶39 (1991). Efforts such as

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Ashkinaze, *Closing Door: Conservative Policy and Black Opportunity* (1991); and William Julius Wilson, *The Truly Disadvantaged* (1987).

[8] In his dissent in *Parents Involved* ,Justice Bea claims that the majority misuses the term "segregate" because it is a transitive verb that requires an actor to do an act which effects segregation. *Parents Involved*, 426 F.3d at 1197.

those undertaken by Seattle and JCPS to change patterns of racial, cultural, and economic balkanization require institutional support, particularly from this Court.

Integration, then, fosters the dignity of the human person and inculcates an entirely human way of life in justice. Synod of Bishops, *Justice in the World* 296 (1971). It is not, as the Petitioners in Seattle claim, a form of "racial balancing for its own sake." Brief for Petitioners, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908; *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (filed August 17, 2006) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)). In choosing to voluntarily desegregate, JCPS strives to improve student education by providing substantially uniform educational resources and by teaching critical thinking skills in a racially integrated and diverse environment. Students of all races learn racial tolerance, practice cross-racial understanding, appreciate the nation's diverse heritage, and build a firm foundation for good citizenship and concern for the "other." JCPS also seeks to foster community support for its schools. *McFarland*, 330 F. Supp. 2d at 837, 852. Similarly, Seattle acts to secure the educational and social benefits of racial and ethnic diversity, and to ameliorate the racial isolation or concentration in its high schools that mirror the area's segregated housing patterns. *Parents Involved*, 426 F.3d at 1166. Equal access to equal schools, faculties, and course offerings enable all students "to reach their full potential." *Id.* at 1174.

This Court has emphasized since *Brown* that public schools are a vital institution in transmitting the values on which our society rests. *See Brown*, 364 U.S. at 493; *see also Plyer v. Doe*, 457 U.S. 202, 221 (1982). Education affords more than just skills and knowledge—it socializes students and contributes to their journey toward authentic living in

justice. Integrated education increases awareness and experience of cultural and social diversity. Students abandon patterns of seeing those who are racially different from themselves as strangers, making our society more fully human. Flynn, *supra*, at 12.

Although the United States would like the Court to believe that the racial classifications of "black" and "white" employed by JCPS, and of "white" and "nonwhite" employed by Seattle are so simplistic as to render diversity-seeking endeavors illegitimate. They are not mere "racial stereotypes," but are fluid descriptors, not of the demographic make-up of society, but of the realities of spatial and institutional arrangements that perpetuate racial stratification and inequalities along a color line. *McFarland*, 339 F. Supp. 2d at 830, n.6; *Parents Involved*, 426 F.3d at 1166; United States Brief at 12. Despite increasingly racially diverse public school enrollment, white students are becoming more segregated from black and Latino students. Erika Frankenberg & Chungmei Lee, The Civil Rights Project at Harvard, *Race in American Public Schools: Rapidly Resegregating School Districts* 4 (2002).[9] Seattle itself struggles to overcome the all too real racial isolation of "white" from "nonwhite" neighborhoods and to keep it from segregating their schools. *Parents Involved*, 426 F.3d at 1177-78.[10]

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[9] Many of the districts experiencing the largest changes in black-white exposure are also having similar changes in Latino exposure to whites. Frankenberg & Lee, *supra*, at 4; *see also* Elizabeth M. Grieco & Rachel C. Cassidy, "Overview of Race and Hispanic Origin," Census 2000 Brief, U.S. Bureau of the Census, March 2001.

[10] As some of Petitioner's *amici* have argued, the school districts would not be attempting to engineer some "right mix" of persons, but to avoid a "wrong mix" where segregation diminishes racial diversity. *See, e.g.*, Brief for Florida Governor John Ellis "JEB" Bush and the State Board of Education as *Amici*

III. DEFERENCE TO DISTRICTS IS APPROPRIATE AND IS IN KEEPING WITH CATHOLIC SOCIAL THOUGHT.

A. The Federal Courts Should Defer to Districts' Authority to Achieve Integration by Furthering Parental Choice.

Federalism, by its very nature allows problem solving to be performed at the lowest level possible. This does not mean that the government that governs least, governs best. Rather, it acknowledges that the appropriate level of intervention must be determined in each instance.

As the U.S. District Court noted in *McFarland*, this Court has "strongly endorsed the role and importance of local elected school boards as they craft educational polices for their communities." *McFarland,* 330 F. Supp. 2d at 850 (citing *Milliken v. Bradley*, 418 U.S. 467, 481 (1992)); *See also Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (explaining that local autonomy of school districts is a vital national tradition); *Bd. of Educ. Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991) (noting that local control allows for participation and innovation); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) (explaining that local control of schools leads to healthy competition of educational excellence).

Indeed, deference to local school boards goes to "the very heart of our democratic form of government." *Id.* As the Ninth Circuit recognized, much can be gained from states employing locally appropriate means to achieve desirable ends. *Parents Involved*, 426 F.3d at 1190. Rather than

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Curiae in Support of Petitioners, *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, No. 05-908; *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915, p. 29, n.18 (filed Aug. 17, 2006).

prohibiting Seattle and JCPS from implementing race-conscious voluntary desegregation plans, the Court should view these plans as an extension of its school desegregation jurisprudence. *McFarland*, 330 F. Supp. 2d. at 851.

B. The Principles of Subsidiarity and the Common Good Justify Deference to Districts.

Although society as a whole has the moral responsibility to enhance human dignity, the government also has a moral responsibility and authority to safeguard human rights. The principle of subsidiarity holds that, in order to protect basic justice, government should undertake only those initiatives that exceed the capacities of individuals or private communities. The functions of government should be performed at the lowest level possible, as long as they can be performed adequately. However, when the needs in question cannot adequately be met at the lower level, then it is not only necessary, but imperative that higher levels of government intervene. *Economic Justice for All*, *supra*, at ¶124.

Here the educational and housing needs of the racially and economically marginalized are not being met and merit government intervention. Pope John Paul II, *Centesimus Annus*, *supra*, at ¶40. The United States admits that segregated housing patterns in Seattle could remain constant if parents and students continue to prefer neighborhood schools. United States Brief at 29. Without race-conscious desegregation measures, segregation will persist if not worsen. Frankenberg & Lee, *supra*, at 4 ("As courts across the country end long-running desegregation plans and, in some states, have forbidden the use of any racially-conscious student assignment plans, the last 10-15 years have seen a steady unraveling of almost 25 years worth of increased integration. From the early 1970s to the late 1980s, districts

in the South had the highest levels of black-white desegregation in the nation; from 1986-2000, however, some of the most rapidly resegregating districts for black students' exposure to whites are in the South").

It is the task of the state and of all society to defend the common good. Pope John Paul II, *Centesimus Annus*, *supra*, at ¶40. Unless authorities take suitable action with regard to economic, political and cultural matters, inequalities between citizens tend to become more and more widespread. Pope John XXIII, *Pacem in Terris*, *supra*, at ¶63. It is precisely this type of action that Seattle and JCPS voluntarily undertake, primarily to equalize the opportunities for the vast majority of families.

In his dissenting opinion in *Parents Involved*, Justice Bea rejects this balancing of interests. He does not dispute the benefits of integration, however he believes the issue is whether this idea "may be imposed by government coercion, rather than societal conviction; whether the students and their parents may choose, or whether their government may choose for them." *Parents Involved*, 426 F.3d at 1196. Justice Bea ignores the reality that choice is always relational, not individual. It is not simply that people choose to sort themselves by living near members of their own ethnic or racial group and that schools mirror these choices. *Id.* at 1220. The choices that one has to choose from are constrained by institutional arrangements; and the choices that one makes constrain the choices available to others.

That is, if concentrated poverty and segregation produce a failing neighborhood school, then the choices of those in the neighborhood are constrained. If, on the other hand, a thriving neighborhood produces a healthy school, and those in the neighborhood choose to go there, then the choices of those outside the neighborhood are constrained because there

are no further openings in that school. Without race-conscious measures, the question merely becomes which parents are in the best position to exercise their choice of which school their child will attend and where. In pursuing integration, respondents are attempting to mitigate the institutional arrangements that constrain choices, freeing up marginalized parents to choose better schools, while at the same time allowing the maximum amount of choice to those parents in the position to constrain.

The principle of subsidiarity provides a way to navigate this quagmire. The school districts, charged with fostering the common good, are the actors at the proper level to make the decisions about how the compelling goal of integration will be met. Seattle and JCPS are not negating parental choice, but facilitating it. They strike a balance by maximizing choice for the vast majority of students, and particularly for students oppressed by segregated arrangements – to who society must give a preference. Respondents are assuming a responsibility for achieving integration, without which parental choice would be limited to the opportunity-rich few.

If this Court were to take away Respondents' authority to achieve integration in their schools, it would uproot its long-standing principle of federalism that defers to local school boards, as well as the principle of subsidiarity, shared by Amici here. More detrimentally, a ruling for Petitioners would diminish parental choice and invite resegregation. To expand parental choice and foster integration, to safeguard the dignity of the human person and support the common good of society, this Court should permit Respondent school districts to continue to implement their race-conscious student assignment plans.

CONCLUSION

Because parental choice and integration are mutually reinforcing compelling state interests that promote human dignity and the common good, the Collaborative of Catholic Leaders and Organizations respectfully requests that this Court affirm the decisions of the 6th and 9th Circuit Courts of Appeals in these cases.

Respectfully submitted,

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APPENDIX

APPENDIX

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS, MAGNET SCHOOLS OF AMERICA, PUBLIC EDUCATION NETWORK, UNITED STATES CONFERENCE OF MAYORS, AND SAN FRANCISCO UNIFIED SCHOOL DISTRICT AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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The Council of the Great City Schools, Magnet Schools of America, Public Education Network, United States Conference of Mayors, and San Francisco Unified School District respectfully submit this brief amici curiae in support of respondents in these cases.[1]

INTEREST OF AMICI CURIAE

Amici and their members are school districts and national organizations that are deeply committed to providing high quality and equal educational opportunities for all of the nation's schoolchildren. Amici and their members are committed to preserving for their members the flexibility to make race-conscious student assignment policies to maintain racially diverse student bodies.[2]

SUMMARY OF ARGUMENT

I. The question in this case is whether school districts may take some modest account of race when they make the necessary assignments of students to schools – or whether, conversely, they are constitutionally required to operate their school systems in a way that reflects racial segregation patterns and the societal inequalities that produce them. Unless schools may take some account of race in student assignments, the residential segregation present in most school districts would result in substantial racial segregation in the school systems, and the emergence or entrenchment of racially isolated schools.

School districts have a compelling interest in promoting racially integrated schools for two independent reasons. First,

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[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than amici, their members, or their counsel contributed monetarily to the brief.

[2] Each of the amici, as well as the 66 school districts represented by the Council of the Great City Schools (including the two now before the Court), are identified and described individually in the attached appendix.

as all three branches of the federal government recognize, assuring equal educational opportunities to all children, regardless of race, is a national priority. That goal cannot be achieved if school districts are left powerless to address racial segregation and isolation in their schools. Only by taking on racial isolation can school districts fully close the "racial achievement gap" – the gap between minority and white educational opportunity and attainment. Second, a critical part of the mission of public schools is to train students as citizens of a multi-cultural democracy. The available social-science data amply confirms the common-sense proposition that this mission is best accomplished by allowing students of different races to learn together and from each other.

II. The means chosen by the respondent school districts to achieve this compelling interest are narrowly tailored. Where race itself is at the crux of the compelling interest at stake, it may permissibly be taken into account by school districts in developing student assignment policies. The districts need not seek out inexact proxies for race, or explore other race-neutral programs, because these options do not offer a workable alternative capable of achieving the districts' interests.

ARGUMENT

I. ALL SCHOOL DISTRICTS HAVE A COMPELLING INTEREST IN RACIALLY INTEGRATED SCHOOLS.

Petitioners and the United States concede, as they must, that one set of school districts has a compelling interest in racial integration: districts that in the past engaged in de jure segregation and have yet to remedy the constitutional violation. But that, according to petitioners and the United States, is where the compelling interest ends. School districts never judged guilty of de jure segregation (like Seattle) have no compelling interest in avoiding racial segregation in their systems. And even school districts (like Jefferson County)

that in the past were found to have engaged in de jure segregation, and as a result were constitutionally *required* to implement race-conscious remedial action *just like the integration programs at issue here*, are without any compelling interest in maintaining desegregated systems from the moment court orders are lifted. On that view, the vast majority of school districts are constitutionally prohibited from taking race into account in any degree, even when necessary to avoid de facto school segregation that mirrors residential segregation. Simply put, should petitioners prevail, such school districts would be constitutionally *obliged* to operate segregated school systems.

That position is incorrect. As we show below, *all* school districts, whether or not guilty of de jure segregation in the past, have a compelling interest in racially integrating their schools in the present, and in avoiding racially isolated schools that otherwise would emerge.

A. All Branches Of The Federal Government Have Recognized The Importance Of Equalizing Educational Opportunities For All Students.

From *Brown v. Board of Education* to the No Child Left Behind Act, the judicial, legislative, and executive branches of the federal government have demonstrated full and perhaps unparalleled agreement on one crucial point: that children of all races are entitled to equal educational opportunities. This Court's decision in *Brown* provided only the starting point for the joint effort to make that promise a reality. In subsequent decisions, running from *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), to *Grutter v. Bollinger*, 539 U.S. 982 (2003), the Court reaffirmed both its commitment to racial equality in the educational context and the importance of racial integration in the nation's schools. And working in tandem with the Court, the legislative and executive branches have continued the effort to remedy persistent inequalities in the educational opportunities afforded

racial minorities, along with the consequent gap in educational achievement among minority children.

From the beginning of his presidency until even after the United States filed its briefs in these cases, President George W. Bush made this issue a centerpiece of his domestic agenda, with frequent and repeated emphasis on the racial achievement gap – or, as it has been more colorfully described by the Bush administration, "de facto educational apartheid," *see* Dr. Rod Paige, U.S. Sec'y of Educ., Remarks at the Kennedy Sch. of Gov't, "Fifty Years After *Brown v. Board of Education*: What Has Been Accomplished and What Remains to Be Done?" (Apr. 22, 2004) [hereinafter "Paige Remarks"]. For example, just days after first taking office in 2001, President Bush made a point of noting that "the academic achievement gap between . . . Anglo and minority [students] is not only wide, but in some cases is growing wider still." Pres. George W. Bush's Education Blueprint "No Child Left Behind" (released Jan. 23, 2001). Since then, he has frequently referenced this racial "achievement gap" and the necessity of eliminating it. *E.g.*, Pres. Bush, Remarks to the Nat'l Urban League Conference, 39 Weekly Comp. Pres. Doc. 984, 987 (July 28, 2003) ("Equal education is one of the most pressing civil rights of our day. Nearly half a century after *Brown* . . ., there's still an achievement gap in America."). The President's dedication to this issue has been consistent throughout his term, remaining evident even in very recent remarks. *See, e.g.*, Pres. Bush, Speech at Woodridge Elementary and Middle Campus, __ Weekly Comp. Pres. Doc. __ (Oct. 5, 2006) (forthcoming), *available at* http://www.whitehouse.gov/news/releases/2006/10/20061005-6.html ("There's an achievement gap in America that's not good for the future of this country.").

Moreover, President Bush's commitment to eradicating the "soft bigotry of low expectations," 39 Weekly Comp. Pres. Doc. at 987, has extended – expressly so – to the use of race-conscious means to address the achievement gap. *E.g.*, Pres.

Bush, Remarks in a Discussion at the Nat'l Inst. of Health, 40 Weekly Comp. Pres. Doc. 870, 874 (May 12, 2004) ("[A]s part of the new accountability system, the No Child Left Behind Act, we break out based upon race. It's really essential we do that. It's really important. If you don't do that, you're likely to leave people behind. And that's not right. There's . . . an achievement gap in America that will be closed. It must be closed, and will be closed. It won't be closed unless you're honest about the achievement gap, unless you're able to see clearly who needs help . . . ."); Pres. Bush, Remarks at Hyde Park Elementary Sch., 39 Weekly Comp. Pres. Doc. 1178, 1181 (Sept. 9, 2003) ("we want to know . . . whether or not the African American students are learning").

The No Child Left Behind Act ("NCLBA" or the "Act") is the cornerstone of this Administration's commitment to eliminating the racial achievement gap. The Administration understands and promotes the Act as a continuation of the *Brown* legacy. *See, e.g.*, Paige Remarks, *supra* (noting "such [racial] division [in schools] was wrong in 1954, and it is wrong today" and crediting Pres. Bush with his attempts to remedy it through measures such as the NCLBA).

Likewise, the Congress that enacted the NCLBA was also cognizant of the racial achievement gap and the need to close it. *See, e.g.*, 147 Cong. Rec. H10082, H10103 (Dec. 13, 2001) (statement of Rep. Miller) ("My colleagues said they wanted accountability for closing the achievement gap, and we have provided that. . . . We believe that because an individual is a minority does not mean they cannot learn. And the evidence is overwhelming that we are right."); 147 Cong. Rec. S3774, S3775 (Apr. 23, 2001) (statement of Sen. Gregg) (discussing reasons why "[w]e are going to say for different ethnic groups, different racial groups . . . explain whether or not those kids are learning"); 147 Cong. Rec. S4125, S4133 (May 2, 2001) (statement of Sen. Frist) ("We have all talked a lot about the achievement gap which has not narrowed but in

fact gotten wider over time . . . ."); 147 Cong. Rec. S13322, S13324 (Dec. 17, 2001) (statement of Sen. Kennedy) ("One of the major goals [of the NCLBA] . . . is to lessen . . . the educational achievement gap between . . . minority and non-minority students.").

Not only does the statutory purpose of the Act mirror the floor statements of the Education Committee leaders of the House and Senate quoted above, *see* 20 U.S.C. § 6301(3) (purpose of Act is, *inter alia*, to "clos[e] the achievement gap between . . . minority and nonminority students"), but the Act itself expressly requires race-conscious measures. The Act mandates that each State's plan include, *inter alia*, "separate measurable annual objectives for continuous and substantial improvement for . . . [t]he achievement of . . . students from major racial and ethnic groups." *Id.* § 6311(b)(2)(C)(v)(II)(bb). Moreover, the Act requires that student test results are disaggregated by race at both the school and district levels in order to be quantified against the annual objectives of each state's plan. *See* 20 U.S.C. § 6311(b)(3)(C)(xiii). School officials are then responsible for increasing the academic achievement of these racially-identifiable groups of students. *See id* §§ 6311(b)(2)(B), 6311(b)(2)(C)(v)(II)(bb).[3]

Congress and the Executive also have enacted and enforced other programs that call for race-conscious education policies. The Magnet Schools Assistance Program ("MSAP"), for example, recognizes that "[i]t is in the best interests of the

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[3] Furthermore, individual schools and districts are subject to severe and costly sanctions to the extent their racial subgroups of students fail to meet the state-established academic proficiency objectives. *See, e.g.*, 20 U.S.C. § 6311(g)(2) (loss of federal funding). Indeed, the failure to meet these requirements for racial subgroups is of such compelling import that it can result in extremely harsh consequences including the dissolution of the school or the abolishment of the district as a unit of local government. *See id.* §§ 6316(b)(7)(C)(iv), (8)(B); *id.* §§ 6316(c)(7)(A), (10)(C).

United States to continue the Federal Government's support of local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stages of such students' education." 20 U.S.C. § 7231(a)(4)(A). Congress, furthermore, was explicit in its intentions for MSAP: "to assist in the desegregation of schools . . . by providing financial assistance to eligible local educational agencies for . . . the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools." *Id.* § 7231(b)(1). The executive branch implemented MSAP in accordance with this view of the necessity of race-consciousness – at least, up until the day it filed its briefs in these cases[4] – relying on selection criteria that include such factors as "the effectiveness of [a school's MSAP] plan to recruit students from different social, economic, ethnic, and racial backgrounds into the magnet school," 34 C.F.R. § 280.31(a)(v), and whether a program "improve[s] the racial balance of students in the applicant's schools by reducing, eliminating, or preventing minority group isolation in its schools," *id.* § 280.31(c)(2)(v).

The racial "achievement gap" that the NCLBA and MSAP were designed to address is real. Nationwide, 39% of white 8th graders in 2005 scored at or above "proficient" on the reading portion of the National Assessment of Educational Progress (NAEP), compared with only 12% of African

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[4] On the same day the Solicitor General filed its briefs in these cases, the Department of Education announced a Notice of Proposed Rulemaking, 71 Fed. Reg. 48866 (Aug. 22, 2006), which would change the MSAP selection criteria, presumably to override the current, and longstanding, practice of favoring and approving race-conscious programs with goals similar to those at issue in these cases. The President has made no clear declaration of the radical policy shift suggested by the Justice and Education Departments' same-day filings, but it is at least much less clear today that the Administration supports programs designed to help remedy the racial achievement gap.

American students. *See* Nat'l Center for Educ. Statistics, U.S. Dept. of Educ., *Nat'l Assessment of Educ. Progress: The Nation's Report Card (Reading)* 5 (2005). Similarly, 39% of white 8th graders scored "proficient" or above on the math portion of the NAEP, while 9% of their African American counterparts did. *See* Nat'l Center for Educ. Statistics, U.S. Dept. of Educ., *Nat'l Assessment of Educ. Progress: The Nation's Report Card (Math)* 5 (2005). These disparities in student achievement ultimately translate into differences in economic well-being later in life and the ability of all citizens to participate fully in the portents of the American dream.[5]

B. Racially Isolated Schools Do Not Provide Equal Educational Opportunities.

1. Like the three branches of the federal government, many local school districts, including those now before the Court, have devoted themselves to closing the achievement gap by equalizing educational opportunities for students of all races. That goal, however, depends critically on the integration of public schools and, in particular, the elimination of racially isolated schools.

Racial isolation is a key reason behind the failure of the K-12 educational system to educate racial minorities to the same level as their white counterparts, and so long as it persists, so

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[5] Eliminating these disparities is even more critical now than it was when *Brown* was decided. In the 1950s, the link between educational and economic parity was modest; even the most equal of educational opportunities would not have translated into equality in the labor market. *See* Christopher Jencks & Meredith Phillips, The Black-White Test Score Gap, at 5-6 (Christopher Jencks & Meredith Phillips eds., Brookings Inst. Press 1998) (in 1953, black men with above-average achievement scores earned about 65% of what their white counterparts earned). Today, by contrast, educational and economic parity are inextricably linked, *id.* (in 1998, black men with above-average scores earned 96% of what their white counterparts earned), and the elimination of a racially identifiable academic achievement gap is crucial to achieving economic equality between blacks and whites, *id.* at 6.

too will the racial achievement gap.[6] As recent studies have demonstrated using large statewide and national databases, the degree of racial isolation in their school environments has a direct relationship to lower achievement among African-American students. *See, e.g.*, Geoffrey D. Borman & N. Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data* 40-42 (unpublished manuscript on file with the Council of the Great City Schools); Eric A. Hanushek et al., *New Evidence About* Brown v. Board of Education*: The Complex Effects of School Racial Composition on Achievement* 23-24 (Stanford Univ., Working Paper, Oct. 2004), *available at* http://edpro.stanford.edu/hanushek/admin/pages/files/uploads/race.pdf; *see also* Debra Viadero, *Fresh Look at Coleman Data Yields Different Results*, Ed. Week, June 21, 2006, at 21 (reporting on Borman & Dowling paper). Even after controlling for other factors such as family background, school, teacher, and peer effects, the percentage of African-American students in a school affects student achievement in a manner that is substantial, negative, and statistically significant. Borman & Dowling, *supra*, at 40-42; Hanushek, *supra*, at 23-24. Indeed, the racial composition of a student's school is approximately one and a half times more important

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[6] Despite *Brown* and the federal courts' decades-old commitment to desegregation, racial isolation is an ever-increasing reality for most public school students. Although the percentage of minority students is growing in the public school system as a whole, *see* Press Release, U.S. Census Bureau, *Nation's Population One-Third Minority* (May 10, 2006), public schools have become increasingly racially isolated throughout the nation, *see* Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project ("HCRP"), 4 (2006) (all Harvard-published reports cited herein are available at http://www.civilrightsproject.harvard.edu/research.php). While students across the country are experiencing increasing racial isolation, the statistics in some regions and states are particularly startling. For example, 87% of black students in California attend majority-minority schools. *Id.* at 25-26.

than that student's socioeconomic status for understanding educational outcomes. Borman & Dowling, *supra*, at 42.[7]

At least in part, this "achievement gap" derives from an inequality of educational resources: racially isolated minority schools do not have access to the same resources as other schools. Specifically, when it comes to what is widely acknowledged to be the single most important educational resource – teacher quality – majority-minority schools are at a distinct disadvantage. *See* Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 Economics of Educ. Rev. 377, 380-81 (2005). Teacher quality has a clear and measurable effect on student achievement. *See* Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 Econometrica 417, 434-35, 447-49 (2005). Yet it is well established that schools with large minority populations are more likely to be staffed by brand new teachers, and teachers with more experience and better education credentials are more likely to teach in schools with lower minority enrollments. The net result is that students in schools with high percentages of minority students have dramatically less qualified teachers. *See, e.g.*, Donald Boyd et al., *Explaining the Short Careers of High-Achieving*

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[7] This is not to suggest that schools with a high proportion of minorities are *inherently* inferior, or that African-American or other minority students are somehow unable to learn when schooled with each other. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 114, 119, 122 (1995) (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior . . . . [and that] any school that is black is inferior . . . . [B]lack schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement."). It is impossible to know exactly what the effect of racial isolation would be in the absence of such things as external racial prejudice and resource inequality. This brief, as it must, simply takes the reality of our contemporary culture and its historical context as it finds them, with external inequalities clearly having a real and negative effect on children attending racially isolated schools.

Teachers in Schools with Low-Performing Students, 95 Am. Econ. Rev. 166, 169-70 (2005); Clotfelter, *supra*, at 378-79 (concluding that the academic skills of the teachers themselves, as well as at least three years of experience, are the key predictors of teacher effectiveness).[8]

This link between racially isolated schools, inequitable resource allocation, and the racial achievement gap makes addressing racial isolation an interest of the most compelling order. Simply put, if school districts cannot take on racial isolation in their school systems, then they cannot provide the equal educational opportunities extolled by all three branches of the federal government. Indeed, absent the authority to address racial isolation – whether or not that isolation can be traced legally to prior de jure segregation – school districts cannot realize the ultimate goals of the No Child Left Behind Act. As discussed *infra*, the NCLBA is concerned centrally with eliminating the racial achievement gap in the nation's schools – which in turn, as shown above, is linked directly to the existence of racially isolated minority schools. To require that school districts progress toward elimination of the racial achievement gap while at the same time tying their hands as to development of locally-sensitive remedies puts districts in an untenable position, and dooms their efforts to failure.

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[8] Resources other than teacher quality are also impacted substantially by racial isolation. For example, racially isolated districts receive less funding than majority-white districts. *See, e.g.*, Council of the Great City Schools, *Adequate State Financing of Urban Schools: An Analysis of State Funding of the New York City Public Schools* 40-43 (2000), *available at* http://www.cgcs.org/pdfs/NYCAdequateFinanceReport.pdf; Council of the Great City Schools, *Adequate State Financing of Urban Schools: An Analysis of State Funding of the Philadelphia Public Schools* 30-33 (1998), *available at* http://www.cgcs.org/pdfs/PhiladelphiaAdequateReport.pdf. They also offer fewer Advanced Placement courses, a resource gap that in turn undermines equitable access to selective colleges and universities. *See, e.g.*, John T. Yun & Jose F. Moreno, *College Access, K-12 Concentrated Disadvantage, and the Next 25 Years of Education Research*, 35 Educ. Researcher 12, 15-16 (2006).

Similarly, this Court's hopes for *Grutter* turn critically on the ability of local districts to address the racial isolation that underlies the achievement gap. In *Grutter*, the Court made plain its wish that affirmative action in college admissions might soon be rendered obsolete. 539 U.S. at 346 ("As lower school education in minority communities improves, an increase in the number of [qualified minority] students may be anticipated. From today's vantage point, one may hope . . . that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."). But as long as the achievement gap remains, so too will the necessity of affirmative action admissions in higher education. *Grutter* cannot be "sunsetted" until the achievement gap is closed and more minority students are eligible for selective colleges without the need for affirmative action.

2. Even apart from the general proposition that educational parity depends on racial integration, this Court should independently recognize that the Seattle and Jefferson County School Boards have specifically identified integration as a compelling interest in their *own* communities. Local school districts, not federal courts, are best situated to determine the precise nexus between unequal resources, racial isolation, and minority achievement in their own communities, and to decide whether fostering racial integration is a necessary precondition to addressing both resource and achievement inequalities. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973) ("the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions"); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("[n]o single tradition in public

education is more deeply rooted than local control over the operation of schools").

It is not just that local school boards are more expert than federal judges in diagnosing the situation on the ground in their localities and devising effective remedies. They also are democratically accountable in a way that courts are not. As this Court has recognized, local control over educational policy ensures that "the school district and all state entities participating with it in operating the schools" can be "held accountable to the citizenry [and] to the political process." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); *see also Milliken*, 418 U.S. at 742 (local control "affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence'" (quoting *Rodriguez*, 411 U.S. at 50)).

In fact, the experience of Jefferson County provides a perfect example of the benefits of local control extolled by this Court. From 1973 to 2000, while under a court-ordered desegregation plan, the Board "demonstrated extraordinary good faith through its dedication to quality education in an integrated setting." *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 841 n.9 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005) ("*JCPS*"). Throughout that time period, Jefferson County reevaluated and modified its student assignment plans "to maintain a fully integrated countywide system of schools" – all with advice from members of the community. *Id.* at 841-42.

Moreover, Jefferson County was keenly aware that its residents were likely to use the public schools (rather than opt out to private schools) – and thereby support the schools through taxes and other aid, both tangible and intangible – only if the Board continued with voluntary programs like the one at issue here even after unitary status was achieved in 2000. *JCPS*, 330 F. Supp. 2d at 834; *see also id.* at 855 (after

unitary status was achieved, there remained "strong public support for . . . an integrated school system" in Jefferson County); *id.* at 854 ("Every measure of *student and public attitudes* on the value of integration completely supports the conclusion that an integrated school system is an advantage for many parents and students [in Jefferson County]." (emphasis added)). Just as members of this Court have recognized, Jefferson County acted because it understood that "[t]he general quality of the schools . . . tends to decline when substantial elements of the community abandon them. The effects of resegregation can be even broader, reaching beyond the quality of education . . . to the life of the entire community." *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., joined by Stewart and Rehnquist, JJ., dissenting from per curiam decision dismissing writs of certiorari as improvidently granted). Thus, over the past several decades, Jefferson County has illustrated perfectly the benefits of local control, carefully refining its student assignment plan to meet both legal mandates *and* the needs and interests of the community it serves.

C. Racially Integrated Schools Are Necessary To Fulfill The Essential Mission Of Public Schools.

This Court has long recognized that public schools are charged with more than teaching the core subjects of mathematics, language, and science. Public schools are also "the primary vehicle for transmitting the values on which our society rests," *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quotation omitted), and preparing students for "good citizenship" is central to the mission of the public school system, *Grutter*, 539 U.S. at 331 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

As our society becomes increasingly diverse, preparation for "good citizenship" increasingly requires that schools teach their students – "by example" as well as otherwise – to interact positively with individuals of different races. "One purpose of education is to prepare children for living in our society, which is a multi-racial society." *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring). That crucial purpose can be fulfilled only by schools that are racially integrated, allowing children to interact with and learn from students of different races.

As this Court has long understood, racially diverse schools promote social cohesion, "preparing minority children for citizenship in our pluralistic society" and "teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473 (1982) (quotation omitted). That effect is achieved, in part, by the fact that racially integrated schools help to combat racial stereotypes and "promote[] cross-racial understanding." *Grutter*, 539 U.S. at 330 (quotation omitted). Learning in a diverse environment also provides both majority and minority students with "improved critical thinking skills – the ability to both understand and challenge views which are different from their own." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1174 (2005) (en banc) ("*PICS*"). As one of the courts below noted, even among those who oppose voluntary school integration, there is little dispute that "diversity encourages students not only to think critically but also democratically." *Id.* at 1175.

Moreover, the positive effects of a racially diverse K-12 educational environment last well beyond the schoolhouse door. In fact, exposure to racial diversity during the school-age years can break the cycle of racial segregation for all students – white and minority – in later life. Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and*

Educational Inequality, HCRP, 40-41 (2005). Alumni of racially diverse secondary schools, for instance, are more likely to attend diverse colleges, live in integrated neighborhoods, work in diverse firms, and have friends from another racial group. *See, e.g.*, Jomills Henry Braddock, II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, Phi Delta Kappan 259, 261 (1984); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 Ohio St. L.J. 733, 745 & n.74 (1998) (citing numerous other studies reaching same and similar conclusions and finding, *inter alia*, that desegregated classrooms increase interracial friendship). Both white and minority students in integrated school districts learn to work together in a way that makes them highly confident about their ability to work in racially integrated settings as adults. *See* Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, HCRP, 9-10 (2001).

These are precisely the beneficial effects of educational diversity that this Court found "compelling" in the university context. *See Grutter*, 539 U.S. at 330 (noting law school's admissions policy promotes "cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races" (quotation omitted) (alteration in original)). As the Court concluded in *Grutter*, there is ample social-science data to support the proposition that educational diversity "promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* at 330 (quoting amici); *see also id.* at 330-31 ("the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints") (citing briefs of leading American business and military leaders).

The interest that the Court deemed compelling in *Grutter* is even more so at the elementary and secondary education level. First, as compared to the elite higher education institutions considered in *Grutter*, attended by a relatively small number of students, public schools shape the lives of the vast majority of American children. These public schools are responsible for preparing an entire generation of children "for work and citizenship," as well as for "sustaining our political and cultural heritage." *Id.* at 331. Second, students at the K-12 level are more impressionable than college and graduate students, and thus more amenable to the benefits of a diverse classroom environment. Indeed, the earlier that students experience desegregated learning environments, the greater the positive impact. *See* Orfield & Lee, *Why Segregation Matters*, *supra*, at 42. In short, it would make no sense to allow selective colleges and universities to provide the benefits of a diverse post-secondary education to their students while prohibiting the public schools that serve a far larger population from providing the even greater benefits of elementary and secondary school diversity to their students. *See PICS*, 426 F.3d at 1176 ("it would be a perverse reading of the Equal Protection Clause that would allow a university, educating a relatively small percentage of the population, to use race when choosing its student body but not allow a public school district, educating all children attending its schools, to consider a student's race").

II. USING RACE AS ONE FACTOR IN SCHOOL ASSIGNMENTS IS NARROWLY TAILORED TO ACHIEVE THE COMPELLING INTEREST IN RACIALLY INTEGRATED SCHOOLS.

A. A Student Assignment Plan May Properly Take Account Of Race To Further A Compelling Interest In Racially Integrated Schools.

Once the compelling interest is properly understood as requiring, by definition, *racial* integration – or the absence of

racial isolation – then it is clear that considering race but not other personal factors is narrowly tailored to achieving the identified interest. Because the goal is explicitly racial in nature, there is no need to look – indeed, no sense in looking – at "holistic" aspects of each student in making school assignments. *See Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) ("If reducing racial isolation is standing alone a constitutionally permissible goal . . . , then there is no more effective means of achieving that goal than to base decisions on race."); *PICS*, 426 F.3d at 1191 ("The logic is self-evident: When racial diversity is a principal element of the school district's compelling interest, then a narrowly tailored plan may explicitly take race into account."). Petitioners disagree, asserting that this Court's precedents require any race-conscious assignment plan to evaluate each student on the basis of some holistic concept of diversity. But "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause," *Grutter*, 539 U.S. at 327, and in the context of K-12 student assignment plans, the notion of "holistic diversity" is misplaced.

First, to import that requirement into this case would be to uncouple the narrow-tailoring analysis from the identified interest. In *Grutter*, the requirement of "individualized holistic review" was relevant to the law school's interest in "'the robust exchange of ideas' fostered by viewpoint diversity." *PICS*, 426 F.3d at 1183 (quoting *Grutter*, 539 U.S. at 324). But here, where the compelling interest is in racial integration, "the only relevant criterion, . . . is a student's race; individualized consideration beyond that is irrelevant to the compelling interest." *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005). Other categories of student characteristics – varying socio-economic backgrounds, interests, talents or life experiences – are simply immaterial to the school districts' interest. *See PICS*, 426 F.3d at 1183 ("Because race itself is the relevant consideration when

attempting to ameliorate de facto segregation, the District's tiebreaker must necessarily focus on the race of its students.").

Second, a requirement that the evaluation of each student applicant include holistic, individualized review may make sense in the context of competitive admissions to institutions of higher education, but it is out of place in addressing K-12 student assignment plans. As the Ninth Circuit explained, "[s]tudents' relative qualifications are irrelevant because regardless of their academic achievement, sports or artistic ability, musical talent or life experience, any student who wants to attend Seattle's public high schools is entitled to an assignment; no assignment to any of the District's high schools is tethered to a student's qualifications." *Id.* at 1181. As a result, "no stigma results from any particular school assignment," and "the dangers that are present in the university context – of substituting racial preference for qualification-based competition – are absent here." *Id*; *see also id.* at 1194 (Kozinski, J., concurring) ("That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability."). In short, the reasons for requiring individualized review in the university setting are absent in the context of K-12 student assignment plans.

Third, the holistic concept of diversity is ill-suited to elementary and secondary schoolchildren. While it is possible to evaluate comprehensively the potential diversity contributions of a law school applicant, who has had decades to accumulate interests, talents, experiences or achievements that may distinguish him or her from another candidate, the value and the practicality of such an inquiry becomes tenuous – even bordering on absurd – as the context shifts to younger and younger students.

It is exceedingly difficult to imagine how (or why) one would subject the youngest children, who are only four or five years old, to an evaluation of their potential contribution to a

broader diversity not even sought here. The type of talent- and experience-based diversity that makes an exceptional class of law students is not one that could or should be replicated in a public elementary school classroom. Nor has anyone asserted that it would be of any value in the K-12 context at issue in these cases. If anything, transforming what is now a stigma-free school assignment process into one that turns on a thorough-going evaluation of everything a five-year-old can bring to a classroom would be entirely contrary to pedagogical goals. Today's children enjoy plenty of opportunities to be critically evaluated and compared to their peers; there is no need to turn public grade-school assignment into a miniature version of elite law-school admissions.

B. School Districts Consider Race As Only One Of Many Factors In School Assignments.

Neither the school districts before the Court nor any other district of which amici are aware relies exclusively on race-conscious student assignment plans to achieve the goal of racially integrated schools. To the contrary, local school districts use race, if at all, only in conjunction with other factors in making school assignments – and those assignments, in turn, are used in conjunction with still other race-neutral methods of desegregating or maintaining desegregated schools. In short, race is not the only or even the predominant factor at play. *Cf. Miller v. Johnson*, 515 U.S. 900, 920 (1995) (because race was "the predominant, overriding factor" in districting, legislation held to strict scrutiny and ruled invalid).

Typically, where race is used as part of a student assignment plan, it is but one of a multitude of factors. In Jefferson County, for instance, "[p]rior to any consideration of a student's race, a myriad of other factors, such as place of residence, school capacity, program popularity, random draw and the nature of the student's choices, will have a more significant effect on school assignment." *JCPS*, 330 F. Supp.

2d at 842. *See also PICS*, 426 F.3d at 1169-71 (Seattle plan provides for consideration of student choice, sibling attendance, distance, and lottery in addition to race). This should not be surprising. As discussed above, *supra* at 12-14, one of the virtues of leaving educational policy judgments in the hands of local school districts is that school boards and other local decisionmakers are democratically accountable entities, required to balance the pursuit of racial integration with other goals important to their communities – like the desire of parents to send their children to neighborhood schools, or to school with their siblings.

Moreover, many school districts employ other, race-neutral means of integrating schools at the same time that they consider race as one factor in school assignments. Both Jefferson County and Seattle, for instance, feature magnet schools and magnet programs designed in part to attract racially diverse student bodies. *PICS*, 426 F.3d at 1191; *JCPS*, 330 F. Supp. 2d at 842. Allowing school choice, as Jefferson County, Seattle, and many other districts do, itself permits a measure of racial integration that otherwise would not be possible in residentially segregated neighborhoods. Finally, many districts – including those before the Court here – are engaged in significant efforts to improve schools across the board, which has the salutary effect of equalizing educational opportunities for everyone. *See PICS*, 426 F.3d at 1169 ("the District implemented the Plan as part of a comprehensive effort to improve and equalize the attractiveness of all the high schools"); *JCPS*, 330 F. Supp. 2d at 840 (JCPS offers "a full array of comprehensive, specialized and advanced programs throughout its schools").

Educational policy is not a one-size-fits-all proposition. Local school boards must have the flexibility to experiment with various means of advancing the compelling interest in racial integration – including, where they believe it necessary, modestly race-conscious assignment policies used as part of

larger programs to ensure that their schools become (or remain) integrated. Race, in other words, must be one of the tools available to localities as they seek to advance a race-specific goal.

Deference to the judgments of local school districts on this count is necessary both to "allow[] citizens to participate in decisionmaking" and to "allow[] innovation so that school programs can fit local needs." *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991). Local efforts to devise solutions to local segregation problems are consistent with this Court's repeated admonitions that it is "the duty of the State and its subdivisions" – not the courts – to ensure that public schools are not shaped by "new and subtle forms" of racial prejudice. *See Pitts*, 503 U.S. at 490 ("[I]t must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility."). As Judge Kozinski explained in his concurrence below, the school assignment plans at issue are "local experiment[s], pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent." *PICS*, 426 F.3d at 1196 (quoting *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring)). In such a case, it is better to "leave the decision to those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable." *Id.*

C. Race-Neutral Alternatives Are Insufficient To Achieve The Compelling Interest In Racial Integration.

1. Petitioners and their amici assert that race-neutral measures are adequate to achieve the goals pursued by the school districts here, but that claim is unsupportable. First, as

just explained, it is illogical to require use of race-neutral methods when the compelling interest identified has an explicitly racial component. If the very goal of the student assignment plans is to achieve racial integration (or to avoid segregation and resegregation), then a narrowly-tailored program need not turn a blind eye to race.

Moreover, it is disingenuous to suggest using socio-economic status or other measures as a proxy for race. If it is impermissible to consider race openly, then there is no reason to believe that a surrogate purposefully designed to take account of race through the backdoor would be any less objectionable. *See Gratz v. Bollinger*, 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting) ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."); *PICS*, 426 F.3d at 1189 ("We do not require the District to conceal its compelling interest of achieving racial diversity and avoiding racial concentration or isolation through the use of 'some clumsier proxy device' such as poverty." (quoting *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring))).

2. Even if it made sense to require school districts to use race-neutral means to achieve race-conscious ends, the research amply supports the conclusion that race-neutral methods alone are not equal to the task of integrating the schools. It is important to remember that school districts are not charged with considering every possible alternative – no matter how impractical or unlikely to succeed – to their race-conscious assignment plans. This Court has only required consideration of "*workable* race-neutral alternatives *that will achieve the diversity*" sought. *Grutter*, 539 U.S. at 339 (emphasis added); *see also Comfort*, 418 F.3d at 23 (district "need not prove the impracticability of every conceivable model for racial integration"). Accordingly, the school districts here need only consider alternatives that would

actually achieve their stated goals of promoting racial integration and avoiding racial isolation in their schools.

Some have suggested that socio-economic status could be used instead of race to achieve the same goals, but the research does not support this assertion. The best evidence on this subject comes from a recent study – specifically designed to explore "the extent to which race-neutral income-based integration plans would produce ancillary integration" – that concluded that "income and race cannot stand as proxies for one another in school integration policies." Sean F. Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 Educ. Eval. & Pol'y Analysis 49, 68 (2006). The study attempted to quantify the levels of racial school integration that are both possible in theory and probable under a variety of income-integration policies and income distributions. *Id.* at 57. An exhaustive analysis demonstrated that "under conditions typical of large school districts in the United States and under practical income-desegregation policies, achieving income desegregation *guarantees little to no racial integration*." *Id.* at 63 (emphasis added). Racial desegregation is particularly unlikely to occur in school districts, like Seattle and many other large urban school districts, with high levels of residential racial segregation. *Id.* Furthermore, the greatest levels of racial integration are likely to occur in school districts that do not have high levels of residential segregation and are not operating under a racial desegregation plan. *Id.* at 66. "But such districts tend to have low levels of school racial segregation in the first place, so the ancillary racial integration benefits of an income-integration policy are likely to accrue primarily where least needed." *Id.* In sum, the "analysis show[ed] that even under the most stringent [and impractical] form of income-based integration – school assignment based on exact family income levels – and assuming that income balance is achieved completely, income integration does not

guarantee even a modest level of racial desegregation." *Id.* at 67. Plainly, consideration of socio-economic status does not provide a workable race-neutral alternative.

The fact that many school districts have experienced significant resegregation upon a return to race-neutral methods further demonstrates that their judgments regarding the insufficiency of race-neutral alternatives are well-founded. For instance, the Charlotte-Mecklenburg school district that was the subject of the *Swann* litigation was declared unitary (over the board's objections) in 1999, and the district court enjoined the school board from continuing to use any race-conscious student assignment policies.[9] In 2000, the school board adopted a race-neutral student assignment plan emphasizing parental choice, effective for the 2002-2003 school year, that resulted in major resegregation in Charlotte schools. Orfield & Lee, *Racial Transformation, supra*, at 33-34 ("After the county school board's long and costly struggle to continue its desegregation plan was rejected by the federal courts, the county has experienced enormous increases in segregation," despite having seen a "major decline in residential segregation during the period of school desegregation"); Thomas J. Kane et al., *School Quality, Neighborhoods, and Housing Prices*, 8 Am. Law & Econ. Rev. 183, 209-10 (2006). *Cf. Belk*, 269 F.3d at 385 ("The trend in CMS toward resegregation of its schools has accelerated markedly since the move to de-emphasize satellite zones and mandatory busing in 1992.").

Similarly, the San Francisco school district experienced a sharp increase in racial segregation when it moved from a

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[9] The Fourth Circuit decision affirming the finding of unitary status vacated the injunctive portion of the district court order because it was "unsettled whether diversity may be a compelling state interest" and there was no evidence regarding any assignment plan the district might adopt. *Belk v. Charlotte-Mecklenberg Bd. of Educ.*, 269 F.3d 305, 347 (4th Cir. 2001).

race-conscious student assignment plan to a race-neutral "diversity index." *See S.F. NAACP v. S.F. Unified Sch. Dist.*, 413 F. Supp. 2d 1051 (N.D. Cal. 2005). The district court there terminated the consent decree after finding that the race-neutral plan "has in fact allowed, if not caused, resegregation of the school district." *Id.* at 1071. Like Charlotte and San Francisco, DeKalb County (subject of the *Pitts* case), Denver (subject of *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973)), Kansas City (subject of the *Jenkins* case), and Oklahoma City (subject of the *Dowell* case) have seen sharp resegregation of their schools following court orders terminating desegregation orders. Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or* Plessy*'s Nightmare?*, HCRP, 38 (2004) (following declaration of unitary status, by 2001, black student exposure to white students fell 72% in DeKalb County, 15% in Denver, 14% in Kansas City, and 12% in Oklahoma City).[10]

The amicus brief of Florida Governor Jeb Bush and the State Board of Education suggests that Florida's race-neutral education programs provide a "better" model for school districts throughout the nation. (Florida Br. 26.) Amici fail to note, however, that despite early progress, Florida schools today are significantly segregated. *See* Kathryn M. Borman et

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[10] The experiences of these districts are not unique; there is a well-documented trend towards resegregation in our nation's schools. *See* Orfield & Lee, *Racial Transformation*, *supra*, at 31 ("[M]any school districts have ended their plans and restored neighborhood schools with segregation reflecting or even intensifying the residential segregation."); *id.* at 37 ("Every measure of segregation since the late 1980s has shown growing separation."); Erika Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, HCRP, 4 (2002) ("The racial trend in the school districts studied is substantial and clear: *virtually all* school districts analyzed are showing lower levels of inter-racial exposure since 1986, suggesting a trend toward resegregation, and in some districts, these declines are sharp."); Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, HCRP, 48 (2001).

al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 Am. Educ. Research. J. 605, 614 (2004). Even if the Florida plan has had some positive educational benefit, there is every indication that it would be *more* effective, even on its own terms, if it addressed the significant racial segregation in Florida schools. The Borman study – which directly assessed "whether school-level variation in racial segregation is associated with school-level performance" on Florida's standardized test (the "FCAT") – concluded that students in racially isolated minority schools scored lower on the FCAT. *Id.* at 614, 626 ("the racial balance (or imbalance) of schools is associated with significantly lower percentages of students passing the FCAT reading and math tests at the elementary and high school levels"). As the study concluded:

> Controlling for other known and argued predictors of school-level standardized test performance, including per-pupil expenditures and percentage poverty, our analyses revealed that race still matters: Both the racial composition of a school and whether a school was Black segregated (relative to the school district's racial composition) predicted the percentage of students passing the FCAT. . . . Furthermore, our analyses suggest that *policies that attempt to resolve the achievement gap by funding equity or classroom size changes may not be successful if they do not accept the premise of* Brown – *that integration is fundamental to ensuring educational quality.*

Id. at 626-27 (emphasis added). Thus, the Florida plan only confirms that race-neutral methods are insufficient to attain the goals of the respondent school districts.

3. In light of the significant evidence that race-neutral measures alone are insufficient, the tradition of local control and accountability in public education suggests that school districts are owed a measure of deference in choosing the

means to address the problem of racial isolation in their localities. This is particularly so in view of the legal minefield in which many school districts must operate. All too frequently, school districts find themselves on the horns of a dilemma, facing costly actual or threatened litigation no matter which way they turn – accused of doing too little to combat segregation and equalize educational opportunity for all students, or faulted for trying to do too much. "Too often nowadays, an election or a vote is a mere precursor to litigation, with the outcome of the dispute not known until judges decide the case many years later." *PICS*, 426 F.3d at 1195 (Kozinski, J., concurring).

Experience bears out Judge Kozinski's observation. Some school districts adopted voluntary race-conscious assignment plans in order to head off legal action based on the segregation in their schools. In the late 1970's, for instance, local groups filed a complaint with the Department of Education's Office of Civil Rights and threatened further legal action against the Seattle school district "if the District failed to adopt a mandatory desegregation plan." *Id.* at 1167. The Seattle plan at issue here grew out of the district's earlier efforts to avoid litigation and a government investigation. Ironically, this litigation might have been avoided had the district refused to adopt voluntary measures then, and instead waited for legal action and a court order.[11]

Other school districts find themselves freed from a desegregation order only to watch helplessly as their schools

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[11] Under the petitioners' view of these cases – that racial integration cannot be undertaken voluntarily – a school district facing the threat of a lawsuit has no option other than litigation, even when it might *agree* with the prospective plaintiffs' claim that an integration plan is constitutionally mandated. Essentially, school districts are forbidden from operating racial integration programs without judicial interference, a result that flies in the face of this Court's mandate that federal court involvement is generally inferior to local control of schools. *See Pitts*, 503 U.S. at 489-90.

resegregate and another lawsuit comes along. The Charlotte-Mecklenburg school district again provides an apt case in point. Following adoption of a race-neutral student assignment plan emphasizing parental choice, Charlotte experienced significant resegregation. *See supra* at 25. Today, the district once again finds itself in litigation, defending claims that it is failing to provide the "sound basic education" guaranteed under state law because the new plan has created high poverty, low income schools marked by, among other things, "racial minority status" and "racial isolation." Second Am. Compl. ¶¶ 6, 32, *available at* http://www.law.unc.edu/PDFS/2ndamendedcomplaint.pdf. *Cf. Belk*, 269 F.3d at 385.

Still other school districts, like Jefferson County, continued to voluntarily operate integration plans following declaration of unitary status in an attempt to maintain the integration they worked so hard to achieve. Often, it was these very efforts that convinced the district courts to relinquish jurisdiction, as they demonstrated the "good faith" commitment to desegregation required by this Court's precedents. *See, e.g., Dowell v. Board of Educ.*, 8 F.3d 1501, 1513 (10th Cir. 1993) (in determining good faith, "we look to future-oriented board policies manifesting a continuing commitment to desegregation"); *Brown v. Bd. of Educ.*, 978 F.2d 585, 592 (10th Cir. 1992) ("[T]he possibility of immediate resegregation following a declaration of unitariness seems all too real. For this reason, we are convinced that evaluation of the 'good faith' prong of the *Dowell* test must include consideration of a school system's continued commitment to integration. A school system that views compliance with a school desegregation plan as a means by which to return to student assignment practices that produce numerous racially identifiable schools cannot be said to be acting in 'good faith.'"); *Spangler*, 611 F.2d at 1241. Petitioners' argument, however, would create a truly bizarre

twist in that the good-faith commitment to desegregation that is applauded – indeed, demanded – by the courts one day, would be transformed into a constitutional violation the day after unitary status is declared. *See JCPS*, 330 F. Supp. 2d at 851 ("It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law.").[12]

In the face of these enduring problems and a lack of workable, race-neutral alternatives, local school officials need some leeway to perform their duties in a manner that best serves their local needs. Their reasoned judgments that limited race-conscious measures are vital to attain the compelling interest in racial integration should not be disturbed.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

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[12] Indeed, if school districts cannot maintain integration through race-conscious student assignment plans once an order has been lifted, then district courts may be reluctant to relinquish jurisdiction in the first place. The result will be even more prolonged supervision by federal district courts, contrary to the tradition of vesting education policy decisions with politically accountable school boards. *Cf. PICS*, 426 F.3d at 1195 (Kozinski, J., concurring) (lamenting frequent "resort to the courts" that "often delays implementation of a program for years," and noting that "there is much to be said for returning primacy on matters of educational policy to local officials").

Respectfully submitted,

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APPENDIX

INTEREST OF AMICI CURIAE

The Council of the Great City Schools ("Council"), the only national organization representing the needs of America's urban public schools, is a coalition of 66 of the nation's largest urban public school systems – including the two now before the Court – educating some 7.5 million students.[1] Founded in 1956 and incorporated in 1961, the

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[1] Member school districts include Albuquerque Public Schools, Anchorage School District, Atlanta Public Schools, Austin Independent School District, Baltimore City Public Schools, Birmingham City Schools, Boston Public Schools, Broward County Public Schools, Buffalo City School District, Caddo Parish School District, Charleston County Public Schools, Charlotte-Mecklenburg Schools, Chicago Public Schools, Christina School District, Cincinnati Public Schools, Clark County School District, Cleveland Municipal School District, Columbus Public Schools, Dallas Independent School District, Dayton Public Schools, Denver Public Schools, Des Moines Independent Community School District, Detroit Public Schools, District of Columbia Public Schools, Duval County Public Schools, East Baton Rouge Parish Schools, Fort Worth Independent School District, Fresno Unified School District, Guilford County Schools, Hillsborough County School District, Houston Independent School District, Indianapolis Public Schools, Jackson Public School District, Jefferson County Public Schools, Kansas City School District, Long Beach Unified School District, Los Angeles Unified School District, Memphis City Public Schools, Metropolitan Nashville Public Schools, Miami-Dade County Public Schools, Milwaukee Public Schools, Minneapolis Public Schools, New Orleans Public Schools, New York City Department of Education, Newark Public Schools, Norfolk Public Schools, Oakland Unified School District, Oklahoma City Public Schools, Omaha Public Schools, Orange County Public Schools, Palm Beach County Public Schools, Philadelphia Public Schools, Pittsburgh Public Schools, Portland Public Schools, Providence Public Schools, Richmond Public Schools, Rochester City School District, Sacramento City Unified School District, Salt Lake City School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, St. Louis Public Schools, St. Paul Public Schools, Toledo Public Schools, and Wichita Public Schools.

Council is located in Washington D.C., where it works to promote urban education through legislation, research, technical assistance in instruction, management, technology, and other special projects. The Council serves as the national voice for urban educators, providing ways to share promising practices and address common concerns. The Great City Schools represents 15.5% of total national public school enrollment. Nearly two-thirds of our students are eligible for a free-lunch subsidy, compared to just over one-third nationally. In addition, more than three-quarters of Great City Schools' students are from minority backgrounds, primarily African American, Hispanic, or Asian American,[2] compared with the 40.5% national average. Many Council districts have obtained unitary status over the past decade. Council districts are committed to integration of their student bodies and providing equal educational opportunities, while fostering the educational benefits of racial and ethnic diversity.

The Council was one of the first national education organizations that supported the No Child Left Behind Act, and continues to do so. The Council agrees with the main goals of No Child Left Behind, including accountability, closing the achievement gaps between minority and non-minority students, and focusing on the needs of poor and minority students, students with disabilities, and English language learners.

* * *

The Magnet Schools of America ("MSA") is a national educational association located in Washington, D.C. and has been in existence since the 1970s. The organization promotes magnet schools through desegregation, equity, and excellence; through the expansion and improvement of

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[2] Of the approximately 7.5 million students enrolled in the Council's members' schools, 38% are African American, 33% are Hispanic, 22% are White, 6% are Asian/Pacific Islander.

magnet, theme, and public choice schools. The Association encourages passage of national and state legislation promoting school desegregation, theme-based/specialty education, and public schools of choice. MSA supports and serves the leaders and teachers of magnet and/or specialized schools, while promoting the development of new magnet and public schools of choice. MSA's professional development for teachers and administrators provides a forum for leadership, school reform, and innovation in public education. Its members, approximately 2,000 individuals and schools across the United States, implement programs to reduce, eliminate, or prevent minority group isolation in its programs and schools. MSA has provided for many years, and continues to provide, technical assistance to the majority of the magnet schools grantees that have been aided by the federal Magnet Schools Assistance Program (MSAP) since its inception in 1984. MSAP was initiated to provide federal support for magnet schools that were part of an approved voluntary or court-ordered desegregation plan. MSAP is the *only* federal program solely addressing desegregation and diversity in public elementary and secondary schools. It has provided the impetus for thousands of magnet schools to be developed with diverse school enrollments. The MSAP federally funded magnet schools have been and continue to be required to develop and implement voluntary desegregation plans, unless they continue to be part of a court order, to reduce racial isolation in our nation.

* * *

The Public Education Network ("PEN") is a national organization of local education funds ("LEFs") and individuals working to build public demand and mobilize resources for quality public education in low-income communities across the nation. PEN believes that public education is the cornerstone of our democratic way of life. PEN represents 78 LEFs working in 34 states and the District

of Columbia on behalf of 11 million children attending 16,000 schools in 1600 school districts in the U.S. On average, 57% of children in LEF communities are poor and minority. PEN seeks to bring the community voice into the debate on quality public education in the firm belief that an active, vocal constituency is necessary to ensure every child, in every community, a quality public education.

* * *

The United States Conference of Mayors ("Conference") is the official national organization of urban mayors representing cities that have populations of 30,000 or more; have been in existence since 1932; and have mayors as their chief locally elected official. One of the primary roles of the Conference is to ensure that federal policy meets urban needs. The Conference, through its stated policies, is committed to ensuring diversity and equity in housing, employment and education in our cities; providing high quality and equal opportunity for all of the nation's children; improving our nation's schools to foster greater student achievement; linking education with related social and human services so children are ready for school; supporting and encouraging the development of a framework for 21st century education; securing and preparing the American workforce of today and tomorrow on the global stage; and ensuring a local leadership role for mayors in establishing policies, programs and practices to better prepare students to succeed as citizens and workers in our cities for the 21st century.

* * *

The San Francisco Unified School District ("SFUSD"), founded in 1851, is the first public school district established in California. One of the largest school districts in the state, SFUSD educates more than 57,000 students annually in more than 160 pre-kindergarten through 12th grade schools. SFUSD is joining this amicus brief, in addition to its membership in the Council of the Great City Schools, because

of its unique experience with the issue of segregation. From 1983 through December 31, 2005, SFUSD was under a federal Consent Decree designed to eliminate the vestiges of de jure segregation throughout SFUSD. *San Francisco NAACP v. SFUSD*, 576 F. Supp. 34 (N.D. Cal. 1983).[3] For the first sixteen years of the Consent Decree, SFUSD successfully eliminated racial identifiability in its schools, classrooms and programs by relying on a plan that allowed for the use of race in student assignment.[4]

In 1999, following a separate class action suit that was subsequently related to the ongoing desegregation case, *Ho v. SFUSD*, Case No. C-94-2418 WHO (N.D. Cal. 1994),[5] the parties to the Consent Decree reached a settlement, which the Court approved. That settlement eliminated the racial balance requirements of the Consent Decree and set a termination date for the Consent Decree of December 31, 2002. *San Francisco NAACP v. SFUSD*, 59 F. Supp. 2d 1021, 1039 (N.D. Cal. 1999). In 2001, the parties to the Consent Decree reached another settlement, which the Court also approved, extending the Consent Decree to December 31, 2005. Since the 1999 settlement and through the end of the Consent Decree in 2005, SFUSD used various race-neutral student assignment strategies to avoid racial identifiability in its schools, classrooms and programs, including relying on multiple race-neutral characteristics such as a student's socioeconomic status. Despite its best efforts, however, SFUSD has not been successful in avoiding racial identifiability since it stopped

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[3] This was a class action suit filed on behalf of all children eligible to attend SFUSD schools.

[4] The plan required that none of nine specific racial/ethnic groups constitute more than 45% of the enrollment at a regular school or more than 40% of enrollment at an alternative school and that at least four of those specific groups be represented at each school.

[5] This class action was filed on behalf of students of Chinese American descent, who claimed that the use of race under the student assignment plan constituted racial discrimination in violation of the Equal Protection Clause.

using race in student assignment. Even though SFUSD is racially and culturally diverse,[6] since the implementation of the race-neutral student assignment plans that followed the 1999 and 2001 settlements, SFUSD's schools have severely resegregated. By the end of the Consent Decree, the number of schools resegregated (60% or higher of one race) at one or more grade levels had reached approximately fifty schools. That number was 43 schools in the 2004-05 school year and thirty in the 2001-02 school year.

Based on its own unique experience, knowing first-hand that the use of race-neutral student assignment methods has led to severe resegregation in its schools, classrooms, and programs, SFUSD respectfully submits that the use of race in student assignment is necessary to avoid racial segregation.

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[6] SFUSD's student body is broken down as follows: approximately 32.2% Chinese, 22% Latino, 13.2% African American, 9.3% non-Hispanic white, with the remaining percentages comprising Filipino, Japanese, Korean, Native American, and other non-white students.

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Nos. 05-908 & 05-915

Supreme Court, U.S.
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In The Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of JOSHUA RYAN MCDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeal For The Ninth And Sixth Circuits

BRIEF OF 553 SOCIAL SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the undersigned social scientists submit this brief as *amici curiae* in support of Respondents Jefferson County Board of Education, et al. (No. 05-915) and Seattle School District No. 1, et al. (No. 05-908).[1]

Amici curiae are social scientists and scholars who have extensively studied issues related to school desegregation, diversity and race relations in K-12 schools. Collectively, *amici* include 553 researchers from 42 states and the District of Columbia and 201 different educational institutions and research centers throughout the United States, extending across numerous disciplines, including education, psychology, sociology, economics, political science, and history.[2]

Amici have an interest in presenting to the Court research findings that address the educational considerations that local school boards take into account as they design and implement student assignment policies. To present the Court with this research – which bears directly on whether the student assignment policies at issue satisfy constitutional scrutiny – *amici* prepared a social science statement summarizing the evidence. The statement is appended to this brief. The body of this brief highlights the key research findings.

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[1] All parties have filed with the Court their blanket consent for the filing of *amicus curiae* briefs in these cases. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] A list of *amici* is included in the Appendix. Institutional affiliation is provided for identification purposes only and does not reflect the views of the institution.

SUMMARY OF ARGUMENT

The body of research that has developed since the Court declared government-sanctioned school racial segregation unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954), supports three interrelated conclusions: (1) racially integrated schools provide significant benefits to students and communities, (2) racially isolated schools have harmful educational implications for students, and (3) race-conscious policies are necessary to maintain racial integration in schools.[3] *Amici* submit that these research findings are relevant and supportive of the educational judgments that underlie the student assignment policies at issue in the instant cases.

Racially integrated schools prepare students to be effective citizens in our pluralistic society, further social cohesion, and reinforce democratic values. They promote cross-racial understanding, reduce prejudice, improve critical thinking skills and academic achievement, and enhance life opportunities for students of all races. These benefits are maximized when schools are structured in ways that optimize intergroup contact. Communities also benefit from a potential workforce that is better prepared for a global economy, reduced residential segregation, and increased parental involvement in schools – all of which increase the stability of communities.

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[3] As noted in the appended statement, desegregation generally describes the creation of schools containing substantial percentages of students from two or more racial or ethnic groups. Integration refers to the positive implementation of desegregation with equal status for all groups and respect for all cultures.

While there are examples of academically successful schools with high concentrations of nonwhite students, more often than not, segregated minority schools offer profoundly unequal educational opportunities. This inequality is manifested in many ways, including fewer qualified, experienced teachers, greater instability caused by rapid turnover of faculty, fewer educational resources, and limited exposure to peers who can positively influence academic learning. No doubt as a result of these disparities, measures of educational outcomes, such as scores on standardized achievement tests and high school graduation rates, are lower in schools with high percentages of nonwhite students.

Race-conscious student assignment policies are necessary to maintain racially integrated schools. Evidence shows that choice assignment policies that do not consider race as a factor in student assignments tend to result in racially homogeneous schools or lead to greater segregation; race-neutral policies that rely on socioeconomic status are not as effective in attaining racial diversity; and school districts that have eliminated race as a consideration in student assignment policies have experienced resegregation and the harmful consequences associated with racially isolated schools.

ARGUMENT

I. THE RESEARCH FINDINGS PRESENTED IN THE APPENDED SOCIAL SCIENCE STATEMENT SHOULD INFORM THE COURT'S ANALYSIS.

The Court should consider the relevant research findings discussed herein and in the appended social science statement in its evaluation of the local school districts' student assignment policies. In *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954), the Court cited with approval the research presented in the social science statement submitted in the case. Since *Brown*, the Court has turned to social science research in school desegregation cases. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 495 (1992). Recently, in *Grutter v. Bollinger*, the Court made clear that scientific evidence can play a significant role in shaping the answers to core questions of constitutional analysis. 539 U.S. 306, 330-31 (2003).

The extensive body of research evidence that has developed since the Court's decision in *Brown* documents the benefits of racial integration and elaborates on the harms associated with racial isolation in K-12 education. Evidence also shows the effectiveness of various policies in maintaining racial integration. This research supports the determination that the school boards have a compelling interest to promote racial integration and prevent racial isolation through choice-based school assignment policies that consider race as a factor.[4]

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[4] *Amici* are aware of two *amici curiae* briefs in support of petitioners that present opposite conclusions. *See* Brief of David J. Armor, Abigail Thernstrom, and Stephan Thernstrom as *Amici Curiae* in Support of Petitioners; Brief of *Amici Curiae* Drs. Murphy, Rossell and Walberg in Support of Petitioners. *Amici* do not intend to address the

(Continued on following page)

II. RACIALLY INTEGRATED SCHOOLS PROVIDE SIGNIFICANT BENEFITS FOR STUDENTS AND COMMUNITIES.

As the Court recognized in *Brown*, education "is the very foundation of good citizenship" and "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." 347 U.S. at 493. For schools to realize this purpose, they must prepare students with the knowledge and skills needed to succeed in our increasingly diverse society. The realization of these goals depends not only on preparing students academically, but in promoting cross-racial understanding and tolerance among all groups and improving the life opportunities of all students. Policies that promote these skills and opportunities in turn foster social cohesion and reinforce democratic values in our diverse citizenry.

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specific arguments in those briefs except to note that they rely on highly selective studies and outdated research to support their conclusions. For specific criticisms of the Armor et al. and Murphy et al. *amici curiae* briefs, see Brief of the American Educational Research Association as *Amicus Curiae* in Support of Respondents (discussing incomplete analyses of the research literature, flaws in methodological critiques, and reliance on studies that are outdated or inconsistent with more recent research findings).

A. Racial Integration Promotes Cross-Racial Understanding and Reduces Racial Prejudice.

Positive interactions with individuals of different backgrounds in integrated school settings provide important experiences necessary to promote cross-racial understanding and reduce racial prejudice and bias. Recent studies have revealed that students who have greater levels of interracial contact have more tolerant and inclusive viewpoints about individuals of different racial groups than students who have less interracial contact. Students who have greater levels of intergroup contact are also more likely to evaluate exclusion of individuals on the basis of group membership as wrong and harmful. Greater levels of contact among different groups are thus typically associated with lower levels of intergroup prejudice and larger reductions occur when optimal conditions for intergroup contact are established. App. at 3-4, 7-11.

Cross-racial experiences are highly valued by students and teachers. A majority of high school students in racially diverse school districts, including students in the Seattle and Jefferson County school districts, have reported that interracial schooling experiences have been valuable and have made them better prepared to live and work in diverse communities. Likewise, a majority of teachers with experience in racially integrated schools have reported the benefits of diversity for student learning, as well as for productive economic and civic participation in society. The opportunities to learn and develop in multiracial settings are particularly valuable for white

students, who, on average, are in the most racially isolated neighborhoods and schools. App. at 5-7.

Schools are better able to achieve these benefits when they create racially integrated environments that allow for direct interaction among individuals from different races. Programs that rely on the transmission of information about other groups rather than on direct interaction may have some positive short-term effects, but studies show that they have minimal impact on the long-term behavior of students. App. at 4-5.

B. Racial Integration Improves Critical Thinking Skills and Academic Achievement.

Learning in racially integrated classrooms, where students have different backgrounds and experiences that inform the perspectives they share in class, promotes complex thinking. Because students of different races and ethnic backgrounds often bring different cultural knowledge and social perspectives into school, classrooms with racially diverse students are more likely to enhance critical thinking by exposing students to new information and understandings. Both experimental and field studies in higher education, for example, have concluded that interactions with a diverse group of students can lead to higher and deeper levels of thinking. App. at 12-13.

Longstanding research on academic achievement has concluded that there are modest positive effects on the achievement levels of African American students who attend desegregated schools. App. at 13-17. Although the impact of desegregation on achievement varies based on context, the positive effects appear stronger for younger

students, and when desegregation is voluntary, as is the situation in these cases. App. at 14. Recent reviews of the more limited literature on the academic achievement of Latino students in desegregated schools suggest that there can also be modest positive gains for Latinos' achievement in desegregated schools. App. 17-18. Because widespread but unfounded beliefs about racial inferiority may significantly hinder minority students' achievement, the reduction of negative stereotypes that can occur in racially integrated schools may have a positive psychological impact that improves black and Latino students' academic performance. App. at 18-19. Additionally, studies have confirmed earlier findings that school desegregation has had little or no measurable negative impact on the test scores of white students. App. at 19-20.

C. Racial Integration Improves Life Opportunities.

Research shows that racially integrated schools improve students' life opportunities, particularly for nonwhite students. Attendance at desegregated schools, for example, is associated with higher graduation rates from high school by minority students. App. at 20. Minorities who graduate from integrated schools are also more likely to have access to the social and professional networks that have historically been available to white students and can provide additional information about college-going opportunities and access to professional jobs. App. at 21.[5] Thus, minorities who graduate from integrated schools also tend to earn higher degrees and major in

[5] *See, e.g., Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (recognizing the importance of networks for occupational success).

varied disciplines, such as architecture and the sciences. App. at 21-22. Labor market studies have also found that African Americans who attended desegregated schools have higher incomes than their peers in segregated schools. App. at 22-23.

Studies also reveal that students of all racial and ethnic groups who attend more diverse schools report an increased sense of civic engagement than do their more segregated peers. App. at 23-24.

D. Racially Integrated Schools Better Prepare Students for a Diverse Workforce, Reduce Residential Segregation, and Increase Parental Involvement in Schools.

In addition to offering benefits that accrue to students, racially integrated schools have been shown to have positive effects for communities. Studies have shown that positive experiences in racially integrated classrooms can make it more likely that individuals will bring fewer racial stereotypes into the workplace and will work more productively with individuals of other races. App. at 24. The U.S. military has found that policies that encourage the participation and leadership of African Americans are essential for the effective functioning of the military in a multiracial society. App. at 24-25.

Recent studies have also shown that school integration can help reduce residential segregation. In particular, research demonstrates that when fully implemented, especially across large geographic areas such as counties, school desegregation can lead to more integrated residential patterns. White households are less likely to leave racially mixed areas if they are confident that their children will continue to attend integrated schools. App. at 25-27.

Research further shows that desegregated school systems tend to have higher levels of parental involvement, which may be due to the fact that there are greater incentives for all residents, regardless of race or class, to commit their resources to the success of the school system as a whole in districts where schools are racially integrated. App. at 27-28.

III. RACIALLY ISOLATED MINORITY SCHOOLS HAVE HARMFUL EDUCATIONAL IMPLICATIONS FOR STUDENTS.

In *Brown*, the Court recognized the significant psychological and educational harms caused by racial segregation in public schools. 347 U.S. at 494. Research findings since *Brown* have substantiated this conclusion and demonstrated that segregated minority schools offer profoundly unequal educational opportunities for students, which lead to lower educational outcomes.

A. Racial Isolation is Associated with Higher Teacher Turnover and Lower Teacher Quality.

The central role that teachers play in influencing student learning means that numerous educational outcomes, including student achievement, are adversely affected by problems of teacher retention. Research demonstrates that teachers are more likely to leave predominantly minority schools than integrated or predominantly white schools, resulting in teacher turnover in minority schools. Race has been shown to be the driving factor in predicting teacher mobility, more so than working conditions and student poverty, and these patterns persist even when accounting for teacher salary. App. at 31. Due in part

to higher teacher turnover, African American and Latino students in predominantly minority schools typically have a greater proportion of teachers who are inexperienced and have lesser qualifications.[6] App. at 32-33.

B. Racially Isolated Schools Have Concentrated Educational Disadvantages.

Research consistently shows that schools with higher percentages of minority students have fewer educational resources, such as larger class sizes, inadequate facilities, and lower per-pupil spending. Research also shows that curricular resources, including honors and Advanced Placement courses, are not equally available at schools serving large percentages of minority students. Segregated minority schools are often located in neighborhoods with high poverty and crime rates, which also negatively influence a broad range of educational factors. App. at 33-34.

C. Racial Isolation Limits Exposure to Peers Who Can Positively Influence Academic Learning.

Research shows that students from families with higher socioeconomic status typically bring educational advantages that improve the achievement of all students in the classroom. App. at 35-36. Because poor black and Latino students are statistically more likely to attend a

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[6] The No Child Left Behind Act (NCLB) of 2001 recognizes the importance of teacher quality for improving student achievement. *See* 20 U.S.C. § 6319(a) (requiring "highly qualified" teachers in every classroom). Additionally, NCLB requires that states develop a plan to ensure "that low-income students and minority students are not taught at higher rates than other students by inexperienced, unqualified, out-of-field, or inexperienced teachers." 20 U.S.C. § 6312(c)(1)(L).

school of concentrated poverty than poor white students – a fact that is driven by race, beyond the influence of class (App. at 29-30) – racially segregated minority schools are less likely to have students from higher socioeconomic backgrounds than schools with higher percentages of white students. App. at 35-37.

D. Racial Isolation is Associated with Lower Educational Outcomes.

As a result of teacher and resource disparities, students in segregated minority schools have lower academic outcomes. App. at 37-38. Research shows that minority isolation is a significant predictor of low graduation rates, even when holding constant the effects of other school performance indicators. App. at 38-39. Further, studies show that students in predominantly minority schools are less likely to graduate from college, even when factoring in students' prior test scores and socioeconomic status. App. at 39-40. Because of the growing number of minority students in public schools, if existing educational trends continue, the nation risks something it has never before seen: an intergenerational decline in its educational level, a threatening outcome in a knowledge-based, global economy. App. at 40.

IV. RACE-CONSCIOUS STUDENT ASSIGNMENT POLICIES ARE NECESSARY TO MAINTAIN RACIALLY DESEGREGATED SCHOOLS.

Research further supports the conclusion that race-conscious policies are necessary to maintain racial integration. In particular, studies have shown that race-neutral policies are not as effective as race-conscious policies in achieving racial diversity. Moreover, resegregation typically

results when school districts do not maintain race-conscious policies in previously desegregated school systems.

A. Race-Neutral Choice Policies Have Led to Racial Isolation and Greater Segregation in Schools.

Research has demonstrated that, without plans or specific guidelines designed to achieve racial integration, "uncontrolled" school choice or geography-based student assignment plans tend to accompany racially homogeneous schools and lead to greater segregation. App. at 41-43. Evidence shows that managed choice assignment policies that consider race as a factor, however, tend to result in racial diversity and maintain integration over time. App. at 43-44. Studies also suggest that denying some students the opportunity to attend their first-choice school through a lottery assignment system may not negatively affect their academic achievement. App. at 44.

B. Race-Neutral Policies that Rely on Socioeconomic Status are Less Effective than Race-Conscious Policies in Attaining Racial Diversity.

Plans that integrate schools by family socioeconomic status are also an inadequate means to achieve racial desegregation. Statistical analyses evaluating whether income-based integration plans in the nation's largest school districts would create racially integrated schools found that income-based plans based on student school-lunch eligibility would have little or no effect in producing racial integration. App. at 48-49. One of the main difficulties is that the only measure of socioeconomic status that schools have is students' free-lunch status which is a dichotomous measure that fails to adequately

capture the wide variation in family economic status. App. at 46. Even if a more adequate measure could be developed, which would require highly intrusive questions about a family's economic situation, the fact remains that while race and class are often strongly correlated, they are not perfectly correlated, and in some cases are not correlated at all. App. at 47-48. Indeed, studies evaluating the actual implementation of socioeconomic integration plans have found that they have had mixed results in maintaining racially diverse schools. App. at 48-50, 53-54.

C. School Districts that No Longer Consider Race in Their Student Assignment Policies Have Experienced Resegregation and Its Harmful Consequences.

Research on school districts that were formerly under desegregation orders reveals that eliminating race from consideration in student assignments has been associated with resegregation and an array of harmful effects on students. Research from the Charlotte-Mecklenburg system, for example, shows that after the district was declared unitary and it implemented race-neutral, neighborhood-based student assignment in August 2002, there was a substantial increase in school segregation within the district, accompanied by declines in academic achievement. App. at 51-52. Similar results have been found in Denver and San Francisco, which have also ended the use of race-conscious policies. App. at 52-54. These results are not surprising given that research had already documented similar patterns of resegregation and achievement declines in Norfolk, Virginia and Oklahoma City. App. at 50-51.

CONCLUSION

For the foregoing reasons, the judgments of the Courts of Appeals upholding the constitutionality of the student admissions policies designed by local education authorities in the Jefferson County and Seattle school districts should be affirmed.

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APPENDIX

STATEMENT OF AMERICAN SOCIAL SCIENTISTS OF RESEARCH ON SCHOOL DESEGREGATION

In the 52 years since *Brown v. Board of Education* was decided, social science research has expanded our knowledge about the positive effects of racially integrated schools. Studies document how racially integrated schools provide students with opportunities to learn and develop in multiracial settings while preparing them to live and work in multiracial communities and institutions as adults. This preparation remains an important component of education in our increasingly diverse society. As the Court acknowledged in *Brown*, schools are the "very foundation of good citizenship" and "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[1] Decades of research have also substantiated *Brown's* conclusion that racially segregated schools are likely to deprive students of an equal opportunity to learn.[2] In a nation where the minority population has tripled since the *Brown* decision, the consequences of segregation are all the more serious, and empirical evidence shows that, for many American communities, sustaining integrated schools is difficult

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[1] *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

[2] Walter Stephan, "School Desegregation: An Evaluation of the Predictions Made in Brown vs. Board of Education," *Psychological Bulletin* 85 (1978): 217-38; Walter Stephan, "The Effects of School Desegregation: An Evaluation 30 Years After *Brown*," in *Advances in Applied Social Psychology*, ed. Michael J. Saks and Leonard Saxe (New York: Erlbaum, 1986): 181-206.

without specific policies designed to achieve or maintain them.[3]

This statement summarizes a large body of research and draws justifiable conclusions from the available scientific evidence. It reflects the consensus of the hundreds of undersigned researchers, who are authorities in fields relevant to the issues discussed here. We submit this statement to aid the Court's understanding of the student assignment policies that the local school districts in the cases before the Court have voluntarily adopted to further educational goals. We present research regarding the benefits of racially integrated schools for students and communities (Part I), the harms that have been found to be associated with racially segregated minority schools (Part II), and the effectiveness of race-conscious policies to help maintain racially integrated schools (Part III). Racially desegregated schools are not an educational or social panacea and the extent of benefits will depend on how desegregation is structured and implemented. What research studies show, however, is that racially integrated schools tend to provide benefits that are not available in segregated schools.

I. The Benefits of Racially Integrated Schools for Students and Communities.

Racially integrated public schools provide significant benefits for students of all races and their communities.

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[3] Desegregation generally describes the creation of schools containing substantial percentages of students from two or more racial and ethnic groups. Integration refers to the positive implementation of desegregation with equal status for all groups and respect for all cultures.

Studies document how these schools provide an environment that promotes social tolerance and reduces racial prejudice, improves students' critical thinking skills and academic achievement, and enhances economic and occupational opportunities. Communities also benefit from a more productive workforce, decreased residential segregation, and increased parental involvement in schools. These positive outcomes improve the future viability of workplaces and communities.

Cross-Racial Understanding and Reduction of Racial Prejudice

A considerable number of studies since *Brown* have shown how the social environment of schools affects the attitudes of students from one racial group toward students of other racial groups.[4] Over the past 15 years, research in developmental psychology has documented the

[4] See Thomas Pettigrew, "Attitudes on Race and Housing: A Social-Psychological View," in *Segregation in Residential Areas*, ed. Amos H. Hawley and Vincent P. Rock (Washington, D.C.: National Academy of Sciences, 1973): 21-84; Thomas Pettigrew, "Justice Deferred: A Half Century after Brown v. Board of Education," *American Psychologist* 59, no. 66 (2004): 521-29; Nancy St. John, *School Desegregation: Outcomes for Children* (New York: Wiley, 1975); Elizabeth G. Cohen, "Design and Redesign of the Desegregated School: Problems of Status, Power, and Conflict," in *School Desegregation: Past, Present and Future*, ed. Walter G. Stephan and Joe R. Feagin (New York: Plenum, 1980): 251-78; Sandra B. Damico, Afesa Bell-Nathaniel, and Charles Green, "Effects of School Organizational Structure on Interracial Friendships in Middle Schools," *Journal of Education Research* 74, no. 6 (1981): 388-93; Vladimir T. Khmelkov and Maureen T. Hallinan, "Organizational Effects on Race Relations in Schools," *Journal of Social Issues* 55, no. 4 (1999): 627-45; Melanie Killen, Nancy G. Margie, and Stefanie Sinno, "Morality in the Context of Intergroup Relationships," in *Handbook of Moral Development*, ed. Melanie Killen and Judith Smetana (Mahwah, N. J.: LEA, 2006): 155-83.

social and developmental benefits of intergroup contact that results from school integration and examined stereotyping, prejudice, and exclusion attitudes in childhood.[5]

These comprehensive educational studies conclude that a racially integrated student body is necessary to obtain cross-racial understanding, which may lead to a reduction of harmful stereotypes and bias. Racially segregated schools deprive students of these learning opportunities and the available evidence indicates that indirect programs that merely emphasize the transmission of information about other groups but are not able to utilize intergroup contact have little impact on actually changing the behavior of students.[6] Like learning new communication skills, the skills needed to relate to students of other racial and ethnic groups require practice.[7] Knowledge

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[5] Melanie Killen and Clark McKown, "How Integrative Approaches to Intergroup Attitudes Advance the Field," *Journal of Applied Developmental Psychology* 26 (2005): 612-22.

[6] Willis D. Hawley, "Designing Schools that Use Student Diversity to Enhance Learning of All Students," in *Lessons in Integration: Realizing the Promise of Racial Diversity in America's Schools*, ed. Erica Frankenberg and Gary Orfield (Charlottesville, Va.: Univ. of Virginia Press, in press); Frances E. Aboud and Maria Amato, "Developmental and Socialization Influences on Intergroup Bias," in *Blackwell Handbook of Social Psychology: Intergroup Relations*, ed. Rupert Brown and Samuel L. Gaertner (Oxford, England: Blackwell Publishers, 2001): 65-85; Janet Ward Schofield and H. Andrew Sagar, "Peer Interaction Patterns in an Integrated Middle School," *Sociometry* 40, no. 2 (1977): 130-38.

[7] Janet Ward Schofield, *Black and White in School: Trust, Tension or Tolerance?* (New York: Teachers College Press, 1989) (showing that behavior changed over time as kids became more comfortable with members of other racial groups and were less likely to avoid them).

about and empathy for other groups are not as easily learned or long-lasting if learned in homogeneous schools.[8]

In a nation in which the proportion of whites among the school-aged population has declined to less than 60% and is declining by the year, there is growing value to cross-racial understanding and cooperation among individuals of all races. For white students, who, on average, grow up in the most racially separate neighborhoods and remain highly segregated in K-12 and higher education classrooms,[9] racially integrated schools provide benefits that many students may not be able to obtain in other ways.[10] Recent findings from a survey of high school juniors and seniors in seven major school districts across the nation, including Seattle and Jefferson County, show that white students value interracial experiences and report that their racially integrated schools better prepared them to work and participate in public life in

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[8] Peter B. Wood and Nancy Sonleitner, "The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice," *Journal of Intercultural Relations* 20, no. 1 (1996): 1-17.

[9] Sean F. Reardon and John T. Yun, "Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000," in *School Resegregation: Must the South Turn Back?*, ed. John C. Boger and Gary Orfield (Chapel Hill, N.C.: Univ. of North Carolina Press, 2005): 51-69.

[10] Michal Kurlaender and John T. Yun, "Is Diversity a Compelling Educational Interest? Evidence from Louisville," in *Diversity Challenged: Evidence on the Impact of Affirmative Action*, ed. Gary Orfield with Michal Kurlaender (Cambridge, Mass.: Harvard Education Publishing Group, 2001): 111-41; Pamela Perry, *Shades of White: White Kids and Racial Identities in High School* (Durham, N.C.: Duke Univ. Press, 2002).

in their multiracial communities.[11] Additionally, students of all racial groups in integrated schools felt higher comfort levels with members of racial groups different than their own when compared with students in segregated schools.[12] For example, white students in integrated settings have been found to exhibit more racial tolerance and less fear of their black peers over time than their segregated peers.[13]

Teachers believe that building respect for people of other races and cultures is one of the most important goals of education.[14] Many teachers with everyday experience in racially diverse schools believe in the benefits of racial diversity for student learning and as an experience that fosters productive, economic, and civic participation in

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[11] John T. Yun and Michal Kurlaender, "School Racial Composition and Student Educational Aspirations: A Question of Equity in a Multiracial Society," *Journal of Education for Students Placed at Risk* 9, no. 2 (2004): 143-68.

[12] Michal Kurlaender and John T. Yun, "Measuring School Racial Composition and Student Outcomes in a Multiracial Society," *American Journal of Education* (forthcoming).

[13] Janet Ward Schofield, "Review of Research on School Desegregation's Impact on Elementary and Secondary School Students," in *Handbook of Research on Multicultural Education*, ed. James A. Banks and Cherry M. Banks (New York: Macmillan Publishing, 1995): 597-616; Amy J. Strefling, "The Influence of Integrated and De Facto Segregated Schools on Racial Attitudes of White Students toward African Americans" (paper presented at Council for Administration Convention, St. Louis, 1998); Jomills Henry Braddock, Marvin P. Dawkins, and William T. Trent, "Why Desegregate? The Effect of School Desegregation on Adult Occupational Segregation of African Americans, Whites, and Hispanics," *International Journal of Contemporary Sociology* 31, no. 2 (1994): 271-83.

[14] Alec Gallup, *The Phi Delta Kappa Gallup Poll of Teachers' Attitudes Towards the Public Schools* (Bloomington, Ind.: Phi Delta Kappa, 1985).

U.S. society. They also state that these benefits are difficult to attain in single-race classrooms.[15] Virtually all teachers (and about 90% of students) in a recent survey stated that it was important for students of different races and ethnicities to interact, although far fewer believed that this was currently happening in their schools.[16]

The harms to students who are the targets of negative stereotypes and to students who become the unwitting inheritors of such views are well known.[17] Children become aware of racial and ethnic group differences from very young ages,[18] and their developing views of different groups are affected and shaped by others within their social worlds.[19] Because stereotypes can become deeply

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[15] Ellen Goldring and Claire Smrekar, "Magnet Schools and the Pursuit of Racial Balance," *Education and Urban Society* 33, no. 1 (November 2000): 17-35; *Teacher Opinions on Racial and Ethnic Diversity: Clark County School District, Nevada* (Cambridge, Mass.: The Civil Rights Project, 2002).

[16] Kelly Bagnashi and Marc R. Scheer, "Brown v. Board of Education: Fifty Years Later," in *Trends and Tudes Newsletter of Harris Interactive Youth Research* 3, no. 6 (June 2004) (summarizing the findings of a Harris Interactive/Education Week poll).

[17] Claude M. Steele, Steven J. Spencer, and Joshua Aronson, "Contending with Group Image: The Psychology of Stereotype and Social Identity Threat," in *Advances in Experimental Social Psychology*, ed. Mark Zanna (New York: Academic Press, 2002): 379-440.

[18] Frances E. Aboud, *Children and Prejudice* (London: Blackwell Publishers, 1988); Lawrence A. Hirschfeld, "The Inheritability of Identity: Children's Understanding of the Cultural Biology of Race," *Child Development* 66, no. 5 (1995): 1418-37.

[19] See Frances E. Aboud, Morton J. Mendelson, and Kelly T. Purdy, "Cross-Race Peer Relations and Friendship Quality," *International Journal of Behavioral Development* 27, no. 2 (2003): 165-73; Killen, Margie, and Sinno, "Morality in the Context of Intergroup Relationships," 155-83; Christopher G. Ellison and Daniel A. Powers, "The Contact Hypothesis and Racial Attitudes among Black Americans,"

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entrenched as children become adults, early social interactions are important to promote tolerance and reduce prejudice.[20] In addition, the effectiveness of constructive, integrated school settings in reducing the transmission of such stereotypes has been well established.[21] It has been

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Social Science Quarterly 75, no. 2 (1994): 385-400. See also Rebecca Bigler and Lynn S. Liben, "A Developmental Intergroup Theory of Social Stereotypes and Prejudice," in *Advances in Child Development and Behavior*, vol. 34, ed. Robert V. Kail (San Diego: Elsevier, 2006): 39-89 (positing that segregation is a causal factor in stereotyping because merely seeing people sorted by some human attribute leads children to believe that the groups differ).

[20] Research focusing on children's implicit attitudes – attitudes that reflect a racial bias, unbeknownst to the individual expressing the attitudes – has shown that white children attending racially homogeneous elementary schools were more likely to attribute negative intentions to peers based on race when evaluating ambiguous situations in school contexts than were white children attending racially heterogeneous schools. See Heidi Mcglothlin, Melanie Killen, and Christina Edmonds, "European-American Children's Intergroup Attitudes About Peer Relationships," *British Journal of Developmental Psychology* 23, no. 2 (2005): 227-49.

[21] See Frances E. Aboud and Sheri Levy, "Intervention to Reduce Prejudice and Discrimination in Children and Adolescents," in *Reducing Prejudice and Discrimination*, ed. Stuart Oskamp (Hillsdale, N. J.: Lawrence Erlbaum, 2000): 269-93; Killen, Margie, and Sinno, "Morality in the Context of Intergroup Relationships," 155-83; Martin Patchen, *Black-White Contact in Schools: Its Social and Academic Effects* (West Lafayette, Ind.: Purdue Univ. Press, 1982); Janet Ward Schofield, "The Impact of Positively Structured Contact on Intergroup Behavior: Does It Last under Adverse Conditions?" *Social Psychology Quarterly* 42, no. 3 (Sept. 1979): 280-84; Walter G. Stephan and Cookie W. Stephan, *Improving Intergroup Relations* (Thousand Oaks, Calif.: Sage, 2001); Hawley, "Designing Schools;" Linda Tropp and Mary Prenovost, "The Role of Intergroup Contact in Predicting Children's Inter-Ethnic Attitudes: Evidence from Meta-Analytic and Field Studies," in *Intergroup Relations: An Integrative Developmental and Social Psychological*

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found that the reduction of stereotyping and the increased understanding that racial exclusion is harmful are products of children's social cognition, perspective taking, empathetic responses, and moral judgments,[22] all of which are enhanced in integrated environments.[23] These outcomes are especially important in the education context, where stereotypes may inhibit academic interaction and learning by all students.

A recent meta-analysis[24] of over 500 prior studies that collectively involved 250,000 participants shows that greater levels of contact among different groups are typically associated with lower levels of intergroup prejudice, and that these effects are consistent and significant for samples of children, adolescents, and adults.[25] Although optimal intergroup conditions – such as

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Perspective, ed. Sheri Levy and Melanie Killen (Oxford, England: Oxford Univ. Press, in press).

[22] Killen, Margie, and Sinno, "Morality in the Context of Intergroup Relationships," 155-83. Research suggests the critical importance of being aligned in collective teamwork to consistently attain positive benefits of intergroup contact. Schofield, "Review of Research," 597-616.

[23] Recent research with adolescents in the Los Angeles area has shown that students who are enrolled in schools with high ethnic diversity are more likely to feel safe and experience less harassment in school than are students enrolled in schools with high racial isolation. Jaana Juvonen, Adrienne Nishina, and Sandra Graham, "Ethnic Diversity and Perceptions of Safety in Urban Middle Schools," *Psychological Science* 17, no. 5 (May 2006): 393-400.

[24] When performing a meta-analysis, researchers attempt to find every study conducted on a particular topic; then, they statistically pool the results to examine the overall patterns of effects and to uncover additional variables that moderate those effects.

[25] Thomas Pettigrew and Linda Tropp, "A Meta-Analytic Test of Intergroup Contact Theory," *Journal of Personality and Social Psychology* 90 (2006): 751-83.

equal status between groups, support of institutional authorities, common goals and cooperation – are not necessary for prejudice reduction, larger reductions in prejudice occur when the conditions are established.[26] A related analysis of 198 independent samples from these studies showed that significant, positive effects of intergroup contact typically emerge for samples of children and adolescents in schools, and specifically when the contact involves youth from different racial and ethnic groups.[27] Additional studies show how cross-race friendships that develop through contact in schools encourage broader, positive changes in interracial attitudes.[28] These positive effects accrue regardless of whether participants voluntarily chose to engage in intergroup contact.[29] Collectively these findings suggest that contact among youth from different racial groups promotes positive intergroup attitudes, and such positive outcomes become stronger

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[26] Gordon Allport, *The Nature of Prejudice*, (Cambridge, Mass.: Addison-Wesley Publishing Company, 1954) (discussing optimal conditions for intergroup contact).

[27] Tropp and Prenovost, "The Role of Intergroup Contact in Predicting Children's Inter-Ethnic Attitudes."

[28] Damico, Bell-Nathaniel, and Green, "Interracial Friendships in Middle Schools," 388-93; Shana Levin, Colette van Laar and Jim Sidanius, "The Effects of Ingroup and Outgroup Friendships on Ethnic Attitudes in College: A Longitudinal Study," *Group Processes and Intergroup Relations* 6, no. 1 (2003): 76-92.

[29] This is noteworthy because critics of contact theory suggest that those seeking out intergroup contact might already have lower prejudice, but an analysis that coded whether participants had "full choice" to engage in contact or "no choice" found that the effects of contact were comparably strong for both groups. See Pettigrew and Tropp, "A Meta-Analytic Test of Intergroup Contact Theory," 757-58.

when optimal intergroup conditions are established in the school environment.

Racially diverse schools can be structured in ways that make positive outcomes more likely to occur.[30] Tracking white and Asian students into more advanced classes and black and Latino students into lower-level classes – as studies have suggested disproportionately occurs, regardless of ability[31] – will limit the intergroup contact that produces gains for all in addition to restricting the future success of minority students.[32] Educators can benefit from the considerable research demonstrating how to implement desegregation successfully.[33]

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[30] Cookie W. Stephan and Walter G. Stephan, "Cognition and Affect in Cross-Cultural Relations," in *Handbook of International and Intercultural Communication*, 2nd ed., ed. William B. Gudykunst and Bella Mody (Thousand Oaks, Calif. Sage, 2002): 127-42; Pettigrew and Tropp, "A Meta-Analytic Test of Intergroup Contact Theory," 751-83; Schofield and Sagar, "Peer Interaction Patterns," 130-38; Robert E. Slavin, "Effects of Biracial Learning Teams on Cross-Racial Friendships," *Journal of Educational Psychology* 71, no. 3 (1979): 381-87; Robert E. Slavin, *Cooperative Learning: Theory, Research, and Practice*, 2nd ed. (Boston: Allyn & Bacon, 1995).

[31] Roslyn A. Mickelson, "Subverting Swann: First- and Second-Generation Segregation in Charlotte, North Carolina," *American Educational Research Journal* 38, no. 2 (2001): 215-52.

[32] See Carol Corbett Burris, Jay Heubert, and Henry Levin, "Math Acceleration for All," *Educational Leadership* 61, no. 5 (2004): 68-71; Jo Boaler and Megan Staples, "Transforming Students' Lives through an Equitable Mathematics Approach: The Case of Railside School" (paper presented at meeting of the American Educational Research Association, Montreal, Canada, April 2005).

[33] See Willis D. Hawley et al., *Strategies for Effective School Desegregation* (Lexington, Ma.: Lexington Books, 1983); Erica Frankenberg and Gary Orfield, ed., *Lessons in Integration: Realizing the Promise of Racial Diversity in America's Schools* (Charlottesville, Va: Univ. of Virginia Press, in press).

Critical Thinking Skills

Educational psychology theories indicate that learning in diverse classrooms, where students from different backgrounds communicate their different experiences and perspectives, encourages students to think in more complex ways.[34] Because students of different races and ethnic backgrounds often bring different cultural knowledge and social perspectives into schools, classrooms with racially diverse groups of students are more likely to enhance critical thinking by exposing students to new information and understandings.[35] Much has already been learned from research in higher education about the benefits of a diverse learning community.[36] For example, there is evidence from a multi-institution study that students experiencing classroom diversity – specifically racial and ethnic diversity – "showed the greatest engagement in active thinking processes, growth in intellectual engagement and

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[34] John D. Bransford and Dan L. Schwartz, "Rethinking Transfer: A Simple Proposal with Multiple Implications," in *Review of Research in Education*, ed. Asghar Iran-Nejad and P. David Pearson (Washington, D.C.: American Educational Research Association, 1999): 61-101; Allan Wigfield et al., "Development of Achievement Motivation," in *Social, Emotional, and Personality*, vol. 3, 6th ed. of *Handbook of Child Psychology*, ed. William Damon, Richard M. Lerner, and Nancy Eisenberg (New York: Wiley, in press).

[35] Hawley, "Designing Schools;" Jean Piaget, *Biology and Knowledge* (Chicago: Univ. of Chicago Press, 1971).

[36] See, e.g., Mitchell J. Chang et al., ed., *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (Stanford, Calif.: Stanford Univ. Press, 2003) as recognized by the Court in *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

motivation, and growth in intellectual and academic skills."[37]

Academic Achievement

A substantial body of research has been conducted on the impact of desegregated schooling on students' academic achievement.[38] Reviews of early desegregation research lead to the conclusion that school desegregation has a modest positive impact[39] on the achievement of African-American

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[37] Patricia Gurin, "Expert Report of Patricia Gurin," submitted in *Gratz, et al. v. Bollinger, et al.*, No. 97-75231 (E.D. Mich. 1999) and *Grutter, et al. v. Bollinger, et al.*, No. 97-75928 (E.D. Mich. 1999); see also Patricia Marin, "The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms," in *Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms*, ed. American Council on Education & American Association of University Professors (Washington, D.C.: ACE & AAUP, 2000): 61-83; Jeffrey F. Milem and Kenji Hakuta, "The benefits of racial and ethnic diversity in higher education," featured report, in *Minorities in Higher Education: Seventeenth Annual Status Report*, Deborah J. Wilds (author) (Washington, D.C.: American Council on Education, 2000): 39-67. Although these studies were more descriptive, experimental work in this area confirms that students exposed to racial diversity relative to those who are not, have improved outcomes. See Greg J. Duncan et al., "Empathy or Antipathy? The Consequences of Racially and Socially Diverse Peers on Attitudes and Behaviors," Working paper, Joint Center for Policy Research, Northwestern University, 2003; Anthony Lising Antonio et al., "Effects of Racial Diversity on Complex Thinking in College Students," *Psychological Science* 15, no. 8 (August 2004): 507-10.

[38] Much of that research was carried out during the 1960s and 1970s, when research on desegregation primarily was focused on black students attending formerly all-white schools, often examining data during one year, early in the implementation of desegregation plans.

[39] Most school reforms have little or no effect on improving students' outcomes (see Richard Rothstein, *Class and Schools* (New York: Teachers College Press, 2004); Jaekyung Lee, *Tracking Achievement Gaps and Assessing the Impact of NCLB on the Gaps: An In-depth Look into National and State Reading and Math Outcome Trends*

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students.[40] Specifically, desegregation appears to have a positive impact on reading achievement, but there appears to be little or no effect on math scores.[41] The impact of desegregation on achievement varies by context, appearing somewhat stronger for younger students.[42] It also appears that there are stronger achievement gains when desegregation is voluntary.[43]

(Cambridge, Mass.: The Civil Rights Project, 2006)). Thus, the modest impact that desegregation has had on student achievement relative to these other reforms is substantial.

[40] Thomas D. Cook, "What Have Black Children Gained Academically From School Integration?: Examination of the Meta-Analytic Evidence," *School Desegregation and Black Achievement*, ed. Thomas D. Cook et al. (Washington, D.C.: Department of Education, May 1984); Rita E. Mahard and Robert L. Crain, "Research on Minority Achievement in Desegregated Schools," in *The Consequences of School Desegregation*, ed. Christine Rossell and Willis D. Hawley (Philadelphia, Pa.: Temple Univ. Press, 1983): 103-25; Schofield, "Review of Research," 597-616.

[41] David J. Armor, "The Evidence on Desegregation and Black Achievement," in *School Desegregation and Black Achievement*, ed. Thomas Cook et al. (Washington, D.C.: National Institution of Education, 1984): 43-67; Norman Miller and Michael Carlson, "School Desegregation as a Social Reform: A Meta-Analysis of Its Effects on Black Academic Achievement," in *School Desegregation and Black Achievement*, ed. Thomas Cook et al. (Washington, D.C.: National Institute of Education, 1984): 89-130; Paul M. Wortman, "School Desegregation and Black Achievement: An Integrative View.," in *School Desegregation and Black Achievement*, ed. Thomas Cook et al. (Washington, D.C.: National Institute of Education, 1984): 194-224.

[42] Mahard and Crain, "Research on Minority Achievement in Desegregated Schools," 103-25.

[43] Walter G. Stephan, "Blacks and Brown: The Effects of School Desegregation on Black Students," in *School Desegregation and Black Achievement*, ed. Thomas Cook et al. (Washington, D.C.: National Institute of Education, 1984): 131-59; Lawrence A. Bradley and Gifford W. Bradley, "The Academic Achievement of Black Students in

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While studies on academic achievement measure student outcomes (defined mainly by test scores), the underlying reasons for these gains in achievement are not entirely clear.[44] Research has shown that children's motivation to succeed academically is significantly related to their social relationships with others, social skills, and social competence.[45] It also appears, however, that the improved achievement of students in integrated schools is, in part, related to the fact that schools with greater proportions of non-minority students generally have better resources to help improve learning opportunities, as discussed in Part II.

The findings of more recent studies of desegregated schools are consistent with earlier findings.[46] One study

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Desegregated Schools: A Critical Review," *Review of Educational Research* 47, no. 3 (1977): 399-449.

[44] Whether standardized tests are a valid indicator of achievement or future success, particularly for African Americans, has been questioned when discussing student achievement in desegregated schools. Jacqueline Fleming, "Standardized Test Scores and the Black College Environment," in *Going to School: The African American Experience*, ed. Kofi Lomotey (Albany, N.Y.: State Univ. of New York, 1990): 143-62; Christopher Jencks et al., *Inequality: A Reassessment of the Effect of Family and Schooling in America* (New York: Basic Books, 1972).

[45] Kathryn R. Wentzel, "Adolescent Classroom Goals, Standards for Performance and Academic Achievement: An Interactionist Perspective," *Journal of Educational Psychology* 81, no. 2 (1989): 131-42; Wigfield et al., "Development of Achievement Motivation;" Allan Wigfield and Jacquelynne S. Eccles, "Students' Motivation during the Middle School Years," in *Improving Academic Achievement: Impact of Psychological Factors on Education*, ed. Joshua Aronson (San Diego: Academic Press, 2002): 160-85.

[46] Kathryn M. Borman et al., "Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools," *American Educational Research Journal*, 41, no. 3 (2004): 605-31; Stephen J. Caldas and Carl Bankston, "The Inequality of

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using National Assessment of Educational Progress (NAEP) data across every state found that when controlling for socioeconomic status, most of the negative relationship with segregated schools and achievement is eliminated for whites but not for black students, although the relationship varied among states.[47]

A recent study in Texas analyzed the impact of racial composition of classmates on the test scores of students, from 4th to 7th grade.[48] A longitudinal dataset following multiple cohorts of 200,000 students across all Texas public schools enabled the researchers to track achievement score gains on an annual basis, and in this respect the study is methodologically superior to studies that analyze a cross-section of data at one point in time. The study's findings suggest that a decrease in the black percentage of classmates for black students, particularly when cumulated over many years, could have a substantial impact on

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Separation: Racial Composition of Schools and Academic Achievement," *Educational Administration Quarterly* 34, no. 4 (1998): 533-57; Adam Gamoran, "The Stratification of High School Learning Opportunities," *Sociology of Education* 60, no. 3 (1987): 135-55; Jeannie Oakes, *Multiplying Inequalities: The Effects of Race, Social Class, and Tracking on Opportunities to Learn Mathematics and Science* (Santa Monica, Calif.: Rand Corporation, 1990); Mark Berends et al., *Examining Gaps in Mathematics Achievement Among Racial-Ethnic Groups, 1972-1992* (Santa Monica, Calif.: Rand Corporation, 2005).

[47] David J. Armor, "Lessons Learned from School Desegregation," in *Generational Change: Closing the Test Score Gap*, ed. Paul Peterson (Lanham, Md.: Rowman & Littlefield, 2006): 115-42.

[48] Eric A. Hanushek, John F. Kain, and Steven G. Rivkin, "New Evidence about *Brown v. Board of Education*: The Complex Effects of School Racial Composition on Achievement," Working paper, National Bureau of Economic Research, Cambridge, Mass., 2006.

increasing their achievement.[49] This relationship held even when other variables such as school quality and peers' achievement were taken into account. The study found that desegregation had a negligible impact on white achievement scores. Thus, decreasing black segregation may improve black achievement scores without adversely affecting white achievement scores.

While the findings on the achievement of Latino students, who are the most segregated students of color in the United States,[50] are more limited, a review of literature on the effect of school desegregation found that the few early studies reported modestly positive or no effect on Latino achievement.[51] A recent study examined the impact that ending court-ordered school desegregation in *Keyes* – where the Supreme Court established desegregation rights for Latinos – had for students. The study found modest negative impacts on average math achievement levels for Latinos in racially isolated schools in Denver relative to Latinos in schools that are more racially integrated.[52] A study of 50 Mexican-origin students who displayed all the

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[49] Specifically, the authors found that an increase of 1% of black students was related to a decrease of .0225 of a standard deviation in the test scores of black students, per year. Desegregating black students across Texas in grades 5-7 alone would close the achievement gap with whites by 15 percent.

[50] Richard R. Valencia, Martha Menchaca, and Rubén Donato, "Segregation, Desegregation, and Integration of Chicano Students: Old and New Realities," in *Chicano School Failure and Success: Past, Present, and Future*, 2nd ed., ed. Richard R. Valencia (London: RoutledgeFalmer, 2002): 70-113.

[51] Schofield, "Review of Research," 597-616.

[52] Catherine Horn and Michal Kurlaender, *The End of Keyes – Resegregation Trends and Achievement in Denver Public Schools* (Cambridge, Mass.: The Civil Rights Project, April 2006).

characteristics that normally predict school failure (e.g., low-income, parents without high school diplomas, and Spanish-speaking households) but who excelled academically in elite colleges and universities found that the overwhelming majority (70%) of these students had attended desegregated schools, even though most of them lived in segregated neighborhoods. Among the critical aspects of this desegregated schooling experience was the confidence it gave them to compete academically.[53]

In addition, educational research has documented how widespread but unfounded beliefs about racial inferiority hinder the academic performance of minority students. This phenomenon is known as "stereotype threat" and it undermines performance in this manner: Students perceiving stereotypic expectations about their own intellect from teachers and fellow students and who are motivated to disprove these stereotypes can become distracted in stressful assessment situations, such as testing, and fail to perform to their capacity. Much of the empirical research documenting the effects of stereotype threat has been done among college students,[54] but research also indicates that stereotype threat can affect elementary school age children. For example, African-American, Latino, Asian, and Native American students (ages 6-10) who were aware of their racial group stereotypes performed significantly worse than white and minority

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[53] Patricia Gándara, *Over the Ivy Walls: The Educational Mobility of Low Income Chicanos* (Albany, N.Y.: State Univ. of New York Press, 1995).

[54] Claude Steele and Joshua Aronson, "Stereotype Threat and the Intellectual Performance of African-Americans," *Journal of Personality and Social Psychology* 69, no. 5 (1995): 797-811; Patricia M. Gonzalez, Hart Blanton, and Kevin J. Williams, "The Effects of Stereotype Threat and Double-Minority Status on the Test Performance of Latino Women," *Personality and Social Psychology Bulletin* 28, no. 5 (2002): 659-70.

students who were unaware of their group stereotypes.[55] In addition to negatively affecting short-term academic achievement scores, research suggests that students who feel threatened by stereotypes may adopt habits that will undermine future academic success.[56]

Numerous studies – recent as well as those that were conducted in the immediate aftermath of court-ordered desegregation – suggest that school desegregation has little or no measurable negative impact on the test scores of white students.[57] Thus, fears that desegregation will undermine their achievement seem unfounded. Further, research showed that there were no gains for white

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[55] Clark McKown and Rhona Weinstein, "The Development and Consequences of Stereotype-Consciousness in Middle Childhood," *Child Development* 74, no. 2 (2003): 498-515. Studies have also confirmed the effect of stereotype threat for girls in math. Catherine Good, *Stereotype Threat and Its Relation to Theories of Elementary Girls' Mathematics Achievement and Task Choices* (Austin, Tex.: Univ. of Texas, 2001); Barbara Muzzatti, "Gender and Mathematics: Attitudes and Stereotype Threat Susceptibility in Children," (Ph.D. diss., Università degli studi di Padova, 2005); Nalini Ambady et al., "Stereotype Susceptibility in Children: Effects of Identity Activation on Quantitative Performance," *Psychological Science* 12, no. 5 (2001): 385-90.

[56] Kira Alexander and Janet Ward Schofield, "Stereotype Threat: How Students' Responses to Perceived Negative Stereotypes Undermine their Achievement," in *Migration Background, Minority-Group Membership and Academic Achievement: Research Evidence from Social, Educational, and Developmental Psychology*, ed. Janet Ward Schofield et al. (Berlin: Social Science Research Center Berlin, 2006): 13-42.

[57] Borman et al., "The Continuing Significance of Racial Segregation in Florida's Schools," 605-31; Patchen, "Black-White Contact in Schools," 182-84; Schofield, "Review of Research," 597-616; Harry Singer, Harold B. Gerald, and David Redfearn, "Achievement," in *School Desegregation: A Long-Term Study*, ed. Harold B. Gerard and Norman Miller (New York, Plenum Press, 1975): 69-87.

students following the end of the desegregation plan as schools resegregated in Denver.[58]

Life Opportunities

Research shows that attendance at racially integrated schools tends to improve students' life opportunities, particularly those of nonwhite students. Studies find that attending desegregated schools is related to completing high school for nonwhite students.[59] Students who experienced integration prior to attending an undergraduate institution are also more likely to connect positively with diverse peers in college and to exploit the academic opportunities that a diverse university can offer.[60] These findings

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[58] Horn and Kurlaender, *The End of Keyes*.

[59] Janet Ward Schofield, "Maximizing Benefits of Student Diversity: Lessons from School Desegregation Research," in *Diversity Challenged: Evidence on the Impact of Affirmative Action*, ed. Gary Orfield with Michal Kurlaender (Cambridge, Mass.: Harvard Education Publishing Group, 2001): 99-141; Walter G. Stephan, "School Desegregation: Short and Long Term Effects," in *Opening Doors: Perspectives on Race Relations in Contemporary America*, ed. Harry J. Knopke, Robert J. Norrell, and Ronald W. Rogers (Tuscaloosa, Ala.: Univ. of Alabama Press, 1991): 100-18. See Jonathan Guryan, "Desegregation and Black Dropout Rates," *American Economic Review* 94, no. 4 (2004): 919-43 (results of a quasi-experimental study of the effect of school segregation on African-American students' dropout rates found a modestly positive effect of desegregation on reducing dropout rates, after controlling for family characteristics); Robert L. Crain and Carol Sachs Weisman, *Discrimination, Personality, and Achievement: A Survey of Northern Blacks* (New York: Seminar Press, 1972).

[60] Anita-Yvonne Bryant, Nathan D. Martin, and Kenneth I. Spenner, *The Campus Life and Learning Project: A Report on the First Two College Years* (Durham, N.C.: Duke University, 2006); Victor B. Saenz, "Breaking the Cycle of Segregation: Examining Students' Pre-College Racial Environments and their Diversity Experiences in College" (Ph.D. diss., University of California, 2005).

are important because college attendance and graduation have become increasingly critical for economic success, much as high school completion was at the time of the *Brown* decision.

Nonwhite students who graduate from integrated schools are also more likely to have access to the social and professional networks that have been traditionally available to white students.[61] These social networks can provide increased access to professional jobs and information about college-going opportunities.[62] Early research on the long-term outcomes of desegregated schools concluded that, when comparing black students in desegregated schools with black students in segregated schools, those in integrated schools often have more realistic occupational aspirations.[63] Similarly, minority graduates of desegregated schools tend to complete more years of education, earn higher degrees, and major in more varied occupations than graduates of all-black schools.[64] For instance, one

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[61] See W. E. B. DuBois, "Does the Negro Need Separate Schools?" *Journal of Negro Education* 4, no. 3 (July 1935): 328-35; Mark Granovetter, "The Microstructure of School Desegregation" in *School Desegregation Research. New Directions in Situational Analysis*, ed. Jeffrey Prager, Douglas Longshore, and Melvin Seeman (New York: Plenum Press, 1986): 81-100.

[62] See Jomills H. Braddock et al., "Applicant Race and Job Placement Decisions: A National Survey Experiment," *International Journal of Sociology and Social Policy* 6 (1986): 3-24.

[63] Amy Stuart Wells and Robert L. Crain, "Perpetuation Theory and the Long-Term Effects of School Desegregation," *Review of Educational Research* 64, no. 4 (1994): 531-55.

[64] Jomills H. Braddock and James M. McPartland, "How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers," *Journal of Social Issues* 43, no. 1 (1987): 5-39; Wells and Crain, "Perpetuation Theory and the Long-Term Effects of School Desegregation," 531-55.

such study found that black graduates of predominantly white high schools are five times as likely to major in architecture and nearly four times as likely to major in computer science as black graduates of segregated schools.[65]

Research examining the long-term labor market implications of desegregation found that the incomes of southern-born blacks rose after desegregation was implemented.[66] A study of a random sample of black students in Hartford, Connecticut found that those attending desegregated schools, when compared with other black students in their cohort, were more likely to have white-collar jobs and were more likely to have more years of education.[67] Another study using a larger sample of black Americans over a period of decades noted that school segregation was negatively related to wages, and that this relationship was statistically significant even when controlling for a number of other background characteristics.[68] As in other studies mentioned above, an intervening factor explaining

[65] Jomills H. Braddock, "Segregated High School Experiences and Black Students' College and Major Field Choices" (paper presented at the National Conference on School Desegregation, Chicago, Ill., June 1987).

[66] Orley Ashenfelter, William J. Collins, and Albert Yoon, "Evaluating the Role of Brown vs. Board of Education in School Equalization, Desegregation, and the Income of African Americans," Working paper, National Bureau of Economic Research, Cambridge, Mass., 2005.

[67] Robert L. Crain and Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment* (Baltimore, Md.: Center for Social Organization of Schools, Johns Hopkins Univ., 1985).

[68] Michael A. Boozer et al., "Race and School Quality since Brown v. Board of Education," in *Brookings Papers on Economic Activity, Microeconomics*, ed. Martin Neil Baily and Clifford Winston (Washington, D.C.: The Brookings Institution, 1992): 269-338.

the increased earnings was that school desegregation for blacks was associated with more years of education.[69]

Studies show that black and white individuals who attended desegregated schools are more likely to have friends from other races, work in desegregated workplaces, live in desegregated neighborhoods, and favor desegregated schools for their own children, beyond the influence of personal characteristics such as socioeconomic status, achievement scores, or geography.[70] An in-depth study of minority students from an urban area who attended predominantly white suburban schools found that participants felt far more comfortable in racially diverse or predominantly white environments than did their friends and family members who lacked such desegregated experiences.[71] These former students, now adults, also felt better prepared for unique leadership roles in the city because of their experience in both white and nonwhite communities. This is consistent with data that reveal that students of all racial and ethnic groups who attend more

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[69] See also Guryan, "Desegregation and Black Dropout Rates," 919-43.

[70] Jomills H. Braddock, Robert L. Crain, and James M. McPartland, "A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults," *Phi Delta Kappan* 66, no. 4 (1984): 259-64. See Jomills H. Braddock, "The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis," *Sociology of Education* 53 (1980): 178-86; Julie E. Kaufman and James Rosenbaum, "The Education and Employment of Low-Income Black Youth in White Suburbs," *Education Evaluation and Policy Analysis* 14, no. 3 (1992): 229-40; Jomills H. Braddock and James M. McPartland, "Assessing School Desegregation Effects: New Directions in Research," *Research in Sociology of Education and Socialization* 3 (1982): 259-82.

[71] Susan Eaton, *The Other Boston Busing Story* (New Haven, Conn.: Yale Univ. Press, 2001).

diverse schools report stronger support for postsecondary participation[72] and an increased sense of civic engagement than their more segregated peers.[73] These findings show that integrated schooling experiences perpetuate desegregation across several contexts.[74]

Producing a Workforce for the Twenty-First Century

Because racially integrated schools can uniquely enhance cross-racial understanding through intergroup contact that is not possible in racially and ethnically homogeneous schools, they help prepare students for the demands of today's workplace. Experiences in racially diverse classrooms make it more likely that people will bring fewer racial and ethnic stereotypes into the workplace, and will work more productively with other members of an increasingly diverse nation.[75] For example, the U.S. military found that establishing policies that encouraged black participation and leadership were essential for effective functioning of the military in the aftermath of the Vietnam War and in a multiracial society. In fact, the

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[72] Yun and Kurlaender, "School Racial Composition and Student Educational Aspirations," 143-68.

[73] Michal Kurlaender and John T. Yun, "Fifty Years after Brown: New Evidence of the Impact of School Racial Composition on Student Outcomes," *International Journal of Educational Policy, Research and Practice* 6, no. 1. (2005): 51-78.

[74] Braddock, Crain, and McPartland, "A Long-Term View of School Desegregation," 259-64; Jomills H. Braddock and James M. McPartland, "Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship between School and Employment Discrimination," *Journal of Black Studies* 19, no. 3 (March 1989): 267-89; Braddock, Dawkins, and Trent, "Why Desegregate?," 273-83; Wells and Crain, "Perpetuation Theory and the Long-Term Effects of School Desegregation," 531-55.

[75] Hawley, "Designing Schools."

military realized that one of the most effective ways to develop interracial cooperation was through intergroup contact, under conditions of equal treatment, and assignments requiring collaboration across racial lines.[76] A 2001 study commissioned for the U.S. National Education Goals Panel pointed out that the Defense Department schools have a substantially lower racial achievement gap than most states, despite the fact that students came from families that were below average in socioeconomic status and parental education.[77]

Residential Segregation

Research also shows that while residential segregation usually drives school segregation, integrated schools can help reduce residential segregation.[78] A recent analysis suggests that school desegregation, when fully implemented,

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[76] Charles C. Moskos and John Sibley Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* (New York: Basic Books, 1997).

[77] Claire Smrekar et al., *March Toward Excellence: School Success and Minority Student Achievement in Department of Defense Schools* (National Education Goals Panel: Peabody Center for Education Policy, Vanderbilt Univ., September 2001): iii-v, 39, 43. See also "In Pentagon-Run Schools, the Achievement Gap Shrinks," *Education Week* (29 March 2000): 1, 20-21.

[78] Diana Pearce, *Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns, Final Report* (Washington, D.C.: Catholic Univ. of America, 1980); Robert Crain, Reynolds Farley, and Diana Pearce, "Lessons Not Lost: The Effect of School Desegregation on the Rate of Residential Desegregation in Large Center Cities" (paper presented at annual meeting of the American Educational Research Association, New Orleans, La., April 1984).

can lead to more integrated residential patterns.[79] While the percentage of white student enrollment in public schools has dropped substantially in virtually every urban district regardless of the presence or type of desegregation plan,[80] in areas with limited central city plans, the decline of white enrollment has accelerated[81] while regional or countywide plans can help maintain stable integration of whites and nonwhites.[82]

Research shows that if pockets of racially identifiable schools exist in a partially desegregated school district, white parents are more likely to seek out schools that are predominately white.[83] A study of metropolitan Charlotte illustrated that the part of the county excluded from the desegregation plan spurred white flight.[84] However, in a regional school district where all schools are racially balanced, the incidence of flight is reduced. An analysis of the largest 100 metropolitan areas noted that "white households are less likely to flee racially mixed environments if they are

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[79] Myron Orfield and Thomas Luce, *Minority Suburbanization and Racial Change: Stable Integration, Neighborhood Transition, and the Need for Regional Approaches* (Minneapolis: Institute on Race & Poverty, 2005).

[80] Erica Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (Cambridge, Mass.: The Civil Rights Project, 2003).

[81] Charles T. Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* (Princeton, N. J.: Princeton Univ. Press, 2004).

[82] Erica Frankenberg and Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts* (Cambridge, Mass.: The Civil Rights Project, 2002).

[83] Pearce, *Breaking Down Barriers*.

[84] J. Dennis Lord and John C. Catau, "School Desegregation Policy and Intra-School District Migration," *Social Science Quarterly* 57, no. 4 (March 1977): 784-796.

confident that their children will continue to attend integrated schools even if the racial mix of the neighborhood changes."[85] Likewise, in Lynn, Massachusetts, an older industrial city outside of Boston, the rapid racial transition in the housing market ended after a voluntary desegregation plan was adopted.[86] The implications of these findings are clear: if school districts fully integrate, housing patterns stabilize and white flight is minimized.[87]

Parental Involvement

Desegregated school systems tend to have higher levels of parental involvement relative to segregated minority schools. This may be the case because there is a greater incentive for all residents to commit their resources to the success of the school system as a whole.[88] A study by the National Research Council showed far higher levels of volunteers in integrated schools compared to heavily nonwhite schools and even sharper differences among private schools.[89] Case studies showed that after

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[85] Orfield and Luce, *Minority Suburbanization and Racial Change.* See also Hawley et al., *Strategies for Effective School Desegregation.*

[86] Richard Cole, "Fostering an Inclusive, Multiracial Democracy," in *Lessons in Integration: Realizing the Promise of Racial Diversity in America's Schools*, ed. Erica Frankenberg and Gary Orfield (Charlottesville, Va.: Univ. of Virginia Press, in press) (*Lynn* counsel of record discussing social science evidence supporting legal arguments in *Comfort v. Lynn School Committee*, 418 F.3d 1 (2005)).

[87] Orfield and Luce, *Minority Suburbanization and Racial Change.*

[88] Gary Orfield, "Metropolitan School Desegregation," in *In Pursuit of a Dream Deferred: Linking Housing and Education Policy*, ed. John A. Powell, Gavin Kearney, and Vina Kay (New York: Peter Lang Publishing, 2001): 121-57.

[89] Bernard Michael, ed., *Volunteers in Public Schools* (Washington, D.C.: National Academy Press, 1990): 18-20.

neighborhood schools were restored and segregation rose, parent involvement declined.[90] In Boston, minority parents with children attending city neighborhood schools and integrated suburban schools reported more involvement in the diverse suburban schools even though these schools were located farther away.[91]

II. The Harms of Racially Isolated Minority Schools.

Social science research over the past half century has confirmed the basic findings of the Court in *Brown* and its progeny of cases, including *Green v. County School Bd. of New Kent County*[92] and *Swann v. Charlotte-Mecklenburg Bd. of Ed.*,[93] that racially segregated schools fail to provide students with equal learning opportunities. Although there are examples of academically successful schools with high concentrations of nonwhite students in African-American communities, they are uncommon[94] and often the result of stable, committed leadership, faculty, and parents. More often, however, despite determined individual efforts, schools with high concentrations of nonwhite students do not perform as well as those with high concentrations of white students due to inequalities that exist. And these inequalities have harmful educational implications for all

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[90] Gary Orfield and Susan E. Eaton, ed., *Dismantling Segregation* (New York: The New Press, 1996).

[91] Gary Orfield et. al., *City-Suburban Desegregation: Parent and Student Perspectives in Metropolitan Boston* (Cambridge, Mass.: The Civil Rights Project, 1997).

[92] 391 U.S. 430 (1968).

[93] 402 U.S. 1 (1971).

[94] Douglas N. Harris, "High Flying Schools, Student Disadvantage and the Logic of NCLB," *American Journal of Education* (forthcoming).

students in such schools and are particularly detrimental for the millions of low-income minority children from families without high levels of parent education.[95]

Although not true everywhere, poor white students, on average, generally do not attend schools with many other poor students, black or white. Poor black and Latino students, on the other hand, are statistically much more likely to attend a school of concentrated poverty and racial isolation.[96] This is partially due to residential segregation by race, which drives segregation independent of affordability. Lower minority incomes compound segregation by

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[95] Evidence since the 1966 *Coleman Report* suggests that school reforms have larger impacts on more disadvantaged children compared with the more powerful home effects on privileged children, which may explain why desegregation studies often show minority gains in academic outcomes with no losses for white students. Daniel Monyihan and Frederick Mosteller, *On Equality of Educational Opportunity* (New York: Random House, 1972); Frederick Mosteller, Richard J. Light, and Jason A. Sachs, "Sustained Inquiry in Education: Lessons from Skill Grouping and Class Size," *Harvard Educational Review* 66, no. 4 (1996): 797-842. Further, lower-achieving students have been found to have more substantial gains when they are surrounded by higher-achieving peers. Julian Betts, Andrew C. Zau, and Lorien A. Rice, *Determinants of Student Achievement: New Evidence from San Diego* (San Francisco: Public Policy Institute of California, 2003); Caroline Hoxby, "Peer Effects in the Classroom: Learning from Gender and Race Variation," Working paper, National Bureau of Economic Research, Cambridge, Mass., August 2000.

[96] Almost nine-tenths of intensely segregated black and Latino schools also have student bodies where a majority of students come from families below the poverty line. Gary Orfield and Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation* (Cambridge, Mass.: The Civil Rights Project, 2006). See also Salvatore Saporito and Deenesh Sohoni, "Mapping Educational Inequality: Concentrations of Poverty among Poor and Minority Students in Public Schools," *Social Forces* (forthcoming).

concentrating lower income minority residents.[97] A recent study also suggests that wealthier students choose to attend private, charter, or magnet schools at a higher rate in neighborhoods with a greater percentage of minority residents.[98] These studies suggest that race is a determining factor in school segregation beyond the influence of class.

Segregated minority schools offer notably weaker educational opportunities. They tend to have more teachers without credentials who teach subjects in which they are not certified, more instability caused by rapid turnover of both students and faculty, more limited academic curriculum, and more exposure to crime and violence in the school's neighborhood. Accordingly, the educational outcomes in segregated schools tend to be lower in terms of scores on achievement tests and high school graduation rates, and dropout levels rise as the level of segregation increases.[99]

By eliminating racially isolated minority schools, integration prevents the educational harms for students enrolled in these schools and provides the opportunity to build understanding across racial lines.

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[97] Massey and Denton, *American Apartheid*

[98] Saporito and Sohoni, "Mapping Educational Inequality."

[99] A recent report from the United Nations Human Rights Commission also suggested that *de facto* school segregation could violate international human rights treaties to which the U.S. is a signatory. Matthew Samberg, "U.N. Criticizes Segregation in U.S. Schools; Supreme Court to Hear Cases Challenging Integration," *National Access*, 16 August 2006 at www.schoolfunding.info/news/litigation/8-16-06Unsegregation.php3 (accessed 29 September 2006).

Teacher Mobility and Quality

Research shows that teachers are more likely to leave segregated black and Latino schools, which results in higher teacher turnover at these schools. According to studies that investigate teacher turnover in segregated minority schools, race is the driving factor in predicting teacher mobility, more so than working conditions or student poverty.[100] White teachers – who comprise 85% of the teaching force – often transfer to schools with a lower minority percentage.[101] These patterns exist even when teacher salary is held constant.

The effects of these teacher trends have serious educational consequences for students at these schools because, as researchers and policymakers generally concur, teachers greatly influence student learning and teaching experience is critical to their effectiveness. A national report examining school quality concluded that "students learn more from teachers with strong academic skills and classroom teaching experience."[102] The

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[100] Benjamin Scafidi, David L. Sjoquist, and Todd Stinebrickner, "Race, Poverty, and Teacher Mobility," Working paper, Andrew Young School of Policy Studies Research Paper Series, Atlanta, Ga., August 2005; Susanna Loeb, Linda Darling-Hammond, and John Luczak, "How Teaching Conditions Predict Teacher Turnover in California Schools," *Peabody Journal of Education* 80, no. 3 (2005): 44-70.

[101] Hamilton Lankford, Susanna Loeb, and James Wyckoff, "Teacher Sorting and the Plight of Urban Schools: A Descriptive Analysis," *Educational Evaluation and Policy Analysis* 24, no. 1 (2002): 37-62; Susan Watson, *Recruiting and Retaining Teachers: Keys to Improving the Philadelphia Public Schools* (Philadelphia: Consortium for Policy Research in Education, 2001).

[102] Daniel Mayer, John Mullens, and Mary T. Moore, *Monitoring School Quality: An Indicators Report* (Washington, D.C.: U.S. Department of Education, National Center for Education Statistics, Office of Educational Research and Improvement, 2000): 5.

differential exposure of black students to novice teachers could be a factor contributing to the persistent achievement gap.[103]

The fact that it is harder for racially isolated minority schools to retain qualified teachers means that these schools disproportionately have teachers with lesser qualifications[104] or teachers who are unqualified. Research also reveals that black and Latino students, in particular, are taught by a greater proportion of new teachers,[105] teachers with fewer years of experience,[106] and go to schools that are characterized by instability and the

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[103] Charles Clotfelter, Helen Ladd, and Jacob Vigdor, "Who Teaches Whom? Race and the Distribution of Novice Teachers," *Economics of Education Review*, 24, no. 4 (August 2005): 377-92; Steven G. Rivkin, Eric A. Hanushek, and John F. Kain, "Teachers, Schools, and Academic Achievement," *Econometrica* 73, no. 2 (March 2005): 417-58.

[104] Camille E. Esch et al., *The Status of the Teaching Profession 2005* (Santa Cruz, Calif.: The Center for the Future of Teaching and Learning, 2005); Jennifer B. Presley, Bradford R. White, and Yuqin Gong, *Examining the Distribution and Impact of Teacher Quality in Illinois* (Edwardsville, Ill.: Illinois Education Research Council, 2005).

[105] Susanna Loeb and Michelle Reininger, *Public Policy and Teacher Labor Markets: What We Know and Why it Matters* (East Lansing, Mich.: The Education Policy Center at Michigan State Univ., 2004); Catherine Freeman, Benjamin Scafidi, and David Sjoquist, "Racial Segregation in Georgia Public Schools, 1994-2001: Trends, Causes and Impact on Teacher Quality," in *School Resegregation: Must the South Turn Back?* ed. John C. Boger and Gary Orfield (Chapel Hill, N.C.: Univ. of North Carolina Press, 2005): 148-63; Stephen J. Carroll et al., *The Distribution of Teachers among California's School Districts and Schools* (Santa Monica, Calif.: Rand Corporation, 2000).

[106] U.S. Department of Education, *Monitoring School Quality*; Clotfelter, Ladd, and Vigdor, "Who Teaches Whom?" 377-92; Rivkin, Hanushek, and Kain, "Teachers, Schools, and Academic Achievement," 417-58.

absence of viable learning communities, due at least in part to the higher teacher turnover rate.

Concentrated Educational Disadvantages

Research has consistently documented that schools with higher percentages of minority students tend to have fewer educational resources.[107] This relationship holds whether the resources are class size, facilities, or per-pupil spending.[108] Research suggests that curricular resources, including honors and AP courses, are not equally available for schools serving larger shares of minority students.[109] Students in segregated schools are also denied equal educational opportunity due to curricular tracking, impersonal counseling, and inadequate community outreach.[110] An

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[107] Meredith Phillips and Tiffani Chin, "School Inequality: What Do We Know?" in *Social Inequality*, ed. Kathryn Neckerman (New York: Russell Sage Foundation, 2004): 467-519.

[108] Harry Ashmore, *The Negro and the Schools* (Chapel Hill: Univ. of North Carolina Press, 1954); Juan Necochea and Cline Zulmara, "A Case Study Analysis of Within District School Funding Inequities," *Equity and Excellence in Education* 29, no. 2 (1996): 69-77; Lawrence Picus, "Estimating the Determinants of Pupil/Teacher Ratio: Evidence from the Schools and Staffing Survey," *Educational Considerations* 21 (1994): 44-55; The Education Trust, *The Funding Gap 2005: Low-Income and Minority Students Shortchanged by Most States* (Washington, D.C.: The Education Trust, Winter 2005).

[109] Ruth B. Ekstrom, Margaret E. Goertz, and Donald Rock, *Education and American Youth* (Philadelphia: The Falmer Press, 1988); Gamoran, "The Stratification of High School Learning Opportunities," 135-55; Jeannie Oakes, Adam Gamoran, and Reba N. Page, "Curriculum Differentiation: Opportunities, Outcomes, and Meanings," in *Handbook of Research on Curriculum*, ed. Philip W. Jackson (New York: MacMillan, 1992): 570-608.

[110] Gary Orfield, "A Secret Success: Racial Equity and Integration in Indiana Schools" in *Advances in Educational Policy*, vol. 3 ed. Kenneth Wong (Greenwich, Conn.: JAI Press, 1997): 225-48.

analysis of educational opportunity in California found that students in segregated black and Latino schools face multiple disadvantages concentrated in their schools, all of which can limit their access to higher educational opportunities.[111]

The larger community context of predominantly minority schools has a negative impact on the educational environment of these schools and can influence a broad range of educational factors such as whether teachers seek employment or whether parents will send their children to schools in these communities. Segregated minority schools are often located in the poorest neighborhoods and in areas with high crime rates, a more transient population, fewer employed residents, more vacant lots, and fewer institutional assets such as libraries.[112] Research also demonstrates that school staff in segregated communities tend not to be as responsive to community needs, promote lower expectations for students, and lack cultural or linguistic competence.[113]

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[111] John T. Yun and Jose F. Moreno, "College Access, K-12 Concentrated Disadvantage, and the Next 25 Years of Education Research," *Educational Researcher* 35, no. 1 (2006): 12-9. See also Jeannie Oakes et al., *Separate and Unequal 50 years after* Brown: *California's Racial "Opportunity Gap"* (Los Angeles: Institute for Democracy, Education, and Access, Univ. of California-Los Angeles, 2004).

[112] Ellen Goldring et al., "Schooling Closer to Home: Desegregation Policy and Neighborhood Contexts," *American Journal of Education* 112, no. 3 (2006): 335-62.

[113] Russell Rumberger and Patricia Gándara, "Seeking Equity in the Education of California's English Learners," *Teachers College Record*, 106, no. 10 (October 2004): 2039-56.

Peer Effects

The 1966 Coleman Report, which was titled *Equality of Educational Opportunity*, was the first large-scale, national statistical examination of schools of its kind, and had a major influence on how the nation and its policy-makers viewed resources that are important to student learning. This Congressionally mandated report found that the composition of a student's school peers had a substantial influence on his or her academic achievement.[114] Social science research continues to confirm the report's finding that one's peers matter for learning.[115]

A specific example of the importance of peers in affecting one's learning relates to non-English speakers learning English. Because Latino students live in predominantly segregated low-income neighborhoods where everyday activities are conducted in Spanish, they have limited exposure to English. This isolation has a direct impact on language acquisition because exposure to the target language is critical to proficiency.[116] Schools can be a place to provide Latino English Language Learners with

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[114] James Coleman et al., *Equality of Educational Opportunity* (Washington, D.C.: Government Printing Office, 1966).

[115] Donna R. Clasen and B. Bradford Brown, "The Multidimensionality of Peer Pressure in Adolescence," *Journal of Youth and Adolescence* 14, no. 6 (1985): 451-67; Laurence Steinberg, Stanford M. Dornbusch, and B. Bradford Brown, "Ethnic Differences in Adolescent Achievement: An Ecological Perspective," *American Psychologist* 47, no. 6 (1997): 723-29; Geoffrey D. Borman and N. Maritza Dowling, "Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data" (paper presented at annual meeting of the American Educational Research Association, Chicago, April 2003).

[116] Russell W. Rumberger, Patricia Gándara, and Barbara Merino, "Where California's English Learners Attend School and Why it Matters," *UC LMRI Newsletter* 15, no. 2 (Winter 2006): 1-2.

meaningful opportunities to interact with native English Language models as a first step toward the acquisition of English.[117]

One of the arguments for ending racial segregation has been the benefit of increasing the number of middle-class children in classrooms of black and Latino students, because evidence demonstrates that a classroom of students from middle-class families can increase the achievement of all students.[118] Because black and Latino students are more likely to attend schools of concentrated poverty than whites, racially segregated minority schools are less likely to have middle-class or wealthy students. This may occur because more middle-class children than poor children have been exposed to additional educational resources prior to and outside of school, teachers drawn to middle-class schools are more qualified and have higher expectations than those who teach at high-poverty schools, and the academic curriculum may be more challenging.[119] Of course, creating middle-class classrooms in itself would not likely produce

[117] M. Beatriz Arias, "School Desegregation, Linguistic Isolation and Access to English for Latino Students," *Journal on Educational Controversy* 2, no. 1 (January 2007).

[118] Rothstein, *Class and Schools*.

[119] Richard D. Kahlenberg, *All Together Now: Creating Middle-Class Schools through Public School Choice* (Washington, D.C.: The Brookings Institution Press, 2001); Russell W. Rumberger and Gregory J. Palardy, "Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School," *Teacher's College Record* 107, no. 9 (2005): 1999-2045; Hoxby, "Peer Effects in the Classroom;" Janet W. Schofield, "Ability Grouping, Composition Effects, and the Achievement Gap," in *Migration Background, Minority-Group Membership and Academic Achievement Research Evidence from Social, Educational, and Development Psychology*, ed. Janet W. Schofield (Berlin: Social Science Research Center Berlin, 2006): 67-95.

the same gains in cross-racial understanding that occur in classrooms with racially diverse peers.

Lower Educational Outcomes

Achievement

As a result of teacher and resource disparities – important educational conditions for student success – district and metropolitan area case studies examining segregated minority schools find lower achievement in these schools. A study of schools in metropolitan Boston, for example, shows that only 61 percent of tenth-grade students in high-poverty, high-minority schools passed the English/Language Arts graduation test in the 2002-03 school year compared to 96 percent of students attending low-minority, low-poverty schools.[120] A study of Florida districts found similar disparities in passage rates for graduation exams in segregated black schools compared with desegregated or racially isolated white schools.[121]

Studies conducted in one southern district indicate that the achievement of middle and high school students is related to the racial composition of schools they attended. These studies, which controlled for factors such as a student's family background, prior achievement, peer effects, and self-reported academic effort, indicated that

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[120] This conclusion is not surprising given that segregated minority schools in metropolitan Boston have higher levels of student poverty (97% of minority schools vs. 1% of segregated white schools), lower shares of certified teachers (78% in high poverty, minority schools vs. 94% in low poverty, white schools), lower test scores, and lower high school completion rates. Chungmei Lee, *Educational Outcomes in Metropolitan Boston* (Cambridge, Mass.: The Civil Rights Project, April 2004).

[121] Borman et al., "The Continuing Significance of Racial Segregation in Florida's Schools," 605-31.

the more time students spent in predominantly black elementary schools the lower their scores on statewide tests, their grade point averages, and their secondary track placements.[122] Across the state of North Carolina, 40 of the 44 lowest-performing high schools identified by a state court judge were predominantly nonwhite including 23 that were 80 to 100 percent nonwhite. These poorly performing schools were found to be so ineffective as to deny students their legal right to a sound, basic education. By contrast, none of the 44 highest performing schools was predominantly nonwhite.[123]

High School Graduation

Research shows that minority isolation remains a significant predictor of low graduation rates. This appears to be the case even after holding constant the effects of a variety of other school performance indicators.[124] This pattern also emerges when examining graduation rates for specific racial and ethnic groups: students from all minority groups graduate at significantly lower rates in highly isolated school systems. White students are also least likely to graduate when they attend school in racially segregated minority environments.[125]

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[122] Roslyn A. Mickelson, *Segregation and the SAT*, 67 Ohio St. L. J. 157 (2006); Mickelson, "Subverting Swann," 215-52.

[123] Howard E. Manning, "Letter Re: The High School Problem – Consequences," *Public School Forum of North Carolina*, 3 March 2006 at http://www.ncforum.org/resources/collateral/030306-MANNING%20OPINION%20re%20High%20Schools%20with%20charts%203_3_06.pdf (accessed 29 September 2006).

[124] Christopher B. Swanson, *Who Graduates? Who Doesn't? A Statistical Portrait of Public High School Graduation, Class of 2001* (Washington, D.C.: The Urban Institute, 2004).

[125] Christopher B. Swanson, *Who Graduates in the South?* (Washington, D.C.: The Urban Institute, 2005).

An examination of over 13,000 public high schools across the country in 2004 showed that schools with a higher concentration of blacks and Latinos tend to have lower "promoting power," which indicates the percentage of students who stay in school and are promoted each year from grades 9 to 12.[126] A majority of high schools whose student bodies are at least 90% nonwhite have low promoting power, meaning that less than 60% of their students graduate in four years.[127] Only 6% of majority white high schools have such low promoting power.[128] These findings suggest that if there were two high schools with identical resources, the school with a higher percentage of African American and/or Latino students is less likely to have on-time promotion, a likely indicator of graduation.[129] Students in predominantly minority schools are also less

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[126] Robert Balfanz and Thomas C. West, "Racial Isolation and High School Promoting Power," in *Graduation Gap Policy Brief* (Baltimore: Center for Social Organization of Schools, Johns Hopkins University, 2006). The study found that racial composition was a significant predictor after controlling for school resources (student-teacher ratio), free-lunch level, school size and urbanicity.

[127] Described as "dropout factories" in Robert Balfanz and Nettie Legters, "Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts?" in *Dropouts in America: Confronting the Graduation Rate Crisis*, ed. Gary Orfield (Cambridge, Mass.: Harvard Education Press, 2004): 85-106. One-third of these dropout factories have students who are 90% nonwhite even though 90-100% nonwhite schools account for only 8% of schools analyzed.

[128] Balfanz and West, "Racial Isolation and High School Promoting Power."

[129] Similarly, a study of high schools in metropolitan Boston found that only 45 percent of students in high-poverty, high-minority schools graduate on time, compared to more than three-quarters of their peers in low-poverty, low-minority schools. Lee, *Educational Outcomes in Metropolitan Boston*.

likely to graduate from college, even after accounting for prior test scores and socioeconomic status.[130]

These findings have significant implications for the lives of minority students and the welfare of communities. Without a high school diploma, a student is unlikely to attend college and will have limited employment options.[131] The graduation rate for all students in highly segregated districts in 2002-03 was 56%, significantly lower than the national rate.[132] The economic health of cities, states, and the nation is threatened by the low level of education received by black, Latino, and Native American students, especially when only about half of these students graduate four years after entering.[133] Because of the growing number of minority students, if existing educational trends continue, the nation risks something it has never before seen: an intergenerational decline in its educational level, a threatening outcome in a knowledge-based economy.[134]

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[130] Eric M. Camburn, "College Completion among Students from High Schools Located in Large Metropolitan Areas," *American Journal of Education* 98, no. 4 (August 1990): 551-69.

[131] Haya Stier and Marta Tienda, *The Color of Opportunity: Pathways to Family, Welfare and Work* (Chicago: Univ. of Chicago Press, 2001); Alice O'Conner, Chris Tilly, and Lawrence D. Bobo, ed., *Urban Inequality: Evidence from Four Cities* (New York: Russell Sage, 2001).

[132] Editorial Projects in Education, *Diplomas Count: An Essential Guide to Graduation Policy and Rates* (Bethesda, Md.: Editorial Projects in Education, 2006).

[133] Gary Orfield, ed., *Dropouts in America: Confronting the Graduation Rate Crisis* (Cambridge, Mass.: Harvard Education Press, 2004).

[134] Recent studies indicate that the U.S. higher education system will not be producing graduates fast enough even to replace retirees, let alone to fill new jobs requiring college education. Anthony P. Carnevale, "Discounting Education's Value," *Chronicle of Higher Education*, 22 September 2006, B6-B9.

III. The Need for Race-Conscious Policies to Create Desegregated Schools.

Research indicates that race-conscious student assignment policies in schools may be necessary to obtain the educational and societal benefits of racial integration and to avoid the harms associated with racial isolation and resegregation. Studies have found that race-neutral policies are not as effective in attaining racial desegregation.

Race-Neutral Choice Policies

Research has shown that without the enforced regulation of desegregation court orders or guidelines designed to attain racial desegregation, the implementation of uncontrolled school choice plans tends to foster racially homogeneous schools[135] and lead to even greater segregation.[136] Experience both in Southern districts immediately after *Brown* and in a number of Northern districts that initiated "open enrollment" transfer programs showed that these programs generally did not desegregate black student

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[135] Janelle Scott, ed., *School Choice and Diversity: What the Evidence Says* (New York: Teachers College Press, 2005).

[136] See also Frankenberg and Lee, *Race in American Public Schools*; Martin Carnoy et al., *The Charter School Dust-Up: Examining the Evidence on Enrollment and Achievement* (New York: Economic Policy Institute & Teachers College Press, 2005). Research on international examples of school choice has also found in different contexts, educational choice produces stratification. See Edward B. Fiske and Helen Ladd, *When Schools Compete: A Cautionary Tale* (Washington, D.C.: Brookings Institution, 2000).

bodies or faculties and brought only a very small number of nonwhite students into white schools.[137]

Unmanaged choice plans are unsuccessful at achieving or maintaining racial diversity for a number of reasons. The concept of choice is based on the theory that everyone will be equally informed and effective in taking the steps needed to exercise choice. However, not all parents have access to the same kind or quality of information about new schools or existing schools. Because information on the comparative value of different educational options is unequally distributed, unrestricted choice plans tend to advantage parents with high educational attainment or more networks and contacts. These parents are more likely than other parents who do not possess this informational advantage to know about the range of choices that are available and to exercise their options.[138] Other socioeconomic factors can limit the actual choices families have when selecting schools, such as lack of transportation for students to attend the schools of their choice or working parents who are unable to leave work to visit schools.[139] Because white parents, on average, have

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[137] U.S. Commission on Civil Rights, *Southern School Desegregation, 1966-67* (Washington, D.C., July 1967). Ninety-eight percent of Southern blacks were confined to all black schools a decade after the *Brown* decision. See Gary Orfield, "The Evolution of Administrative Policy: from the Law to the Guidelines," ch. 2 in *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act* (New York: John Wiley, 1969).

[138] Bruce Fuller, Richard F. Elmore, and Gary Orfield, ed., *Who Chooses, Who Loses?: Culture, Institutions, and the Unequal Effects of School Choice* (New York: Teachers College Press, 1996).

[139] Amy Stuart Wells et al., "Charter Schools as a Postmodern Paradox: Rethinking Social Stratification in an Age of Deregulated School Choice," *Harvard Educational Review* 69, no. 2 (Summer 1999):

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more education and connection to higher-status networks, the difference between those who can choose and those who cannot is likely to further stratify schools on the basis of race. As a result of these dynamics, many schools that use unrestricted choice plans are segregated by race and socioeconomic status.[140]

Assignment policies that manage choices and consider race as a factor, on the other hand, tend to result in and sustain levels of racial diversity[141] that create a learning environment that can incorporate the benefits of racial integration to further the education of all students. Local educators, community leaders, and parents[142] often see

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172-204; Betsy Levin, "School Choice and Students with Disabilities," in *School Choice and Social Controversy*, ed. Stephen D. Sugarman and Frank R. Kemerer (Washington, D.C.: Brookings Institution Press, 1999): 266-99.

[140] Casey D. Cobb and Gene V. Glass, "Ethnic Segregation in Arizona Charter Schools," *Education Policy Analysis Archives* 7, no. 1 (Jan. 1999) at http://epaa.asu.edu/epaa/v7n1/ (accessed 29 September 2006); Erica Frankenberg and Chungmei Lee, "Charter Schools and Race: A Lost Opportunity for Integrated Education," *Education Policy Analysis Archives* 11, no. 32 (Sept 2003) at http://epaa.asu.edu/epaa/v11n32/ (accessed 29 September 2006).

[141] See Salvatore Saporito and Deenesh Sohoni, "Coloring Outside the Lines: Racial Segregation in Public Schools and Their Attendance Boundaries," *Sociology of Education* 79, no. 2 (April 2006): 81-105 (finding in a study of 22 major school districts that the implementation of free-market choice systems led to further race/ethnic stratification in all districts except those districts with some race-conscious plan in place).

[142] A survey of a random sample of 1204 parents in Louisville showed that 86% of parents in the system and 92% of African American parents said it was important "that schools have students from different races and backgrounds in the same school." Majorities also agreed that diversity would produce a "higher quality of education" for their own children. Significantly, parents also supported specific district mechanisms to create integrated schools while still giving them choices for their children. For example, over half of white parents and three

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these outcomes as a major benefit and such schools tend to be well accepted in communities.[143] A new study of race-conscious and race-neutral choice plans in San Diego, the nation's 8th largest district, found that the district's two choice programs with race-conscious mechanisms to encourage integration, including providing transportation to attend out-of-neighborhood schools, did more to integrate schools than did the open-enrollment choice program, which had no race-conscious aspect.[144]

Recent economic studies also suggest that denying parents and students their first-choice school may not have negative academic consequences for students. A study of a pure choice student assignment plan, for example, found that the ability of students to attend their first-choice school is not associated with academic gains, including test scores. This finding holds even when the first-choice schools have higher average test scores, suggesting that denying some students their first choice will not harm their academic outcomes.[145]

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fourths of black parents thought the district should "have guidelines to achieve racial balance." Thomas Wilkerson, *Student Assignment Survey: Summary of Findings* (Louisville, Ky.: Wilkerson & Associates, July 1996).

[143] *Teacher Opinions on Racial and Ethnic Diversity: Clark County School District, Nevada*, (Cambridge, Mass.: The Civil Rights Project, 2002); Bagnashi and Scheer, "Brown v. Board of Education."

[144] The study also found clear evidence of academic gains only in the race-conscious high school magnet programs and suggested a broader and more targeted magnet program. Julian R. Betts et al., *Does School Choice Work? Effects on Student Integration and Achievement* (San Francisco: Public Policy Inst. of California, August 2006).

[145] Justine Hastings, Thomas Kane, and Douglas Staiger, "Parental Preferences and School Competition: Evidence from a Public School Choice Program," Working paper, National Bureau of Economic Research, Inc., Cambridge, Mass., 2005; Julie B. Cullen, Brian A. Jacob,

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A widely implemented example of managed choice plans are magnet schools, which created hundreds of specialized and sometimes very popular schools offering programs and educational approaches that previously had not existed in the school districts.[146] Because magnet schools have desegregation as their mission, policies designed to explicitly consider race, and mechanisms like family outreach and free school transportation, they have increased the number of interracial schools in many districts[147] since they were first incorporated in desegregation plans in the mid-1970s. By 1991, there were more than 2,400 magnet schools enrolling about 1.2 million students concentrated in large urban districts. Many students had voluntarily transferred to these schools from outside the schools' neighborhoods. Further, there were more than 120,000 students on waiting lists.[148] Though magnets had only a modest impact on overall segregation levels, they demonstrate how choice can be compatible with desegregation.

Socioeconomic Status as a Race-Neutral Alternative

A few school districts have adopted socioeconomic plans that are designed, at least in part, to achieve racial

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and Steven Levitt, "The Effect of School Choice on Student Outcomes: Evidence from Randomized Lotteries," Working paper, National Bureau of Economic Research, Inc., Cambridge, Mass., 2003.

[146] Lauri Steel and Roger Levine, *Educational Innovation in Multiracial Contexts: The Growth of Magnet Schools in American Education* (Palo Alto, Calif.: American Institutes for Research, 1991): i-20.

[147] Amy G. Langenkamp, "Magnet Schools," in *Encyclopedia of Sociology*, ed. George Ritzer (Boston: Blackwell Publishers, in press).

[148] Steel and Levine, *The Growth of Magnet Schools in American Education*, i-20.

integration.[149] Social scientists have studied the impact of these plans to determine whether socioeconomic integration can lead to racial integration, and have concluded that plans based on class are not likely to produce racially integrated schools.

One of the main difficulties of designing a successful racial integration plan that uses the socioeconomic status of students is that the only measure of class that schools normally possess is whether a student receives a free lunch. This measure, however, is flawed. Free lunch eligibility is a dichotomous measure and is a weak classifier of individuals because it groups those who are from very different economic classes – students who are just above the poverty line and those who are highly affluent – in the same category and treats them identically under integration plans. Moreover, many eligible students do not apply for free lunch, particularly in high school, because of the stigma attached to the program or because they are immigrant students from undocumented families. Free lunch status is also a weak measure of socioeconomic status because it includes students who may be temporarily poor, such as children of highly educated new immigrants or graduate students, and does not account for wealth, which represents cumulative earnings.[150]

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[149] Cambridge, Massachusetts is also often mentioned as an example of using socioeconomic integration, and while their student assignment plan does include socioeconomic status as one factor, it retains race as a factor in assignments where significant resegregation appears and is not a pure race-neutral plan.

[150] Wealth is distributed even more unequally among racial groups than is income. Black wealth is, on average, 10 cents for every dollar of white wealth. On an individual basis, this wealth gap between black and white families has grown to be more than $80,000. See Thomas M.

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Moreover, while race and class are often strongly correlated, they are not perfectly correlated. Class-based solutions typically do not consider patterns of white resistance to living in minority neighborhoods, regardless of income level,[151] and are therefore unable to address the residential segregation that often fuels school segregation. Regardless of how class is measured, research demonstrates that black segregation is high across all socioeconomic levels.[152] Thus, it appears that residential segregation is driven by race,[153] and not by class or affordability,[154] and

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Shapiro, *The Hidden Cost of Being African-American* (New York: Oxford Univ. Press, 2004). Hispanic wealth is slightly higher, on average, than black wealth but is also much less than white wealth. Rakesh Kochhar, *The Wealth of Hispanic Households: 1996 to 2002* (Washington, D.C.: Pew Hispanic Center, October 2004). These data thus indicate that a measure of socioeconomic status relying solely on poverty status would reveal only a small part of a family's actual financial status. Although the available measures of class are flawed, obtaining a more complete measure would require intrusive questions about a family's financial situation.

[151] Camille Zubrinsky Charles, "Can We Live Together? Racial Preferences and Neighborhood Outcomes," in *The Geometry of Opportunity: Race and Housing Choice in Metropolitan America*, ed. Xavier de Souza Briggs (Washington, D.C.: Brookings Institution Press, 2005): 45-80.

[152] Douglas Massey and Nancy Denton, "Table 4.1," in *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, Mass.: Harvard Univ. Press, 1993): 86; Joe T. Darden and Sameh H. Kamel, "Black Residential Segregation in the City and Suburbs of Detroit: Does Socioeconomic Status Matter?" *Journal of Urban Affairs* 22, no. 1 (2000): 1-13; John Iceland, Cicely Sharpe, and Erika Steinmetz, "U.S. Census Bureau Class Differences in African American Residential Patterns in U.S. Metropolitan Areas:1990-2000," *Social Science Research* 34, no. 1 (March 2005): 252-66.

[153] Because of this fact, neighborhood-based assignment plans are also likely to produce segregated schools.

[154] John Logan, *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America* (Albany, N.Y.: Lewis Mumford Center, Univ. of Albany, October 2002). The average

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that racial residential segregation is greater than income residential segregation.[155] This means that in segregated minority areas a policy might end up bringing together blacks or Latinos to create socioeconomic but not racial diversity in schools. Further, plans that use poverty as a criterion tend to exclude remedies for the minority middle class even though these individuals are often isolated, behind in achievement, and more exposed to negative peer groups and weak schools than middle-class whites.[156]

A statistical analysis investigating the racially integrative possibility of income-based integration plans in the nation's largest school districts found, in fact, that in the great majority of districts such a plan would leave schools racially segregated.[157] Analysis of data from 89 of the nation's 100 largest school districts found that relying on income as defined by student free lunch eligibility and assigning students within the district to approximate the percentage of a district's poor students in each school would have very little, if any, effect on racial integration. Only by collecting and using more specific data on income and including a much broader area than a single school

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neighborhood lived in by blacks in 2000 had a much lower median income, even among affluent blacks, than whites of similar income bracket, according to an analysis of the 2000 Census.

[155] Massey and Denton, *American Apartheid*.

[156] Mary Pattillo-McCoy, *Black Picket Fences: Privilege and Peril Among the Black Middle Class* (Chicago: Univ. of Chicago Press, 1999).

[157] Sean F. Reardon, John T. Yun, and Michal Kurlaender, "Implications of Income-Based School Assignment Policies for Racial School Segregation," *Educational Evaluation and Policy Analysis* 28, no. 1 (Spring 2006): 49-75.

district would there likely be any racial diversity.[158] Thus, while such plans might create economic diversity or other forms of diversity that may benefit students, they do not provide the specific benefits of racial integration.[159]

The sole example where socioeconomic diversity has created racial integration has been where dramatic economic differences exist between whites and nonwhites. Such a situation exists in Raleigh, North Carolina where extreme economic differences in a biracial community made income a better than normal proxy for race. The Wake County district adopted a policy in 2000 providing for integration on the basis of poverty and standardized test scores, and has had some significant success since its implementation. Wake County has a set of special conditions rarely found in major school districts: it is an overwhelmingly white district with only about a fourth of its students in poverty[160] with black students being about ten times as likely to be poor as white students. The district's prior history of racially desegregated schools and a commitment to preserve diversity along with strong district leadership combined to achieve significant success in its early years,[161] although there is growing political opposition

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[158] See Duncan Chaplin, "Estimating the Impact of Economic Integration of Schools on Racial Integration" in *Divided We Fail: Coming Together through Public School Choice*, ed. Century Foundation Task Force on the Common School Report (New York: The Century Foundation Press, 2002): 87-113.

[159] Reardon, Yun, and Kurlaender, "Implications of Income-Based School Assignment Policies for Racial School Segregation," 49-75.

[160] Wake County Public School System, "2005-2006 Student Enrollment – District Schools," <http://www.wcpss.net/demographics/quickfacts/05/sys-05.html> (accessed October 4, 2006).

[161] Susan Leigh Flinspach and Karen E. Banks, "Moving Beyond Race: Socioeconomic Diversity as a Race-Neutral Approach to Desegregation in

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and data that suggest a number of the schools are exceeding both the caps set for the percentage of students that are poor and that have low test scores.[162]

Experience of School Districts that Have Adopted Race-Neutral Policies

Recent research shows that districts formerly under desegregation orders that have eliminated the use of race in student assignments have experienced resegregation and its harmful effects in the few years since they were released from court orders and were declared "unitary."[163] This has been clearly demonstrated in the aftermath of dissolving plans in Charlotte and Denver, the two districts at issue in the Court's decisions in *Swann* and *Keyes v. School District No. 1*.[164] In addition, the effort in San Francisco to achieve racially integrated schools without the use of race-conscious policies has shown the limits of such policies in achieving racial integration.

These results are not surprising given that research had already documented similar patterns of resegregation and achievement declines for black students in Norfolk, Virginia, the first district to dissolve its desegregation plan

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the Wake County Schools," in *School Resegregation: Must the South Turn Back?*, ed. John C. Boger and Gary Orfield (Chapel Hill, N.C.: Univ. of North Carolina Press, 2005): 261-80.

[162] Gerald Grant, *Hope and Despair in the American City* (Cambridge, Mass.: Harvard Univ. Press, forthcoming); Todd Silberman, "Wake Schools Find Diversity Hard to Maintain," *Raleigh News and Observer*, 11 June 2006.

[163] See Orfield and Lee, *Racial Transformation*.

[164] 413 U.S. 189 (1973).

in 1986,[165] and in Oklahoma City, where ten elementary schools became at least 90% black after the district was declared unitary. Further, a report found that Oklahoma City's claims of increased parental involvement and achievement gains that would result from an end of desegregation were questionable.[166]

Charlotte

From 1971 to 2002, the Charlotte-Mecklenburg Schools (CMS) grappled with the mandate of the *Swann* decision to desegregate their schools. During the early 1980s, only 5% of black students in CMS attended racially imbalanced schools, though this percentage rose substantially as CMS limited busing in favor of voluntary magnet plans.[167] In August 2002, after the district was declared unitary, CMS implemented a race-neutral neighborhood-based, limited choice student assignment plan.[168] Shortly thereafter, a majority of CMS schools began to experience

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[165] Vivian Ikpa, "The Effects of Changes in School Characteristics Resulting from the Elimination of the Policy of Mandated Busing for Integration upon the Academic Achievement of African-American Students," *Educational Research Quarterly* 17, no. 1 (1994): 19-29.

[166] Jennifer Jellison, *Resegregation and Equity in Oklahoma City* (Cambridge, Mass: The Harvard Project on School Desegregation, 1996).

[167] Roslyn A. Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L.Rev. 1513, 1543 (2003).

[168] Roslyn Mickelson, "Are Choice, Diversity, Equity, and Excellence Possible? Early Evidence from Post-Swann Charlotte-Mecklenburg Schools, 2002-2004," in *School Choice and Diversity: What the Evidence Says*, ed. Janelle Scott (New York: Teachers College Press, 2005): 129-44.

racial resegregation.[169] After two years, 22.6% fewer elementary schools, 7.4% fewer middle schools, and 20.6% fewer high schools were racially integrated compared to the last year that the district was under the Court order in *Swann*.[170] The student assignment plan permitted increased socioeconomic and racial stratification of students, which amplified differences in math and reading test scores of 3rd through 8th graders from different racial, ethnic, and socioeconomic backgrounds.[171] The experience in Charlotte corroborates other research demonstrating that race-neutral neighborhood/choice plans lead to segregation, which can have tangible consequences, particularly regarding student achievement.[172]

Denver

In 1995, the Denver School District ended its use of race in making student assignment decisions. Almost immediately, about half of the district's schools experienced moderate or substantial changes in the racial and

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[169] In the year following the end of the desegregation plan, the percentage of black students in racially isolated black schools jumped eleven percentage points. Mickelson, *The Academic Consequences of Desegregation and Segregation*.

[170] Roslyn A. Mickelson and Stephanie Southworth, "When Opting-Out is Not a Choice; Implications for NCLB from Charlotte, North Carolina," *Equity & Excellence in Education* 38, no. 3 (2005): 1-15.

[171] R. Kenneth Godwin et al., "Sinking Swann: Public School Choice and the Resegregation of Charlotte Schools," *Review of Policy Research* 23, no. 5 (2006): 983-97.

[172] Fuller, Elmore, and Orfield, ed., *Who Chooses, Who Loses?; The Socioeconomic Composition of the Public Schools: A Crucial Consideration in Student Assignment Policy* (Chapel Hill, N.C.: Univ. of North Carolina Center for Civil Rights, January 2005).

ethnic composition of the schools.[173] Despite a decreased overall percentage of white students in Denver's public schools, the number of racially isolated white schools actually increased. By 2003, 84% of Latinos and 74% of blacks were in schools that had less than 30% white students.[174] Both black and Latino achievement, on average, declined in schools that became increasingly minority concentrated in comparison to racially stable schools or schools with rising white enrollment. This pattern was more pronounced for Latino students.[175]

San Francisco

In 1999, San Francisco school authorities entered into a consent decree that governed the district's student assignment policies. The decree eliminated the use of race and adopted an index that considered non-racial factors in student assignment decisions such as socioeconomic status, academic achievement, English-language learner status, mother's educational background, academic performance at prior school, home language, and geographic areas. Analyses of district data suggest that the district's race-neutral student assignment policies were unsuccessful for maintaining racial integration, particularly at the elementary school level. The state monitor found that under the new index racial resegregation accelerated,[176]

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[173] Horn and Kurlaender, *The End of Keyes*.

[174] Chungmei Lee, *Denver Public Schools. Resegregation, Latino Style* (Cambridge, Mass.: Civil Rights Project, January 2006).

[175] Horn and Kurlaender, *The End of Keyes*.

[176] Stuart Biegel, "Annual Report No. 22 of the Consent Decree Monitor, 2004-2005" submitted in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, No. C-78 1445 (N.D. Cal. Aug. 1, 2005).

and the schools that were considered to be "highly diverse" under the index were actually among the least diverse along racial lines.[177] The reports also found a connection between resegregation and a concurrent increase in the number of schools scoring at the lowest level on the state's Academic Performance Index.[178]

Conclusion

The research summarized here fully supports the educational judgments by the local education authorities in the Jefferson County and Seattle school districts to promote racial integration and prevent racial isolation through choice-based policies that consider race as a factor. Ideally, as social scientists and the Court have noted, we will reach a point where race no longer matters in the life opportunities of American children, but until that time comes, race-conscious policies such as the ones in Seattle and Jefferson County are critically needed.

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[177] Stuart Biegel, "Supplemental Report by the Consent Decree Monitoring Team Regarding The Achievement Gap and Related Issues in the San Francisco Unified School District," submitted in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, No. C-78 1445 (N.D. Cal. Mar. 12, 2004). See also William T. Trent, "The Effect of School Racial Composition on Student Outcomes in the San Francisco Unified School District" (Dec. 2005) (unpublished report, on file with San Francisco Unified School District).

[178] Stuart Biegel, "The Report of the Consent Decree Monitoring Team, Report No. 20, 2002-2003," submitted in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, No. C-78 1445 (N.D. Cal. July 31, 2003). See also Trent, "The Effect of School Racial Composition" (finding an association between minority concentration and the test scores of African Americans and Latinos, even after controlling for other factors that might influence student achievement).

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v.

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CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN McDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.

On Writs Of Certiorari
To The United States Courts Of Appeals
For The Sixth Circuit And The Ninth Circuit

BRIEF OF FORMER UNITED STATES SECRETARIES OF EDUCATION AND SECRETARIES OF HEALTH, EDUCATION, AND WELFARE WHO SERVED FIVE FORMER PRESIDENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF FORMER UNITED STATES SECRETARIES OF EDUCATION AND SECRETARIES OF HEALTH, EDUCATION, AND WELFARE WHO SERVED FIVE FORMER PRESIDENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

David Mathews, Joseph A. Califano, Jr., Shirley M. Hufstedler, Lauro Fred Cavazos, and Richard W. Riley, each of whom served as United States Secretary of Education or Secretary of Health, Education, and Welfare, respectfully submit this brief as *amici curiae* in support of respondents in these cases.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are individuals who each served as the Secretary of the United States Department of Education or its predecessor, the Department of Health, Education, and Welfare, for some period of time during the past 30 years. The Secretary of Education serves as the only "single, full-time, Federal education official directly accountable to the President, the Congress, and the people." Department of Education Organization Act, Pub. L. No. 96-88, tit. I, § 101, 93 Stat. 669 (codified at 20 U.S.C. § 3401(10)).

These former Secretaries were nominated by various Presidents from both of the major political parties. Although the former Secretaries may hold differences of opinion with respect to other educational policies, in this

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[1] Letters from petitioners and respondents indicating their consent to the filing of *amicus* briefs have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

respect they are in complete accord: reduction of racial isolation in public schools constitutes a compelling national interest. Each Secretary while serving in office supported a national educational policy of encouraging States and localities to take steps to reduce racial isolation in public schools regardless of whether that isolation could be shown to be caused by unconstitutional race discrimination.

Amicus David Mathews was appointed by President Gerald Ford to serve as United States Secretary of Health, Education, and Welfare. He served from 1975 to 1977.

Amicus Joseph A. Califano, Jr. was appointed by President Jimmy Carter. He served as Secretary of Health, Education, and Welfare from 1977 until 1979.

Amicus Shirley M. Hufstedler was the first United States Secretary of Education. She was appointed by President Carter upon the establishment of the Department and served from 1979 until 1981.

Amicus Lauro Fred Cavazos was appointed Secretary of Education by President Ronald Reagan and was retained as Secretary by President George H.W. Bush. He served from 1988 to 1990.

Amicus Richard W. Riley was appointed by President William J. Clinton. He served as Secretary of Education from 1993 to 2001.

Amici file this brief because, in their view, petitioners and their *amici* either ignore or improperly diminish the virtually unwavering support that the national government has long provided, through the Department of Education and its predecessor, to voluntary local actions in the Nation's public schools to eliminate, reduce, and prevent racial isolation, with the understanding that consideration of race of the students would sometimes be necessary to achieve that goal.

SUMMARY OF ARGUMENT

I. Over the course of the past several decades, the United States Department of Education, as well as its predecessor the Department of Health, Education, and Welfare (together "the Department" or "Department of Education") has deliberately supported voluntary local efforts to eliminate racial isolation and to develop integrated, racially diverse schools regardless of any proof of *de jure* segregation. The Department, with its expertise and ability to examine the effects of not only *de jure* but also *de facto* segregation on a nationwide level, has properly described this interest as a compelling one, and has consistently determined that use of race in furtherance of this interest can be appropriate.

The Department's support for such voluntary local efforts manifested itself as the Department implemented various grant programs, first established by statute in 1972 and most recently re-enacted by Congress as part of the No Child Left Behind Act of 2001, that are intended to encourage the voluntary elimination, reduction, or prevention of "minority group isolation" in elementary and secondary schools. Through implementation of these programs, the Department approved plans that relied on the race of students in the determination of school assignments. Indeed, if the Department had not done so, there would have been no effective way that grant recipients could have met the detailed numerical requirements established by the statutory grant programs and the Department's regulations.

Working in tandem with Congress's efforts, the Department of Education has consistently interpreted Title VI of the Civil Rights Act of 1964 not to prohibit consideration of race in the furtherance of the elimination,

reduction, or prevention of racial isolation caused by so-called *de facto* racial segregation. The Department specifically amended its Title VI regulations in 1973 to express its longstanding view that race could be used to address racial isolation, regardless of whether the racial isolation was the result of proven intentional discrimination. These regulations are still in effect and have not been altered over the course of the past 30 years. *See* 34 C.F.R. §§ 100.3(b)(6)(ii), 100.5(i).

The federal government's longstanding policy of promoting diversity in public elementary and secondary schools reflects nearly five decades of careful and deliberate consideration of the negative effects of racial isolation. Far from embodying a fleeting administration-specific viewpoint, the Department has consistently concluded that children of all races, and society as a whole, benefit from the voluntary desegregation and diversification of segregated school districts.

II. The Department has taken a deferential approach over the past several decades to local school districts' attempts to diversify racially isolated schools. The Department has provided information, expertise, and experience to States and localities so that they can craft their own programs to address individual local circumstances. That approach reflects the longstanding policy of the federal government that public education in this country is ultimately a local responsibility. Indeed, the statute that established the Department of Education and the statutes that address methods of school desegregation all manifest the federal government's commitment to local control, a commitment that is also reflected in this Court's cases.

Some latitude must be accorded to respondents, and other local school districts, who have determined, often with the assistance of the Department's expertise, that use of race is an appropriately tailored means to achieve the compelling national interest in the elimination, reduction, or prevention of racial isolation and promotion of racially integrated schools with diverse student bodies. Granting school authorities this latitude provides them needed breathing space so that they feel confident to make sound educational choices for their students in the "play between the joints" of what the Constitution requires and what the Constitution prohibits.

ARGUMENT

The federal government's involvement in public elementary and secondary education is, for the most part, a relatively modern phenomenon. The growth of its role commenced, to a large extent, with this Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955).

The Department of Health, Education, and Welfare (HEW) was established in 1953. *See* Act of Apr. 1, 1953, ch. 14, 67 Stat. 18 (codified at 42 U.S.C. § 3501). In 1979, its education functions were transferred to the then newly-created Department of Education. *See* Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 669 (1979) (codified as amended at 20 U.S.C. § 3401 *et seq.*). For ease of reference, albeit anachronistically, we refer in this brief to both as "the Department of Education" or "the Department."

With the enactment of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, the Department of Education became the primary federal agency responsible

for encouraging state and local governments to desegregate public schools.[2] Over the past 40 years, the Department of Education has been charged with ensuring that recipients of federal funds do not engage in unlawful race discrimination; providing technical expertise and assistance in the development of plans to desegregate, when requested by school districts; and implementing various grant programs related to race and public education.

The programs for which the Department was and is responsible all share certain features. First, as we discuss in more detail in Part II, *infra*, the Department's authority is linked to federal spending programs. The Department of Education alone does not compel school districts, through methods such as fines or court orders, to take any particular action in this area. Instead, it possesses certain authority to terminate or delay existing streams of federal financial assistance, and is authorized to grant certain additional funds for various programs related to desegregation.

The second common feature of the Department's programs, discussed immediately below, is that the Department, charged by Congress with implementing these programs, long has administered them on the understanding that they do not require school districts to disregard race in making pupil assignments in all circumstances. Just as this Court had held that race neutral policies were not sufficient to remedy *de jure* segregation, the Department understood that voluntary local efforts to eliminate effectively so-called *de facto*

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[2] The Department's earlier responsibility in this area had been limited essentially to the operation of integrated schools for the children of members of the armed forces living on military bases in the South when local schools refused to desegregate. *See* Civil Rights Act of 1960, Pub. L. No. 86-449, §§ 501-502, 74 Stat. 86.

segregation would similarly require considerations of race. The Department of Education thus gave financial support to the voluntary efforts of local school districts to reduce racial isolation in public schools even when those efforts considered a student's race in the determination of school assignment.

I. Longstanding National Education Policy Confirms That The Elimination, Reduction, And Prevention Of Racial Isolation In Public Schools Is A Compelling Governmental Interest, Including Where The Isolation Cannot Be Proven To Be The Result Of Unconstitutional Conduct

The United States Department of Education has consistently and deliberately supported voluntary local efforts to eliminate racial isolation and to develop integrated, diverse public schools, including in the absence of proof of *de jure* segregation. The Department, with its expertise and ability to examine the effects of both *de jure* and *de facto* segregation on a nationwide level, has properly described this interest as a compelling one. The Department has consistently determined that use of race in furtherance of this interest can be appropriate.[3] Petitioners' contention that these efforts do not constitute a compelling governmental interest conflicts with these determinations, rooted in the institutional learning and considered judgment of the agency charged by Congress with furthering national education policy.

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[3] *Amici curiae* do not here contest that public schools that use race in student school assignments must demonstrate that such policies further a compelling state interest.

A. After Careful And Deliberate Examination Of The Benefits Of Desegregated Schools, And Consistent With Congressional And Presidential Pronouncements, The Department Of Education Has Supported Efforts By Local School Districts To Eliminate, Reduce, And Prevent Racial Isolation In Public Schools, Including By Race-Based Mechanisms

For half a century, the federal government has sought to address the problem of racially segregated public schools in this country and their adverse effect upon our Nation's well being. To address this problem, the federal government, through the Department of Education, has concluded that local school districts should be supported in their voluntary efforts to minimize racial isolation and to promote diversity in our elementary and secondary schools. The Department reached this conclusion based in part upon its unique position to examine, over the course of many years and numerous studies, the negative effects of racial isolation on students in localities across the Nation.

1. As the country exited the era of "massive resistance" to public school desegregation, the Department's implementation of Title IV and VI of the Civil Rights Act of 1964, supported by the decisions of federal judges, significantly furthered the elimination of *de jure* school segregation in much of the South by the late 1960's.[4] Thereafter, the focus of the federal government's

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[4] Title IV of the Civil Rights Act authorizes the Department "to make grants" to school districts to pay for the costs of "giving to teachers and other school personnel inservice training in dealing with problems incident to desegregation" and "employing specialists to

(Continued on following page)

attention expanded to the problem of so-called *de facto* segregated school districts, for which sufficient proof of official race discrimination was not available. This reflected a widely-held concern that a large number of children nationwide remained racially isolated in their daily lives.

Congress, as part of the Civil Rights Act of 1964, instructed the Department to prepare a survey and report "concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions." Pub. L. No. 88-352, tit. IV, § 402, 78 Stat. 247. The Department thus commissioned a team of social scientists led by sociologist James Coleman to undertake that task, which resulted in the 1966 report, *Equality of Educational Opportunity* (1966). The report concluded that the "great majority of American children attend schools that are largely segregated," but that black students in desegregated schools had higher achievement levels than black students in predominantly black schools. *Id.* at 3, 29.

The U.S. Commission on Civil Rights relied on the Department's report when the Commission conducted its own study, at the request of President Lyndon Johnson, on

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advise in problems incident to desegregation." Pub. L. No. 88-352, tit. IV, § 405, 78 Stat. 247 (codified at 42 U.S.C. § 2000c-4). That title also authorizes the Department to "render technical assistance" to local school districts "in the preparation, adoption, and implementation of plans for the desegregation of public schools." *Id.* § 403, 78 Stat. 247 (codified at 42 U.S.C. § 2000c-2). Title VI of the Civil Rights Act, as discussed later in the text, prohibits the Department from providing federal financial assistance to any entities that discriminate on the basis of race. *Id.*, tit. VI, §§ 601, 602, 78 Stat. 252 (codified at 42 U.S.C. §§ 2000d, 2000d-1).

the effects of racial isolation in the Nation's public schools. *See* 1 U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools*, at v (1967). The Commission concluded that even in those portions of the country that had not formally engaged in racial segregation, many children were being taught in single-race schools and those children were injured by their inability to interact on a daily basis with children of other races. *See id.* at 8-10, 113-114. The Commission emphasized that the Department had reached the same conclusion that "racial imbalance contributes to educational deprivation" and that the Department encouraged "efforts to develop project activities which will tend to reduce such imbalance." *Id.* at 238. The Commission recommended that the federal government provide assistance to school districts to eliminate racial isolation and foster diversity. *See id.* at 210-211.

President Richard M. Nixon subsequently explained in his 1970 statement regarding the desegregation of elementary and secondary public schools, that "*[d]e facto* segregation, which exists in many areas both North and South, is undesirable" and that "local school officials may, if they so choose, take steps beyond the constitutional minimums to diminish racial separation." 1970 Pub. Papers 304, 310 (March 24, 1970). At the President's direction, the Department drafted a bill calling for aid to school districts "that wish to undertake voluntary efforts to eliminate, reduce, or prevent *de facto* racial isolation." 1970 Pub. Papers 448, 448 (May 21, 1970).

President Nixon explained that "[i]t is in the national interest that where such isolation exists, even though it is not of a kind that violates the law, we should do our best to assist local school districts attempting to overcome its effects." *Id.* at 449. This elimination of "racial separation,

whether deliberate or not," the President concluded, was "vital to quality education – not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broadbased human understanding that increasingly is essential in today's world." *Id.*

In response, Congress enacted the Emergency School Aid Act of 1972, Pub. L. No. 92-318, tit. VII, 86 Stat. 421, to "encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students." *Id.* § 702, 86 Stat. 421. The term "minority group isolated school" was defined to mean a school "in which minority group children constitute more than 50 per centum of the enrollment of a school" and the term "integrated school" was defined as a school in which "the proportion of minority group children" was less than half of "the proportion of minority group children enrolled in all schools" in the relevant area. *Id.* § 720(6), (10), 86 Stat. 440-441. Congress continued to amend and expand the program throughout the 1970s and, after a short hiatus, the 1980s.

2. The Department of Education was charged with promulgating regulations to implement the Emergency School Aid Act's grant program and successive legislation. The Department engaged in notice-and-comment rulemaking and then issued regulations that addressed racial composition in those schools that participated in the federal grant programs. *See, e.g.*, 38 Fed. Reg. 10,094 (1973) ("In no event shall the minority group enrollment in any such school [receiving federal funds under this program] exceed 50 per centum."); 43 Fed. Reg. 36,229 (1978) (prohibiting compulsory enrollment in magnet

schools but conditioning eligibility for federal funds under the program on schools meeting "enrollment requirements relating to the percentage of minority group students and the ratio of students from each minority group").

The question of how school districts were expected to overcome "minority group isolation" was not explicitly addressed by Congress in the statute, but the Department, implementing the grant program, approved plans under these programs that relied on the race of students in the determination of school assignments. Indeed, if the Department had not done so, there would have been no way the fund recipients could have met the detailed numerical requirements established by the statutory grant program and regulations.

Congress recognized as much when it re-enacted the program in 1984. At that time, Congress, working with President Ronald Reagan, instructed that, in order for a school district to be eligible for grant funds, it must assure the Secretary of Education that "it will not engage in discrimination based upon race, religion, color, or national origin in the mandatory assignment of students to schools or to courses of instruction within the schools of such agency *except to carry out the approved plan*." Pub. L. No. 98-377, tit. VII, § 707(b)(4), 98 Stat. 1300 (1984) (emphasis added). Congress re-enacted that provision in 1988, *see* Pub. L. No. 100-297, § 3007, 102 Stat 232, and then again in 1994, *see* Pub. L. No. 103-382, § 5106, 108 Stat. 3692. That language confirms that Congress expected that consideration of race, which might otherwise constitute "discrimination based on race," would be a permissible component of a school district's plan, approved by the Department of Education, to eliminate, reduce, or prevent racial isolation.

In 1998, the Department of Education expressly described its criteria for approval of federal grants for voluntary plans that "take race into account in assigning students to magnet schools." 63 Fed. Reg. 8022 (1998). The Department explained that in order for "a voluntary plan involving a racial classification" to be "adequate," the plain "must be narrowly tailored." *Ibid.* The Department reiterated these criteria for narrow tailoring in 1999 and 2000. *See* 64 Fed. Reg. 2110-2111 (1999); 65 Fed. Reg. 46,699 (2000). Further, consistent with an intervening congressional finding,[5] the Department concluded that "reducing, eliminating or preventing minority group isolation" is a "compelling interest." 63 Fed. Reg. at 8022 (1998).

Most recently, Congress re-enacted the 1984 statutory language in 2001 as part of the No Child Left Behind Act of 2001, Pub. L. 107-110, tit. V, § 5301, 115 Stat. 1807, and it is currently codified at 20 U.S.C. § 7231d(b)(2)(C)(ii). Subsequently, the Department made clear that "if a district proposes to use race in its voluntary plan," it must demonstrate that the use is "narrowly tailored to accomplish the objective of reducing, eliminating, or preventing minority group isolation." 69 Fed. Reg. 4992 (2004).

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[5] Congress, in its 1994 amendments to the grant program, had found that it is in "the best interest of the Federal Government" to support "school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." Pub. L. No. 103-382, § 5101, 108 Stat. 3690 (1994). That finding was reaffirmed by Congress in the No Child Left Behind Act of 2001. Pub. L. 107-110, tit. V, § 5301, 115 Stat. 1806 (codified at 20 U.S.C. § 7231(a)(4)(A)).

B. The Department Of Education Has Long Implemented Title VI Of The Civil Rights Act To Further The Ability Of School Districts To Eliminate, Reduce, And Prevent Racial Isolation, Including By Race-Based Mechanisms

For decades the Department of Education has deliberately abstained from prohibiting race-based local responses to so-called *de facto* racial segregation. Working in tandem with Congress's efforts discussed above, the Department of Education has consistently interpreted Title VI of the Civil Rights Act of 1964 not to prohibit consideration of race in furtherance of the elimination, reduction, or prevention of racial isolation.

Title VI prohibits any program or activity receiving federal financial assistance from discriminating on the basis of race. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d). It charges the Department of Education with the responsibility to enforce the prohibition for the assistance it disburses through rules of general applicability approved by the President. *See id.* § 602, 78 Stat. 252 (codified at 42 U.S.C. § 2000d-1).

The early years of the Department of Education's efforts to enforce Title VI focused virtually exclusively on the elimination of the dual school system in the South. When the Department first began to focus on school segregation outside the South, it promulgated Title VI Guidelines that provided that neither its regulations "nor Title VI bars a school system from reducing or eliminating racial imbalance in its schools" regardless of its cause. *Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964*, 33 Fed. Reg.

4955 (1968); *see also* Pub. L. No. 90-557, § 410, 82 Stat. 995 (1968) (instructing the Department to "enforce compliance with title VI of the Civil Rights Act of 1964 by like methods and with equal emphasis in all States of the Union" and to "assign as many persons to the investigation and compliance activities * * * in the other States as are assigned to the seventeen Southern and border States to assure that this law is administered and enforced on a national basis").[6]

After notice-and-comment rulemaking, the Department amended its Title VI regulations in 1973 to confirm specifically its longstanding view that race could be used to address racial isolation, regardless of whether the racial isolation was the result of proven intentional discrimination. The Department explained that, "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 38 Fed. Reg. 17,979 (1973). Thus, the Department noted, "an applicant or recipient may properly

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[6] In 1970, Congress ratified the Department of Education's 1968 Title VI Guidelines when it provided that "[i]t is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 * * * dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States." Congress further specified that "[s]uch uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found." Pub. L. No. 91-230, § 2, 84 Stat. 121 (1970) (codified as amended at 42 U.S.C. § 2000d-6); *see also* Pub. L. No. 92-318, § 703(b), tit. VII, 86 Stat. 422 (1972) (also articulating policy of uniform nationwide application of Title VI to *de facto* and *de jure* segregation by race).

give special consideration to race, color, or national origin." *Id.* at 17,981.

When the United States filed its brief as *amicus curiae* in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Solicitor General correctly stated that the Department had interpreted Title VI "as permitting consideration of race in the university admissions process." Supp. Br. for the United States as *Amicus Curiae*, in No. 76-811, at 18 (Nov. 1977). Furthermore, the Solicitor General contended, consistent with the views of the Department, that the "elimination of racial separation is an important governmental objective." *Id.* at 14 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1970); *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 94-95 (1977)).

Following this Court's *Bakke* decision, the Department reexamined its Title VI regulations and concluded that no changes were warranted. *See* 44 Fed. Reg. 58,509 (1979). The Department determined that the Title VI regulatory provision that authorized voluntary consideration of race is consistent with the Court's decision and that *Bakke* permits schools to "establish and pursue numerical goals to achieve the racial and ethnic composition of the student body it seeks." *Id.* at 58,511. These regulations are still in effect and have not been altered over the course of the past 30 years. *See* 34 C.F.R. §§ 100.3(b)(6)(ii), 100.5(i).

* * *

The federal government's longstanding policy of promoting diversity in the nation's elementary and secondary schools thus reflects nearly five decades of careful and deliberate consideration of the negative effects on children of racial isolation. Far from embodying a fleeting administration-specific viewpoint, the Department has

consistently concluded that the voluntary desegregation and diversification of segregated school districts contributes to the well-being of the Nation, after witnessing and studying the effects on children of such segregation, regardless of its cause. The Department realized that addressing only segregation that could be proven to be caused by unconstitutional discrimination would leave large swaths of our Nation's schools composed of racially isolated children. Accordingly, the Department concluded that children of all races, and society as a whole, would benefit from more diverse learning environments in which students could gain a common understanding of each other and the larger community in which they live.

II. The Longstanding Federal Policy Of Deference To Local School Districts Supports According Those Districts Latitude In Crafting Programs Aimed At The Elimination, Reduction, And Prevention Of Racial Isolation In Public Schools

The Department has taken a deferential approach over the past several decades to local school districts' attempts to diversify racially isolated schools. The Department has provided information, expertise, and experience to States and localities so that they can craft their own programs to address individual local circumstances. Underlying this respect for the voluntary efforts of school districts to desegregate their schools is the overriding federal policy that education is a local matter that cannot, and should not, be governed by a singular federal policy.

Indeed, when Congress established the Department of Education in 1979, it expressly found that, "in our Federal

system, the primary public responsibility for education is reserved respectively to the States and the local school systems." Department of Education Organization Act, Pub. L. No. 96-88, tit. I, § 101, 93 Stat. 669 (1979). Congress established the Department of Education, in part, "to protect the rights of State and local government * * * in the areas of educational policies and administration of programs." *Id.* § 103(a), 93 Stat. 670. Furthermore, every program administered by the Department of Education is a condition on the receipt of federal education funds and does not constitute a unilateral federal regulatory scheme.[7]

Congress has on many occasions expressed the view that the federal government should not require any particular response from local school districts to racial segregation in public schools that cannot be proven to be the result of *de jure* segregation. At the same time, Congress has indicated that the federal government should support local school districts if the districts themselves elect to combat "racial imbalance." *See, e.g.*, Pub. L. No. 92-318, tit. VIII, § 802(a), 86 Stat. 442 (1972) ("No funds appropriated * * * may be used for the

[7] In doing so, Congress followed a pattern established earlier in the Nation's history. *See, e.g.*, Act of July 2, 1862, ch.130, 12 Stat. 503 (First Morrill Act, also known as the Land Grant College Act) (offering federal land to States on condition they sell the land and put the money in a fund which would be appropriated "to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life").

transportation of students or teachers * * * in order to overcome racial imbalance in school or school system * * * except on the express written voluntary request of appropriate local school officials.").[8]

This mandate is consistent with this Court's treatment of educational issues, which has continually stressed that education always has been a matter in which localities are authorized to shape their own policies. *See Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools."); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (States should not be prevented "from experimenting and exercising their own judgment in an area [such as education] to which States lay claim by right of history and expertise"). School districts are entitled to great deference even when they have engaged in constitutional violations. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Brown v. Board of Education*, 349 U.S. 294, 299 (1955).

Because federal law acknowledges that States and localities have the primary responsibility for educating

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[8] Other statutes also make clear that the federal government would not require school districts to address the racial composition in their schools absent prior *de jure* segregation *See* Pub. L. No. 88-352, tit. IV, § 407, 78 Stat. 248 (codified at 42 U.S.C. § 2000c-6(a)). The Eagleton-Biden Amendment, which has been attached to every appropriations act for the Department since 1977, provides that none of the appropriated funds "shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home * * * in order to comply with Title VI of the Civil Rights Action of 1964. * * * The prohibition in this section does not include the establishment of magnet schools." *E.g.*, Pub. L. No. 109-149, § 302, 119 Stat. 2870 (2006).

children and precludes federal interference with decisions in most instances, some latitude must be accorded to local school districts that have determined, often with the assistance of the Department's expertise, that race is an appropriately tailored means to achieve the compelling national interest in the elimination, reduction, and prevention of racial isolation and promotion of racially integrated schools with diverse student bodies. Granting school authorities this latitude will provide them some needed breathing space so that they feel confident to make sound educational choices for their students in the "play between the joints" of what the Constitution requires and what the Constitution prohibits. *Cf. Locke v. Davey*, 540 U.S. 712, 718 (2004).

CONCLUSION

For the reasons set forth above, the judgments of the courts of appeals should be affirmed.

Respectfully submitted,

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No. 05-908 and 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are 60 scholars who have devoted much of our careers to the study of Reconstruction-era history, abolitionism, race relations, and civil rights.[1] We submit this brief as *amici curiae* in support of Respondents.[2]

We are not an organization, but individual scholars with a professional interest in ensuring that the Court is fully and accurately informed about the historical context surrounding the passage and early implementation of the Fourteenth Amendment. We have authored and edited numerous books and articles in scholarly journals on Reconstruction-era history and the Reconstruction Amendments. Many of us have served as presidents of the American Historical Association, Organization of American Historians, and Southern Historical Association.

In our professional judgment, the school assignment policies at issue in these cases are fully consistent with the original purpose of the Fourteenth Amendment. Indeed, the same Congress that passed the Fourteenth Amendment enacted a wide range of race-conscious programs and funded deliberate efforts to integrate schools. Therefore, to the extent that the Court finds probative the intentions of those who passed the Fourteenth Amendment, it should affirm the decisions below.

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[1] This brief is filed with the written consent of both parties. No counsel for a party wrote this brief in whole or in part. *Amici* recognize a generous contribution by the Yale Civil Rights Project and the Project for Law and Education at Yale to cover the cost of printing this brief.

[2] A list of the *amici* scholars, their academic affiliations, and publications is included in the Appendix. The views expressed herein are those of the scholars alone and do not necessarily reflect the views of their institutions.

SUMMARY OF ARGUMENT

In these cases, Petitioners urge the Court to hold, in effect, that integration and segregation are equally offensive to the Fourteenth Amendment insofar as they involve any consideration of race. Some *amici* in support of Petitioners further suggest that this novel reading of the Fourteenth Amendment is consistent with the original understanding of the Amendment's framers. *See, e.g.*, Brief for Project on Fair Representation at the American Enterprise Institute as *Amici Curiae* Supporting Petitioners, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908; *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (filed Aug. 17, 2006) [hereinafter AEI Brief]. This suggestion rests on a deep misunderstanding of those framers' aims. We submit this brief to correct that misunderstanding.

In fact, the Reconstruction Congresses viewed deliberate efforts to integrate schools as wholly consistent with their broader goals of incorporating blacks into the civic, economic, and political mainstream of American society. The same Reconstruction Congresses that passed and enforced the Fourteenth Amendment funded race-conscious school integration efforts in Kentucky and elsewhere. In addition, Congress raised no objection when Louisiana wrote a "mixed schools" clause into its state constitution in 1868 and deliberately sought to integrate schools in New Orleans. Indeed, a variety of state and local officials across the nation appear to have taken the Fourteenth Amendment's passage as a signal that the door was open to desegregate—and even to use race-conscious means to integrate—their schools.

There is simply no evidence from the Reconstruction period to suggest that those who framed and ratified the Fourteenth Amendment ever meant for it to limit voluntary, race-conscious integrative measures like those adopted in

Seattle and Louisville. Instead, the relevant historical record points powerfully in the opposite direction. The Seattle and Louisville integration policies are fully consistent with both the goals of the Reconstruction project and the means Congress deemed permissible to effectuate those goals.

Congress passed the Thirteenth Amendment in order to erase all badges and incidents of slavery. When this Amendment proved inadequate to prevent the isolation of, and discrimination against, black citizens, Congress passed the Civil Rights Act of 1866 and the Freedmen's Bureau Acts, and then drafted the Fourteenth Amendment to constitutionalize those statutes. The Fifteenth Amendment extended the goal of inclusion into the political realm. Understood in the context of this Reconstruction project, the purpose of the Fourteenth Amendment was to fully incorporate blacks into the fabric of civic, economic, and political life.

Petitioners' *amici* insist, instead, that the original intent of the Reconstruction Amendments was to establish "color-blind" government, meaning that the words "black" or "white" would henceforth never appear in a piece of legislation. AEI Brief at 3. It is difficult even to know what to make of *amici*'s claim, given that the Reconstruction Congresses themselves passed *A Resolution Respecting Bounties to Colored Soldiers*, No. 46, 14 Stat. 357, 357-58 (1866) and myriad other explicitly race-conscious statutes, and supported state and local race-conscious efforts to integrate schools. Congress considered such race-conscious means wholly permissible, and often necessary, to build a society without "caste"—a society that was "color-blind" in the sense that it allowed "no superior, dominant, ruling class of citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

This Court should not allow the original intent of the framers of the Fourteenth Amendment to be misconstrued to impugn racial classifications whose indisputable purpose and effect is to educate students of different racial and ethnic backgrounds together. In the K-12 context, no scarce good is being distributed between racial groups. There are only children going to school, in public systems that make room for them all. The question in these cases is simply whether students with different racial backgrounds will have an opportunity to attend school together, or separately—whether local officials in Louisville and Seattle can continue their efforts to advance toward a truly colorblind society, or will be forced by an ahistorical doctrinal framework to ignore the realities of race. Whatever may be said for the proposition that voluntary integration must cease, let the record show that this proposition has no basis in the original intent of the framers of the Fourteenth Amendment.

ARGUMENT

From the day Berea College opened its doors as a one-room schoolhouse in Kentucky in 1855, its abolitionist founders insisted on teaching black and white children together. On September 3, 1867, a black minister addressed the student body: "[L]et there be Bereas planted throughout the nation, institutions in which the youth of the land white and colored shall study together, play together, sing together, worship together, and there will be no war of races." Richard Sears, *A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866-1904*, at 57 (1996). This dream of integration was alive—but still only a dream—in 1963, when Dr. King preached, "I have a dream that one day, down in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers." Martin Luther King. Jr., I Have a Dream, Keynote Address at the March on Washington for

Jobs and Freedom (Aug. 28, 1963), *in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* 217 (James M. Washington ed., 1986). Many Americans of all races are still waiting for that day. After a period of progress, rising de facto segregation has left our schools more segregated than they were in 1970. Gary Orfield, The Civil Rights Project at Harvard University, *Schools More Separate: Consequences of a Decade of Resegregation* (2001). Against this backdrop, the locally-elected school boards in Louisville and Seattle have voluntarily chosen to address de facto segregation and move closer to the long-delayed dream of integration.

Some of the framers of the Fourteenth Amendment believed the Amendment mandated the integration of schools. Others may not have understood the Fourteenth Amendment to *require* such school integration. In *Brown*, this Court concluded that the evidence on whether the framers of the Fourteenth Amendment intended to mandate school integration was "inconclusive." *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954). We do not ask the Court to revisit that difficult question.[3] But what is beyond serious historical dispute is that the Congress that passed the Fourteenth Amendment did not intend or even contemplate that their Reconstruction project would one day be used as a cudgel to beat back the dream of integration that Berea College epitomized, that Dr. King championed, and that

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[3] *Compare* Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, *Brown v. Bd. of Educ.*, 347 U.S. 483 [hereinafter *Brown* brief] and Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) (arguing that the Fourteenth Amendment was understood to bar school segregation) *with* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 58 (1955) and Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995) (arguing against McConnell's conclusions).

many of those framers themselves passionately advocated. The framers of the Reconstruction Amendments did not strive for the antiseptic race-neutrality that *amici* in support of Petitioners advance. AEI Brief at 5. Instead, they vigorously enacted race-conscious legislation which they understood as wholly consistent with the Fourteenth Amendment—and indeed, sometimes, the only way to realize that Amendment's purpose. The voluntary integration plans in Louisville and Seattle are consistent with that purpose, and employ race-conscious means that are well within the scope of actions deemed permissible by the Reconstruction Congresses.

I. The Reconstruction Congresses Supported Deliberate Efforts by States and Localities to Integrate Schools

The Reconstruction Congresses did not believe that the Fourteenth Amendment barred states and localities from choosing to deliberately integrate their schools. As an initial matter, many members of Congress and state legislatures understood the Fourteenth Amendment to actually *require* school integration. Moreover, only a year after passing the Fourteenth Amendment, Congress began funding ambitious race-conscious school integration efforts in Kentucky and other states. There is simply nothing in the historical record to suggest that Congress understood the Fourteenth Amendment to bar such voluntary integration efforts.[4]

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[4] To be sure, the Reconstruction Congresses did not go so far as to withhold all funding from segregated schools. But given the context of the Reconstruction period, Congress's willingness to affirmatively fund race-conscious school integration is powerful evidence that it understood such efforts as permissible means to achieve the Reconstruction Amendments' inclusionary goals. Indeed, the fact that the modern notion of race-conscious school integration constituted a small segment of the congressional debates should not be surprising, given that most of the fight during this period was over the then-radical proposition that blacks

Many members of the Congress that passed the Fourteenth Amendment supported the goal of integrated education. In 1865, Senator Charles Sumner introduced a resolution demanding that former slave states, as a requirement for readmission to the Union, integrate their schools.[5] Cong. Globe, 39th Cong., 1st Sess. 2 (Dec. 4, 1865). Representative John Baker introduced a similar resolution in the House later that day. *Id.* at 69. Many Radical Republicans likewise "lined up in favor of a bill by Senator Trumbull to enlarge the powers of the Freedmen's Bureau . . . to force the integration of Southern schools." *Brown* brief at 18; *see also* Cong. Globe, 39th Cong., 1st Sess. 541 (Jan. 31, 1866) (statement of Rep. Dawson) (explaining that the bill's supporters believed "the white and black race are equal. . . . *Their children are to attend the same schools with white children, and to sit side by side with them.*") (emphasis added).

In the debates over the adoption of the Civil Rights Act of 1875, once again many members of Congress pressed for integrated schools. *See, e.g.*, 2 Cong. Rec. 4116 (May 21, 1874) (statement of Sen. Boutwell) ("The theory of human equality cannot be taught in families," but "in the public school, where children of all classes and conditions are brought together, this doctrine of human equality can be taught, and it is the chief means of securing the perpetuity of republican institutions."). Senator Sumner offered a version

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should be afforded the opportunity to attend school at all. *See Brown* brief at 120-25.

[5] Senator Sumner had long advocated for school integration. Years earlier he had argued in *Roberts v. City of Boston*, 59 Mass. (1 Cush.) 198 (1849) that "[t]he law contemplates not only that all be taught, but that *all* shall be taught *together* . . . . The school is the little world where the child is trained for the larger world of life." Charles Sumner, *Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts, in* 2 *The Works of Charles Sumner* 327, 371 (1849).

of the Act that was uniformly understood to require integration. Cong. Globe, 42d Cong., 2d Sess. 244 (Dec. 20, 1871). Senator Allen Thurman said of a later version of the bill: "I do not think there is one member of the majority of the Judiciary Committee who will not say, if the question is put directly to him, that the meaning of the section is that there shall be mixed schools." 2 Cong. Rec. 4088 (May 20, 1874).

Although the provision specifically mandating school integration was narrowly defeated in the House and dropped from the final version of the Civil Rights Act of 1875,[6] the message in favor of integration over segregation emanated from the federal level to the states. In 1881, a Pennsylvania court struck down a school segregation law on the basis of the Fourteenth Amendment. J. Morgan Kousser, *Dead End: The Development of Nineteenth Century Litigation on Racial Discrimination in Schools* 22-23 (1986). Other states, while not explicitly acknowledging a federal constitutional mandate, passed legislation integrating their schools. These states included Rhode Island (1866), Michigan (1867), Connecticut (1868), New York (1873), Nevada (1873), Illinois (1874), California (1880), Pennsylvania (1881), New Jersey (1881), and Ohio (1887). *See* J. Morgan Kousser, *"The Onward March of Right Principles": State Legislative Actions on Racial Discrimination in Schools in Nineteenth-Century America*, 35 Hist. Methods 177, 183 (2002).

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[6] Shortly before close of session in 1874 the Senate passed the "mixed schools" bill by a vote of 29-16. 2 Cong. Rec. 4176 (May 22, 1874). While a substantial majority of the House also supported the bill, its supporters could not muster the requisite two-thirds vote to get the bill to the floor. 2 Cong. Rec. 4242-43 (May 25, 1874); *see also* McConnell, *supra*, at 1053-79 (discussing the Senate and House votes on these bills).

A. During Reconstruction, States and Localities Took Voluntary Steps to Achieve Integrated Schools, and Congress Raised No Objection

During Reconstruction, some states not only outlawed school segregation to integrate their schools, but took deliberate steps to ensure that their schools would actually be integrated. Federal authorities were well aware of these efforts and raised no constitutional objection.

In 1868, Louisiana ratified a new constitution which not only banned segregation, but included the most ambitious integration clause of any southern state. Roger A. Fischer, *The Segregation Struggle in Louisiana 1862-77*, at 51 (1974) (noting that Article 135 of the Louisiana Constitution mandated mixed schools by banning "separate schools or institutions of learning established exclusively for any race" and directing the legislature to establish new, free public schools in each parish for children of all races to attend together); *see also* Dale A. Somers, *Black and White in New Orleans: A Study in Urban Race Relations, 1865-1900*, 40 J. S. Hist. 19, 24-25 (1974). In 1870, the Louisiana legislature established new criminal penalties for school officials who impeded integration efforts. Paul A. Kunkel, *Modifications in Louisiana Legal Status Under Louisiana Constitutions, 1812-1957*, 44 J. Negro Hist. 1, 13 (1959). The State Republican Party promised to "enforce the opening of all schools, from the highest to the lowest . . . to all children."[7] Fischer, *supra*, at 43.

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[7] One white Republican party supporter drew constitutional support for school integration from the integrationist goals of the Fifteenth Amendment: "If my colored brother and I touch elbows at the polls, why should not his child and mine stand side by side in the school room?" Fischer, *supra*, at 43.

After integrationists gained control of the New Orleans School Board, Superintendent Thomas W. Conway began integrating the city's schools:

> I had fully concluded to put the system of mixed schools to a thorough, practical test, and I did. The white pupils all left . . . and the school-house was virtually in the hands of the colored pupils. This was the picture one day . . . . [the next day] before I reached my office . . . the children of both races who, on the school question, seemed like deadly enemies, were, many of them, joined in a circle, playing on the green . . . . In a few days I went back to see how the school was progressing, and, to my surprise, found nearly all the former pupils returned to their places.

Louis R. Harlan, *Desegregation in New Orleans Public Schools During Reconstruction*, 67 Am. Hist. Rev. 663, 664 (1962).

At the height of desegregation in New Orleans, one-third of schools were racially integrated—a remarkable feat in a city where whites outnumbered blacks three-to-one. "[B]etween five hundred and one thousand Negroes and several thousand whites attended mixed schools." Harlan, *supra*, at 666; *see also* Fischer, *supra*, at 110 (concluding that the New Orleans public school system was a "remarkable experiment in interracial coexistence"). "Black students remained in predominately white schools in New Orleans in fairly large numbers until the federal soldiers were withdrawn and the Radical Republican government collapsed in 1877."[8] Fischer, *supra*, at 131.

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[8] After 1877 both blacks and whites in New Orleans continued to fight to maintain integrated schools. While these efforts were ultimately

During the debates leading up to the Civil Rights Act of 1875, Congress evinced knowledge of voluntary integration in New Orleans and across Louisiana. Cong. Rec. App. 478 (June 16, 1874) (statement of Rep. Darrall) ("[C]olored children attend . . . all the public schools of that State . . . . The school law attaches heavy penalties to the refusal of colored children admission into any of the public schools . . . "). During the congressional debate, Representative Darrall quoted the President of the New Orleans City Board, Judge Henry C. Dibble, as explaining that the school integration project was "proceeding harmoniously." *Id.*

South Carolina's 1868 constitution also included a mixed school clause. S.C. Const. art. X, § 10 (1868). After the constitution came into effect, the state-run University of South Carolina—which at the time offered primary and secondary, as well as college, education—took deliberate steps to create a truly mixed school. *See* William Preston Vaughn, *Schools for All: The Blacks and Public Education in the South, 1865-1877*, at 111-16 (1974); *see also id.* at 114 ("[I]nformation still extant indicates that the student body was 50 percent or more black."). "The new faculty's attitude toward integration was . . . highly favorable." *Id.* at 113.

The South Carolina legislature supported the university's efforts to "integrate on an extensive scale," *id.* at 108, by "establish[ing] 124 state-financed scholarships." *Id.* at 114. "Faculty chairman Benjamin B. Babbitt insisted the

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unsuccessful, it is notable that in the Louisiana court challenges to segregation during that period, no defendant ever advanced the claim that the Fourteenth Amendment *prohibited* the state from integrating schools. *See* J. Morgan Kousser, *Before* Plessy, *Before* Brown: *The Development of the Law of Racial Integration in Louisiana and Kansas* 213, 226-33 *in Toward a Usable Past: Liberty Under State Governments* (Paul Finkelman & Stephen C. Gottlieb eds., 1991).

scholarship students came from 'all classes and conditions of men and fairly represent[ed] the population.'" [9] *Id.* One legislator explained of the efforts to integrate schools, "we are laying the foundation of a new structure here, and the time has come when we shall have to meet things squarely, and we must meet them now or never. The day is coming when we must decide whether the two races shall live together or not." David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 Am. J. Educ. 236, 248 (1986).

Not only did these deliberate integration efforts have the support of state legislatures that ratified the Fourteenth Amendment, but they raised no constitutional concerns during a period when the level of federal monitoring, especially in the South, was extraordinarily high. William Richter, *American Reconstruction 1862-1877*, at 176 (1996) (explaining that Freedmen's Bureau officials maintained a strong presence in these locales).

B. The Reconstruction Congresses Funded Race-Conscious School Integration Plans

On March 2, 1867, less than a year after passing the Fourteenth Amendment, Congress passed a charter incorporating Howard University—an ambitious race-conscious effort to establish an integrated higher education institution in the nation's capital.[10] Congress funded Howard

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[9] Governor Moses of South Carolina "also indicated his pleasure with integration of the university and was certain that the 'narrow spirit of bigotry and prejudice' had been banished from its halls forever." Vaughn, *supra*, at 112.

[10] Although the primary goal was to offer increased educational opportunities to freedmen, Howard University was, from its inception, open to all races and both sexes, and actively recruited an integrated student body. John A. Carpenter, *Sword and Olive Branch: Oliver Otis*

through the Freedmen's Bureau, which spent an estimated $500,000 on Howard University—nearly five percent of the Bureau's total budget over its lifetime.[11] Dwight O. W. Holmes, *Fifty Years of Howard University: Part I*, 3 J. Negro Hist. 128, 136 (1918).

During this period, the Freedmen's Bureau provided direct financial assistance to other ambitious race-conscious school integration programs. In 1867, the Freedmen's Bureau provided a $7,000 grant to Berea College in Kentucky, a school that would become the "longest-running, most thorough going experiment in integrated education that the United States had yet seen."[12] Sears, *supra*, at 44.

Berea College was reincorporated in early 1866, as Congress was reauthorizing the Freedmen's Bureau Act and drafting the Fourteenth Amendment. During the summer of that year voters in the town of Berea elected district trustees who established this "mixed" school as the district's public school. *Id.* at 53. The school's founders implemented an ambitious integration program, "insist[ing] that the[] educational program . . . incorporate as basic racial principles the total equality of the Negro and a fifty-fifty ratio of black and white students."[13] Paul David Nelson,

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Howard 170 (1964). In fact, Howard University's first students were white women. *Id.* at 171.

[11] General Oliver Otis Howard, for whom the University was named, was the Commissioner of the Freedmen's Bureau in 1867 and an avowed integrationist. He made affirmative efforts to integrate his church and to attract black parishioners. *Id.* at 197.

[12] Chief Justice Salmon P. Chase, Ohio Governor J. Dolson Cox and others contributed to Berea College and publicly supported Berea's integration plan. Sears, *supra*, at 51.

[13] Integration in Berea went far beyond the school context. For founder John G. Fee, "[i]t was never enough . . . to teach equality without having the means to practice it . . . . He considered it pointless to speak of a person having a right if that right could not be enjoyed." *Id.* at 70. The community also engaged in race-conscious housing integration, termed

Experiment in Interracial Education at Berea College, 1858-1908, 59 J. Negro Hist. 13, 13 (1974). In 1869, the Freedmen's Bureau awarded Berea a second grant, of $18,000 to construct Howard Hall, an integrated dormitory.[14] *Berea College, Kentucky: An Interesting History* 48 (1883). Berea's black graduates had an important effect on integrating the teaching corps in Kentucky and across the South, some becoming "the most prominent black professors, administrators, and school founders of their day."[15] Sears, *supra*, at 92-94.

The Freedmen's Bureau similarly supported Maryville College in Tennessee, an integrated primary and secondary school which maintained integrated classes until state law made it illegal in 1901.[16] *See* Scott Blakeman, *Night Comes to Berea College: The Day Law and African American Reaction*, 70 Filson Club Hist. Q. 3, 26 n.45 (1996).

"interspersion" by its leaders. *Id.* at 80. "The region around Berea [was] divided almost equally between whites and blacks . . . virtually no black family own[ed] land without a boundary on some white person's property. The reverse [was] also true: virtually all white people around Berea had freeholding black neighbors." *Id.* at 82.

[14] The new grant was prompted by a trip to Berea by the Assistant Commissioner of the Freedmen's Bureau of Kentucky, who wrote to Commissioner Howard that the school was "one of the most singular sights I ever witnessed . . . all shades and colors, all ages and conditions and all intent on one object, to escape from the bonds of ignorance." Sears, *supra*, at 89.

[15] One such graduate was Frank L. Williams. Sears, *supra*, at 93. Born in Louisville, Williams went on to teach on the integrated faculty at Berea until the school was forced to segregate by Kentucky's Day Law in 1904. Williams spent the remainder of his professional career teaching in the segregated Louisville school system. Williams was the great-grandfather of one of the authors of this brief.

[16] The Freedmen's Bureau also funded Fisk University in Nashville, which like Howard, admitted students of all races. Joe M. Richardson, *A History of Fisk University, 1865-1946*, at 13 (1980).

In sum, the historical record shows that the Reconstruction Congresses did not intend the Fourteenth Amendment to prohibit race-conscious efforts to integrate schools. Congress did not object to deliberate state and local efforts to integrate schools. Indeed numerous congressmen believed the Fourteenth Amendment required school integration, and the federal government itself funded race-conscious integration programs through the Freedmen's Bureau.

II. The Primary Purpose of the Reconstruction Amendments Was to Incorporate Blacks into the Civic, Economic, and Political Mainstream of American Society

Viewed in light of the Reconstruction Amendments' inclusionary purpose, it is not surprising that these voluntary efforts to integrate schools during Reconstruction raised no constitutional objection. In fact, these efforts aimed to achieve the same goals that the Congresses that passed the Thirteenth, Fourteenth, and Fifteenth Amendments sought: to break down discrimination and incorporate blacks into the civic, economic, and political mainstream of American society. *Slaughter-House Cases*, 83 U.S. 36, 71-72 (1872) ("[O]n the most casual examination of the language of [the Thirteenth, Fourteenth, and Fifteenth] amendments, no one can fail to be impressed with the one pervading purpose found in them all . . . the security and firm establishment of . . . freedom . . . and . . . protection [of] the newly-made freeman and citizen from . . . oppression[]."). Louisville and Seattle's voluntary school integration plans are similarly consistent with that goal.

The Fourteenth Amendment, with its guarantee of equal protection of the laws, was a direct outgrowth of Congress's affirmative efforts to secure the rights guaranteed by the

Thirteenth Amendment. Joseph H. Taylor, *The Fourteenth Amendment, the Negro, and the Spirit of the Times*, 45 J. Negro Hist. 1, 27 (1960) ("Following the adoption of the Thirteenth Amendment there was 'the conviction that something more was necessary in the way of constitutional protection' . . . . The statesmen accordingly 'passed through Congress the proposition for the Fourteenth Amendment.'") (internal citations omitted).

The Thirteenth Amendment did more than prohibit slavery; Congress intended that Amendment to eliminate all badges and incidents of slavery as well.[17] *See* Cong. Globe, 39th Cong., 1st Sess. 1152 (Mar. 2, 1866) (statement of Rep. Thayer) ("[W]hat kind of freedom is that which is given by the amendment of the Constitution if it is confined simply to the exemption of the freedmen from sale and barter?"). Congress understood the pervasive denial of education to blacks as an incident of slavery that the Thirteenth Amendment empowered Congress to address. Cong. Globe, 39th Cong., 1st Sess. 322 (Jan. 19, 1866) (statement of Sen. Trumbull) ("Those laws . . . that did not allow [blacks] to be educated, were all badges of servitude. . . . When slavery goes, all this system of legislation . . . goes with it."); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring) (explaining that Frederick Douglass believed that "education . . . means emancipation").

Following the ratification of the Thirteenth Amendment, many southern states enacted repressive "Black Codes"

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[17] Justice Harlan recognized the scope of this constitutional authority in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) (explaining that the Thirteenth Amendment "not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude").

aimed at isolating blacks from whites.[18] *See* Daniel C. Thompson, *The Role of the Federal Courts in the Changing Status of Negroes Since World War II*, 30 J. Negro Educ. 94, 95 (1961) (explaining that the purpose of the Black Codes was "confining [blacks] to the bottom rung of the social ladder"); Margaret Washington, *African American History and the Frontier Thesis*, 13 J. Early Republic 230, 237 (1993) (referring to the Black Codes as "exclusionary"). In response, Congress passed the Civil Rights Act of 1866 and the Freedmen's Bureau Act. Senator Lyman Trumbull, the principal drafter of the Civil Rights Act of 1866, explained that it was necessary to "give effect" to the Thirteenth Amendment's "abstract truths and principles" and to "secure to all persons within the United States practical freedom." Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (statement of Sen. Trumbull).

Likewise, the Freedmen's Bureau Act was intended to give blacks an equal opportunity to participate in the civic and economic life of the country. During debates on the Act's reauthorization, Representative Samuel Moulton explained that "[t]he very object of the bill is to break down the discrimination between whites and blacks." Cong. Globe,

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[18] The Joint Committee on Reconstruction, authorized in December 1865 to investigate conditions in the South, concluded that, given the emergence of the Black Codes, it would be unwise to "abandon" the former slaves "without securing them their rights as free men and citizens." Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. Resolution and Report of the Committee, at xiii (1866). On the committee were long-time proponents of racial equality and integration, John Bingham, the principal author of Section 1 of the Fourteenth Amendment, and Thaddeus Stevens, a central proponent of the Amendment. Also included were George S. Boutwell of Massachusetts and Justin Morrill of Vermont. "Both had been life-long opponents of slavery and both came from states that gave free blacks full legal rights, including suffrage." Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 Temp. Pol. & Civ. Rts. L. Rev. 389, 400 (2004).

39th Cong., 1st Sess. 632 (Feb. 3, 1866) (statement of Rep. Moulton).

Congress passed the Fourteenth Amendment both to ensure the constitutionality of these two statutes and to write them into the fabric of the Constitution so they could not be easily overturned. *See* Jacobus tenBroek, *Equal Under Law* 201 (1965) ("The one point upon which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt."); Cong. Globe, 39th Cong., 1st Sess. 2462 (May 8, 1866) (statement of Rep. Garfield) ("[E]very gentleman knows that [the Civil Rights Act of 1866] will cease to be a part of the law whenever . . . [the other] party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife . . . and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it."); Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L.J. 565, 570 (1989) (noting that the Fourteenth Amendment was passed to secure the rights enumerated in the Civil Rights Act because Congress understood these rights as "essential to political and economic freedom and individual autonomy").

The ratification debates in the Pennsylvania Legislature—the only state whose debates were fully reported—indicate that state legislators shared this view. State Representative J.R. Day stated: "We propose in the first place, to write, in substance, the Civil Rights Bill, the essence of justice." Chester James Antieau, *The Intended*

Significance of the Fourteenth Amendment 180 (1997) (citation omitted).

Beyond constitutionalizing the Civil Rights Act of 1866 and Freedmen's Bureau Acts, the Congress that passed the Fourteenth Amendment aimed to include blacks within the circle of full citizenship through a "national guarantee of equality before the law." Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, at 257 (1988). The Fourteenth Amendment "uprooted the caste system" and placed blacks on an equal footing with whites in the civic and economic sphere. Howard J. Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism* 5 (1968); *see also* Charles Sumner, *Promises of the Declaration of Independence, and Abraham Lincoln, in* 9 *The Works of Charles Sumner* 367, 424-25 (1874) (stating that the "demon of Caste" must be destroyed and "[t]he same national authority that destroyed Slavery must see that this other pretension is not permitted to survive"). Proponents and opponents alike understood that what was at stake was whether blacks would be "admitted to the rights of citizenship." Cong. Globe, 39th Cong., 1st Sess. 498 (Jan. 30, 1866) (statement of Rep. Van Winkle).

The Fourteenth Amendment's commitment to including blacks as citizens is even clearer when viewed in light of the final element of the Reconstruction project: the Fifteenth Amendment's affirmative grant of political rights. The Fifteenth Amendment guaranteed much more than the right to cast a ballot: it was an inherently integrationist effort to bring people of all races together in the nation's political institutions, including the jury box and the town square.[19]

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[19] The First Military Reconstruction Act of 1867, an important precursor to the Fifteenth Amendment, went beyond a colorblind conception of "universal suffrage" to integrate blacks into the political community. Act

Akhil Reed Amar, *America's Constitution: A Biography* 400 (2005) (explaining that the right to vote necessarily encompassed the right to vote as members of juries, to vote inside legislatures—and thus to run for office—and other political rights). After passage of the Fifteenth Amendment, Congress paved the way for integrated juries by banning discrimination in jury service on the basis of "race, color, or previous condition of servitude"—the language of the Fifteenth Amendment itself. 18 U.S.C. § 243 (2000). In addition, while Georgia was initially readmitted into the Union upon agreeing to eliminate racial discrimination at the polls, its representatives were excluded from Congress when the state legislature attempted to deny the right of blacks to hold office. 2 James G. Blaine, *Twenty Years of Congress: From Lincoln to Garfield* 464-65 (1884).

Thus understood in light of the Reconstruction project, the Fourteenth Amendment aimed to include blacks in the full benefits of American citizenship. *See* Foner, *supra*, at 251-60. As Justice Harlan articulated in his canonical dissent in *Plessy*, the Fourteenth Amendment's goal was to eliminate the evils of "caste," so that society could become "color-blind" in the sense of abolishing any "superior, dominant, ruling class of citizens," and ensuring that "all citizens are equal before the law." 63 U.S. at 559-60 (Harlan, J., dissenting). Although often misrepresented to suggest that the state must never take account of race, *see, e.g.*, AEI Brief at 10-11, Justice Harlan's argument was not about government means, but about ends. He argued that the segregation of the Louisiana railcar in *Plessy* was unconstitutional because it perpetuated a caste system that

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of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429 (1867). While the Act was motivated by both philanthropic purpose and political partisanship, it was an explicitly race-conscious attempt to fully incorporate blacks into all aspects of political life. C. Vann Woodward, *The Political Legacy of Reconstruction*, 26 J. Negro Educ. 231, 234-35 (1957).

offended the core purpose of the Fourteenth Amendment. Indeed, Justice Harlan later argued that the Fourteenth Amendment would prohibit "mak[ing] it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature, in which all citizens, without regard to race, are equally interested."[20] *Berea College v. Kentucky*, 211 U.S. 45, 69 (1908) (Harlan, J., dissenting).

III. The Reconstruction Congresses Used Race-Conscious Means to Implement the Goals of the Reconstruction Amendments

The Reconstruction Congresses enacted a vast system of federal programs and regulations to achieve the integrative goals of the Reconstruction project. Race pervaded this effort. Still, some have claimed that the Reconstruction Congresses intended to prohibit the state from using any race-conscious means, even to achieve those goals. *See, e.g.*, AEI Brief at 3. This assertion has no basis in the history of Reconstruction. Not only did Congress fund race-conscious school integration efforts during this period, *see infra* Part I.B, but the same Congress that passed the Fourteenth Amendment enacted myriad other race-conscious measures, which it clearly understood as not only permissible but often necessary to achieve the Amendment's goals.[21]

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[20] Justice Harlan also understood the integrative implications of the Fifteenth Amendment's grant of political rights, explaining that, after the Amendment's passage, a state could not "prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day." *Plessy*, 163 U.S. at 558 (Harlan, J., dissenting).

[21] Indeed, Congress rejected an alternative version of the Fourteenth Amendment that might have prohibited all racial distinctions. *See* Cong. Globe, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866) (indicating that only

In 1866, the Reconstruction Congress clashed with President Andrew Johnson over the permissibility of race-conscious legislation. In his message vetoing the Freedmen's Bureau Act, Johnson explained that he opposed the Act because it created "distinction[s] of race and color." 5 *Messages and Papers of the Presidents* 3610-11 (1914). For the first time in history, Congress overrode a presidential veto, passing an emboldened version of the legislation that was even more race-conscious than the original bill.[22]

The same Congress passed numerous other statutes explicitly aimed at giving blacks meaningful opportunities to participate in post-bellum society, many of which employed facially race-conscious means. Congress in 1866 and again in 1867 passed facially race-conscious legislation to ensure black soldiers could secure the financial benefits they earned during service. *See* Act of July 26, 1866 no. 86, §§ 2-4, 14 Stat. 367, 368 (1866) (providing for the payment of bounties to "colored" soldiers and their representatives); Act of Mar. 29, 1867, no. 25, 15 Stat. 26 (1867) (providing for the

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seven senators voted for proposed language expressly prohibiting any law or regulation that drew distinctions based on race).

[22] The new bill contained race-conscious provisions not included in the earlier proposal. While congressional drafters had broadened the statute's scope from "freedmen" to "refugees and freedmen," Paul Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J. S. Hist. 271, 275-78 (1995), the new bill gave the two groups different benefits. The bill authorized the Bureau to aid blacks in almost any manner related to their newly-won freedom, while white refugees could only receive the assistance necessary to achieve self-sufficiency. While the earlier bill had authorized construction of schools "for refugees and freedmen," the new bill limited educational programs to blacks. *Compare* S. 60, 39th Cong. (1866) *with* H.R. 613, 39th Cong. (1866). Furthermore, congressmen commonly understood that the bill was intended to benefit blacks. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 513-16 (Jan. 30, 1866) (statements of Reps. Eliot and Smith); *id.* at 544 (statement of Rep. Taylor); *id.* at 634 (statement of Rep. Ritter).

payment due to "colored" soldiers, sailors, and Marines). Opponents criticized these statutes as "class legislation," unfairly "applicable to colored people and not . . . to the white people," Cong. Globe, 40th Cong., 1st Sess. 79 (Mar. 13, 1867) (statement of Sen. Grimes), yet Congress overrode these objections and passed these race-conscious measures in the weeks leading up to and immediately following the adoption of the Fourteenth Amendment. *Id.* at 294 (recording the vote of the Senate); *id.* at 445 (recording the vote of the House). The Thirty-Eighth Congress also established a bank to provide financial services to freedmen and their descendents. Act of Mar. 3, 1865, ch. 92, § 5, 13 Stat. 510, 511 (1865) (incorporating the Freedman's Savings and Trust Company). And Congress passed numerous facially race-conscious statutes to assist impoverished black citizens. *See, e.g.*, Act of Feb. 14, 1863, ch. 33, 12 Stat. 650 (1863) (incorporating the National Association for the Relief of Destitute Colored Women and Children); Act of June 23, 1864, ch. 169, 13 Stat. 201 (1864) (incorporating the Colored Catholic Benevolent Society); Act of Mar. 3, 1865, ch. 118, 13 Stat. 535 (1865) (incorporating the Colored Union Benevolent Association); Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20 (1867) (appropriating welfare benefits to blacks in the District of Columbia).

In addition, the Civil Rights Act of 1866 itself contained facially race-conscious provisions to guarantee enforcement of civil rights for blacks. Ch. 31, 14 Stat. 27, 27 (1866). The Act established new criminal penalties for subjecting blacks or other non-whites to "different punishment . . . by reason of . . . color or race, than is prescribed for the punishment of *white* persons." Ch. 31, § 2, 14 Stat. 27, 27 (1866) (emphasis added). President Andrew Johnson vetoed the bill because "[t]he object of [that provision] is to afford discriminating protection to colored persons." 6 *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 408

(James Richardson ed., 1899). But Senator Trumbull countered that "protecting the rights of freedmen" required singling out race as the trigger for protection. *See* Cong. Globe, 39th Cong., 1st Sess. 475 (Jan. 29, 1866) (statement of Sen. Trumbull).

Finally, in June 1866, as Congress was approving the Fourteenth Amendment, it also passed the Southern Homestead Act to provide blacks an opportunity to become landowners. Senator Samuel Pomeroy explained that "it need not be disguised that [the Act] is aimed particularly for the benefit of the colored man . . . the object of this bill is to let [Negroes] have the land in preference to people from Europe or anybody else." Cong. Globe, 39th Cong., 1st Sess. 2735-36 (May 22, 1866) (statement of Sen. Pomeroy). The Act offered blacks preferential access to land[23] in an effort to "draw them into the American mainstream." Michael L. Lanza, *Agrarianism and Reconstruction Politics: The Southern Homestead Act* 27 (1990). Representative George W. Julian, the Act's principal sponsor, designed the Act to encourage blacks to develop homesteads alongside white southern loyalists and immigrants. Paul Wallace Gates, *Federal Land Policy in the South: 1866-1888*, 6 J. S. Hist. 303, 306 (1940).

IV. Respondents' Voluntary School Integration Plans are Fully Consistent with the Original Understanding of the Reconstruction Amendments

One hundred and forty years after the Reconstruction Congress and the abolitionist founders of Berea College

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[23] The Act established a six-month window in which freedmen had preferential access to available land. Southern Homestead Act, ch. 127, 14 Stat. 166 (1866); *see also* George R. Bentley, *A History of the Freedmen's Bureau* 134 (1974).

began their work towards a more inclusive society, Respondents in Louisville and Seattle have chosen to continue pursuing the same inclusionary goals. To allow Petitioners "[t]o use the Fourteenth Amendment as a sword against such State power would stultify that Amendment," *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring), and turn the Amendment's original purpose on its head. This Court has never credited Petitioners' ahistorical argument in the school integration context. Instead, this Court has wisely chosen a path consistent with the original goals of the Fourteenth Amendment. Rather than treating segregation and integration as constitutional equivalents, this Court has preserved the right of states and localities to pursue integration through voluntary race-conscious means. *See, e.g., Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 459 (1982) (concluding that Seattle's "elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State").

Other *amici* have documented the Court's unbroken practice of upholding the use of race in voluntary school integration cases. *See* Brief for NAACP Legal Defense and Educational Fund as *Amicus Curiae* Supporting Respondents, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908; *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (filed Oct. 10, 2006). We add only that the Court's longstanding approach of distinguishing between integration and segregation in these and other cases is consistent with the original purpose of the Reconstruction Amendments. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 595-96 (1983) (holding that a government agency can deny tax-exempt status to an organization engaged in private segregation even though such *private* action—like de facto segregation—is not constitutionally prohibited); *see also Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003)

(upholding, in the redistricting context, state and local race-conscious efforts to build what Congressman John Lewis called "a truly interracial democracy . . . . the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens").

Louisville and Seattle's plans are clearly consistent with the Reconstruction Amendments' goals of incorporating all citizens into the civic, economic, and political life of the nation. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J., concurring) ("[W]ithout education one can hardly exercise the civic, political and personal freedoms conferred by the Fourteenth Amendment"). These plans seek to achieve these goals through limited race-conscious means that fall squarely within the category of integration measures that the Reconstruction Congresses themselves embraced—and that this Court has consistently upheld. Therefore, if the Court chooses to strike down voluntary race-conscious school integration plans as inherently suspect, it should not do so in the name of the original purpose of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, as well as arguments advanced by Respondents, *amici curiae* respectfully urge the Court to affirm the decisions below.

Respectfully submitted,

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APPENDIX

APPENDIX

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PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of JOSHUA RYAN McDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF OF *AMICI CURIAE* HOUSING SCHOLARS AND RESEARCH & ADVOCACY ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici include research and advocacy organizations, law professors, sociologists, historians and other scholars[1] who have devoted significant time and attention to studying the causes and harms of residential segregation.[2] They are united in their belief that school districts should be allowed to implement voluntary school desegregation programs given the history and persistence of residential segregation in the United States.

The organizational *amici* include: the **Poverty & Race Research Action Council**, a nonprofit civil rights policy organization that supports research and advocacy to address the mechanisms of structural inequality in our society; the **Institute on Race & Poverty** at the University of Minnesota, a research and advocacy organization dedicated to improving access to opportunity and maintaining regional stability through investigation of policies and practices that disproportionately affect people of color and the disadvantaged; the **National Fair Housing Alliance**, an organization dedicated to eliminating housing discrimination and ensuring equal housing opportunity for all people; the **National Low Income Housing Coalition**, an advocacy and research organization dedicated to ending America's affordable housing crisis; the **National Housing Law Project**, a law and advocacy center that works to advance the housing rights of the poor; the **Gamaliel Foundation**, an organizing network of 60 affiliates that represents more than a million multi-faith, multi-racial church-going people who work on social justice campaigns;

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[1] The parties' blanket letters of consent to the filing of all *amicus* briefs have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no person other than *amici* or counsel contributed money or services to the preparation and submission of this brief.

[2] Non-organizational *amici*, listed in the Appendix, sign this brief in their individual capacities. Academic affiliations are provided for identification purposes only.

the **Center for Cities and Schools** at the University of California, Berkeley, a research organization committed to bridging the fields of education and urban policy to create equitable, diverse, and livable cities and schools; the **Inclusive Communities Project**, a Dallas-based not-for-profit organization that works for the creation and maintenance of thriving racially and economically inclusive communities; the **Kentucky Commission on Human Rights**, an anti-discrimination enforcement and research organization that was formed in 1960 to enforce the Kentucky Civil Rights Act; and the **Metropolitan Housing Coalition**, a Louisville-based non-profit organization representing over 170 member organizations and more than 250 individual members that advocates for sound affordable housing policies in Louisville and nationwide.

SUMMARY OF ARGUMENT

Since at least the 1970s, this Court has recognized the reciprocal relationship between residential integration and school integration. Subsequent social science has confirmed this connection. Given the vital importance of meaningful racial integration for our democratic society, it is necessary to consider the links between schools and housing to assess fully a school district's compelling interest in promoting school integration. Such an examination reveals that housing markets distorted by private discrimination and government policy are incapable of creating residential integration that would make school integration measures unnecessary, and that school integration promotes residential integration, benefiting all Americans.

Contrary to the assertion of Petitioner Parents Involved in Community Schools, today's housing patterns are not simply products of private, free choice. Segregated residential patterns result from an array of policies and actions by public and private actors. Beginning with historical state-sponsored discrimination, such as *de jure* racial segregation in public housing, discriminatory public housing site selection and tenant assignment policies, and

purposeful exclusion of African-Americans from federal mortgage lending programs, government at all levels has indelibly formed the landscape of America's metropolitan areas.

In addition, discriminatory practices, both public and private, continue to mar the housing market. Real estate agents, for example, frequently steer people to different neighborhoods based on their race. Mortgage lending and insurance redlining contribute to residential segregation because lenders and insurers offer different terms and policies to minority homebuyers and deny their applications at disproportionately high rates. Quite simply, today's residential patterns are not the product of unfettered choice.

As a result, schools will not become integrated without affirmative steps by school districts to promote integration. Indeed, for school districts to do nothing when faced with today's levels of residential segregation is effectively to choose school segregation.

School districts also have a compelling interest in undertaking voluntary efforts to integrate their schools due to the strong, positive impact school integration has on residential integration in both the short and long term. Social science research demonstrates that school districts that employ robust desegregation programs also enjoy *stable* residential integration. An integrated school system opens entire districts to parents who might otherwise choose to live in a neighborhood based largely on the racial composition of the schools their children will attend. In addition, graduates of integrated schools are more likely to live in integrated neighborhoods.

The interest of school districts like Seattle's and Louisville's (the "Districts") in ensuring that their public schools remain integrated can only be understood with reference to the substantial barriers to residential integration. At a time when Americans are more willing than ever before to share their neighborhoods, school districts have a

compelling interest in guaranteeing that students of all racial and ethnic backgrounds can share classrooms as well.

ARGUMENT

The compelling interests identified by the Districts in support of their school desegregation programs appear even more compelling in light of the relationship between integrated schools and integrated housing. More than thirty years ago, this Court described the "profound reciprocal effect" of student assignment plans on the racial composition of residential neighborhoods within a metropolitan area. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 202 (1973).

Understanding the relationship between housing and schools is particularly important in the context of continuing residential segregation patterns within the United States. According to the 2000 Census, the American population was 69.1% White, 12.5% Latino, 12.1% African-American, 3.6% Asian, 0.7% American Indian or Alaska Native, and 1.9% other or two or more races. Elizabeth M. Grieco & Rachel C. Cassidy, U.S. Census Bureau, *Overview of Race and Hispanic Origin: Census 2000 Brief* 10 (2001). However, "[t]he average white person in metropolitan America lives in a neighborhood that is 80% white and only 7% black." John Logan, Lewis Mumford Ctr. for Comparative Urb. & Reg'l Res., *Ethnic Diversity Grows, Neighborhood Integration Lags Behind* 1 (2001). In stark contrast, "[a] typical black individual lives in a neighborhood that is only 33% white and as much as 51% black," *id.*, making African-Americans the most residentially segregated group in the United States, John Iceland et al., U.S. Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980-2000*, at 95 (2002). For the African-American population of each neighborhood to equal the African-American population of its metropolitan area, 64% of African-Americans would need to move – a decrease of only 4% since 1990. *Id.* at 8, 60. Segregation actually increased or remained the same for lower-socioeconomic status African-Americans between 1990 and 2000. John Iceland et al., U.S. Census Bureau, *Class*

Differences in African American Residential Patterns in U.S. Metropolitan Areas: 1990-2000, at 8, 16 (2003).

Levels of school segregation are even more severe for low income African-Americans. In 2002-2003, only 28% of all White public school students (K-12) attended high-poverty schools (defined as schools where 40% or more of the students were eligible for free and reduced lunches). *See* Gary Orfield & Chungmei Lee, Civil Rights Project, *Why Segregation Matters: Poverty and Educational Inequality* 19 tbl.7 (2005). In contrast, 71% of all Black public school students and 73% of all Latino public school students attended high-poverty schools during the same period. *See id.*

Segregation remains significantly correlated with race, not simply socioeconomic status. For Blacks and Latinos, relatively high incomes are no protection against segregation: "Disparities between neighborhoods for blacks and Hispanics with incomes above $60,000 are almost as large as the overall disparities, and they increased more substantially in the [1990s]." John R. Logan, Lewis Mumford Ctr. for Comparative Urb. & Reg'l Res., *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America* 2 (2001). Plainly, significant barriers to integration remain.

At the same time, the United States is rapidly becoming more racially and ethnically diverse than ever before. The group among whom this shift is most evident is children, as America's youth are more racially and ethnically diverse than its adult population. William H. Frey, Brookings Inst., *Diversity Spreads Out: Metropolitan Shifts in Hispanic, Asian and Black Populations Since 2000*, at 1 (2006). This shift is particularly apparent "[i]n nearly one-third of the nation's largest metropolitan areas, [where] at least half of all people under age 15 are racial and ethnic minorities." *Id.* at 17. In combination with growing "exurban" communities at the periphery of metropolitan areas caused by mainly White migration, *id.* at 13-14, the profile of metropolitan areas is changing rapidly.

The racial housing patterns of both Seattle and Louisville reflect these trends. As noted by the Ninth Circuit, the "[Seattle School] District 'established that housing patterns in Seattle continue to be racially concentrated,' and would result in racially concentrated or isolated schools if school assignments were based solely on a student's neighborhood or proximity to a particular high school." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1177 (9th Cir. 2005) (en banc). Like much of the United States, Seattle has an ugly history of racial exclusion and discrimination in its housing market. Through the use of restrictive covenants and other discriminatory tactics, 69% of African-Americans occupied just ten census tracts within single Seattle neighborhood by 1950. Kate Davis, Housing Segregation in Seattle 12 (2005) (unpublished M.P.A. thesis, University of Washington) (on file with counsel). The concentration of African-Americans increased over the next decade, with 78% of African-Americans in the same area by 1960. *Id.* In 1964, a fair housing ballot initiative was defeated by a 2 to 1 margin. *Id.* at 14. In more recent years, Seattle has become more integrated overall, but the continuing effects of these historical patterns exert a powerful effect, with residential segregation particularly pronounced in the city's southeastern neighborhoods. *See id.* at 24, 33.

Louisville also has a long history of racial discrimination and residential segregation. This Court first confronted residential segregation in Louisville when it struck down a zoning ordinance forbidding the sale of property to African-Americans on majority White blocks. *See Buchanan v. Warley*, 245 U.S. 60, 81-82 (1917). Several decades later, Louisville's African-American community rapidly concentrated. While just 28% of the African-American population lived in 30 of Jefferson County's 149 census tracts in 1960, 82% lived in those same 30 tracts by 1970. Comm'n on Human Rights, Commonwealth of Ky., *More Housing Segregation Than Ever . . . In Louisville and Jefferson County* 4 (1973). In addition, the

number of census tracts that were more than 90% African-American ballooned from six to 15 in the 1960s. *Id.* This increased segregation is attributable to a number of forces, including the county housing authority's failure to follow through on affordable housing proposals outside Louisville, and private discriminatory acts such as racial steering and the refusal to sell homes to African-Americans in suburban areas. *Id.* at 7-10. Residential segregation is still a serious concern in Louisville today, as African-Americans constitute less than 19% of the metropolitan area's population, but more than 50% of the population in five council districts and less than 5% in five other districts. Metro. Hous. Coal., *State of Metropolitan Housing Report* 9 (2005). Moreover, African-American children in metropolitan Louisville are twice as likely as other children to live in poverty. *Id.*

Given the reciprocal effect of housing patterns on school composition, the Districts' interests in reducing school segregation are compelling for two independent reasons. *First*, school segregation is practically inseparable from the many causes of housing segregation, as recognized in *Keyes*. And, it is clear that even decades after the eradication of Jim Crow laws, residential segregation persists and is not simply the product of private free choice. Rather, the historical and contemporary practices of state and private actors, such as racial steering and mortgage lending discrimination, directly contribute to the persistent segregation of America's neighborhoods. When a school district acquiesces to segregated residential patterns in drawing school attendance zones and setting student assignment policies it is in a very real sense affirmatively *choosing* segregation. *Second*, extensive social science research demonstrates that school integration programs support housing integration in both the short and long term. Parents are less likely to move when integration programs help to ensure racially integrated schools, and students who attend racially integrated schools are more likely to live in integrated neighborhoods as adults.

I. SCHOOL DISTRICTS HAVE A COMPELLING INTEREST IN EMPLOYING RACE-CONSCIOUS INTEGRATION PROGRAMS BECAUSE - ABSENT SUCH PROGRAMS - SCHOOL INTEGRATION CANNOT OCCUR SO LONG AS RESIDENTIAL SEGREGATION PERSISTS.

Because of the undeniable link between school integration and housing integration, school officials who combat racial segregation in their schools actually address two compelling interests: defeating school segregation and promoting residential integration.

As this Court recognized long ago, school districts are constitutionally permitted to recognize school segregation as an educational problem and take steps to remedy it. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."); *see also N.C. Bd. of Educ. v. Swann*, 402 U.S. 43, 45, 46 (1971) (striking down a state statute that "flatly prohibit[ed] assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools" because it would "render illusory the promise of *Brown v. Board of Education*, 347 U.S. 483 (1954)").

This Court best explained the strong connection between school and residential segregation in *Keyes*:

> [I]t is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designated "feeder" schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white. Similarly, the practice of building a school . . . to a certain size and in a certain location, "with conscious knowledge that it would be a segregated school," has a substantial

> reciprocal effect on the racial composition of nearby schools. So also the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, *together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.*

400 U.S. at 201-02 (emphasis added). As *Keyes* explains, racial segregation patterns in schools cannot be understood without reference to racial residential patterns. For a school district to take no action in response to coextensive school segregation and residential segregation would be to acquiesce to both – contrary to strong national policies regarding school desegregation, fair housing, and residential integration.

While Petitioner Parents Involved in Community Schools suggests that the locations of families' homes are purely "voluntary choices," and that residential segregation is a result of "many families choos[ing] to live near people of similar racial and ethnic heritage," Pet'rs Br. 38, that claim ignores the role of government policy and private discrimination, and also grossly oversimplifies the process by which a family selects a home. Three decades after *Milliken v. Bradley*, 418 U.S. 717 (1974), we have learned a great deal about the mechanisms of metropolitan housing segregation. No longer, as Justice Stewart noted in discussing the evidentiary record in Detroit, are the factors affecting housing segregation "unknown and perhaps unknowable," *id.* at 756 n.2 (Stewart, J., concurring). Both Whites and people of color, particularly African-Americans, face a housing market that is highly distorted.

America's extensive history of state-sponsored discrimination has set the stage for the rampant housing discrimination that helps to perpetuate residential segregation. Even today, minorities of all income levels are highly likely to suffer housing discrimination, particularly in the form of racial or ethnic "steering," an illegal practice which has actually increased since 1989.

Within this context, the racial composition of schools results from much more than the technical drawing of student attendance zone boundaries, and meaningful integration is unlikely to occur without the efforts of school districts like those of Seattle and Louisville. Critically, those efforts accord with the Fair Housing Act's dual purposes of promoting integration and prohibiting discrimination.

A. Fair housing and the promotion of integration are national policy.

Congress recognized the importance of both residential integration and the elimination of housing discrimination in the Fair Housing Act of 1968 (the "Act"), which established that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.[3] As Senator Javits described the Act, it was intended to promote integration, thereby benefiting not just minorities, but "the whole community." 114 Cong. Rec. 2706 (1968). In addition, as this Court has noted, Senator Mondale explained that a purpose of the Act is to replace ghettos "by truly integrated and balanced living patterns." *Trafficante v. Met. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 Cong. Rec. 3422 (1968)). This

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[3] Congress passed the Act shortly after the release of the Report of the National Advisory Commission on Civil Disorders (commonly known as the Kerner Commission Report), which found that "most Negro families have remained within predominantly Negro neighborhoods, primarily because they have been effectively excluded from white residential areas," and "pointed out the connection between racial segregation in housing and in schools." Robert G. Schwemm, *Housing Discrimination Law and Litigation* § 5:2 (2006).

Court has also recognized that, through the Act, Congress made "a strong national commitment to promote integrated housing." *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 95 (1977).

The compelling national interest in residential integration expressed by Congress in both the text and legislative history of section 3601 of the Act is reinforced by the express provisions of the Act that require HUD, all agencies of the federal government, and, by extension, their state and local grantees, to carry out their housing-related programs "in a manner affirmatively to further" purposes and policies of the Act, *i.e.*, fair housing and integration. *See* 42 U.S.C. § 3608(d), (e)(5); Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 14, 1994). Because the 1964 Civil Rights Act's prohibition on discrimination in public housing had been unsuccessful in creating residential integration, Congress adopted section 3608 to force the federal government to work more aggressively to end segregation. Schwemm, *supra*, at § 21:1. As Senator Brooke explained, "[t]oday's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph." *Id.* (quoting 114 Cong. Rec. 2281 (1968)). As a result, Congress realized that giving HUD the freedom to make decisions with the caveat that they not be discriminatory was insufficient, and instead imposed upon HUD and other federal agencies an affirmative duty to make decisions that further integration. *Id.*

Section 3608 creates presumptions against locating housing projects in segregated neighborhoods, *see, e.g.*, *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970), and providing financial support for local housing authorities that practice segregation, *e.g.*, *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971). Further, HUD is not allowed to make housing selection decisions unless it considers the impact of the project on the area's racial concentration. *Shannon*, 436 F.2d at 821. A key part of that analysis is consideration of the racial composition of local schools. *Id.* at 822. In addition,

HUD's lack of aggressiveness in influencing local governments to promote fair housing is remediable under § 3608. *E.g., NAACP v. HUD*, 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, J.) (explaining that the Act's broad goal "suggests an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases").

This clear national mandate for the promotion of fair housing and residential integration provides a compelling interest in support of school integration policies.

B. Historical practices by state and private actors have skewed the housing market to create significant residential segregation, hindering the emergence of integrated schools.

Today's highly racially segregated residential patterns were not always in place. Before 1900, nothing resembling the modern racially identifiable ghetto existed in northern cities. Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 20 (1993). Legally enforced segregation outside of the South was a product of the twentieth century and gradually developed as a result of "violence, collective antiblack action, racially restrictive covenants, and discriminatory real estate practices." *Id.* at 42. In addition, state action that systematically limited development of minority neighborhoods and excluded minorities from White neighborhoods promoted the creation of the racially isolated American ghetto.

1. Development of the American suburb.

Historians have long recognized that the federal government transformed the American housing market by making it accessible to people outside the upper middle and upper classes – but Whites only – through the Federal Housing Administration's ("FHA") mortgage insurance

programs. *See* Kenneth T. Jackson, *Crabgrass Frontier* 190-218 (1985); Ira Katznelson, *When Affirmative Action Was White* 115-41 (2005). The FHA, in combination with New Deal-era selective credit programs, had a huge impact on the American housing market, functioning to insure private lenders against loss, standardize appraisal practices, and popularize the use of long-term, amortized mortgages. *See* Jackson, *supra*, at 204; David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America, in The New Suburban History* 11, 16 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006). Unfortunately, these programs were also explicitly discriminatory, as they denied benefits in accordance with race-based rules. *See* Jackson, *supra*, at 207-09. Many of those rules were memorialized in the FHA's Underwriting Manual, which described the "risks posed by the commingling of 'inharmonious racial groups.'" Arnold R. Hirsch, *"Containment" on the Home Front: Race and Federal Housing Policy from the New Deal to the Cold War*, 26 J. Urb. Hist. 158, 162 (2000).

In addition, African-Americans were systematically excluded from GI Bill loan programs, administered through the Veterans Administration ("VA"), that insured mortgages for five million homes throughout the United States because banks refused to approve loans to African-Americans. Katznelson, *supra*, at 115, 139-40. Both the VA and FHA "endorsed the use of race-restrictive covenants until 1950," and refused to underwrite loans that would "introduc[e] 'incompatible' racial groups into white residential enclaves." Freund, *supra*, at 16. Financing almost half of all suburban homes in the 1950s and 1960s, the FHA and VA facilitated the development of the American suburb through racially discriminatory programs. Jackson, *supra*, at 215.

2. Urban renewal and public housing.

The federal government also actively promoted segregation through its design of interstate highways that physically separated minority and White communities,

elimination of "blighted" largely African-American communities, and facilitation of White flight to new suburban areas. *See* Sheryll Cashin, *The Failures of Integration: How Race and Class Are Undermining the American Dream* 103 (2004); Raymond A. Mohl, *Planned Destruction: The Interstates and Central City Housing, in From Tenements to the Taylor Homes: In Search of an Urban Housing Policy in Twentieth-Century America* 226, 226-45 (John F. Bauman et al. eds., 2000). In addition, federally subsidized urban renewal programs destroyed housing and forced mainly Black residents to search for homes in central cities and public housing projects that were located in racially isolated and poor areas. *See* Cashin, *supra*, at 103; Massey & Denton, *supra*, at 56.

Public housing has also contributed in no small part to the entrenchment of concentrated poverty and residential segregation throughout the country. Many cities established separate public housing for African-American and White residents. *See, e.g., NAACP v. HUD*, 817 F.2d 149 (1st Cir. 1987) (Boston); *Thompson v. HUD*, 348 F. Supp. 2d 398, 406 (D. Md. 2005) (Baltimore); *Walker v. HUD*, 734 F. Supp. 1289, 1294, 1296 (N.D. Tex. 1989) (Dallas); *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 909 (N.D. Ill. 1969) (Chicago). The 1950s through the 1970s saw the development of large, densely populated "projects," often consisting of high-rise buildings located in poor, segregated communities. Rod Solomon, Brookings Inst., *Public Housing Reform and Voucher Success: Progress and Challenges* 2 (2005). Housing authorities often yielded to political pressure to keep public housing projects out of White neighborhoods. *See Walker*, 734 F. Supp. at 1294; *Gautreaux*, 296 F. Supp. at 913-14. As housing projects were erected, the demographics of cities and public housing changed, with the result of fewer Whites and more African-Americans living in public housing. *See, e.g., Thompson*, 348 F. Supp. 2d at 406; *Walker*, 734 F. Supp. at 1296; *Gautreaux*, 296 F. Supp. at 909. The high proportions of African-Americans in public housing, and the persistence of

residential segregation in other neighborhoods, have perpetuated segregation in public housing.

Without question, the federal government and individual housing authorities played an active and deliberate role in concentrating poverty in the racially segregated public housing they created. For example, the "primary purpose of [Dallas's] public housing program was to prevent blacks from moving into white areas of th[e] city," and the city deliberately took actions to create and maintain segregation through its public housing. *Walker*, 734 F. Supp. at 1293. Chicago public housing officials admitted to a policy of racial segregation in Chicago housing projects. *Gautreaux*, 296 F. Supp. at 909. HUD, too, has admitted to constructing public housing in already segregated neighborhoods, and to being "part of the problem" and "complicit in creating isolated, segregated, large-scale public housing." *Thompson*, 348 F. Supp. 2d at 467. The effects of those policies are apparent today, as the majority of African-American public housing residents live in segregated projects in poor, racially isolated neighborhoods. *See* John Goering et al., *Recent Research on Racial Segregation and Poverty Concentration in Public Housing in the United States*, 32 Urb. Aff. Rev. 723, 736 (1997).

3. Low Income Housing Tax Credit and other government practices.

Government programs today continue to contribute to the residential concentration of poor people of color, albeit without the explicitly discriminatory design of earlier programs. The implementation of the Low Income Housing Tax Credit program ("LIHTC"), 26 U.S.C. § 42, is one key example. The LIHTC has been the "principal mechanism for supporting the production of new and rehabilitated rental housing for low-income households" since it began in 1987. Carissa Climaco et al., Abt Assocs., *Updating the Low-Income Housing Tax Credit (LIHTC) Database Projects Placed in Service Through 2003*, at 2 (2006). It provides federal tax credits to investors who acquire, rehabilitate, or construct affordable

rental property targeted to low-income tenants. *Id.* at 1. Since 1999, the LIHTC has supported the development of 100,000 units per year. *Id.* at ii. Although adopted with the laudable goal of creating more affordable housing, the LIHTC has contributed to the concentration of low-income households in poor and racially isolated neighborhoods in America's central cities. *See* Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 Vand. L. Rev. 1747, 1781 (2005). A recent report found that "very few states are placing more than half their [metropolitan area] LIHTC family units . . . in census tracts with lower minority population rates than the metropolitan area average." Jill Khadduri et al., Abt Assocs., *Are States Using the Low Income Housing Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* 17 (2006). In both the Seattle and Louisville metropolitan areas, with minority population shares of approximately 24% and 18%, respectively, more than 68% of LIHTC family units were located in census tracts with greater than average minority population shares between 1995 and 2003. *See id.* at 41, 43. Accordingly, the LIHTC is not being implemented with the goal "to affirmatively further" fair housing, as the Fair Housing Act mandates. *See* Florence Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit and the Civil Rights Laws*, 52 U. Miami L. Rev. 1011 (1998).

In addition, the Section 8 tenant-based assistance program – with more than 1.4 million vouchers nationwide[4] – perpetuates segregation through its support of housing in racially identifiable, high poverty neighborhoods. Neighborhoods with affordable housing but disproportionately low numbers of Section 8 participants are disproportionately White and more often located in the

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[4] Deborah J. Devine et al., U.S. Dep't of Hous. & Urban Dev., *Housing Choice Voucher Location Patterns: Implications for Participants and Neighborhood Welfare* 90, 120 n.65 (2003).

suburbs, while neighborhoods with proportionate or disproportionately high numbers of Section 8 participants are disproportionately African-American and have higher poverty levels. Devine et al., *supra*, at 13-14, 65.

In principle, Section 8 participants have many housing options, as they locate their own apartments and may use their vouchers in jurisdictions across the country. 42 U.S.C. § 1437f. In practice, however, voucher holders frequently encounter difficulty moving to more affluent neighborhoods, where landlords often refuse to rent to them. *See, e.g.*, Susan J. Popkin & Mary K. Cunningham, Urban Inst., *CHAC Section 8 Program: Barrier to Successful Leasing Up* 4-5 (1999); *Keeping the Promise: Preserving and Enhancing Housing Mobility in the Section 8 Housing Choice Research Program* (Philip Tegeler et al. eds., 2005). Even though discrimination against Section 8 recipients is illegal in many cities, in most states Section 8 discrimination is not regulated, and a study of Chicago Section 8 voucher holders' experiences found such discrimination "to be disturbingly common." *Id.* at 23.[5]

Zoning also impacts almost every American town and neighborhood. Unfortunately, many zoning restrictions, allowing local governments to "indirectly control who may live within their boundaries," go hand in hand with the exclusion of people of color.[6] Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. Am. Planning Ass'n 125, 140 (2000). There is a "long-known connection between low-density-only zoning and racial exclusion," *id.* at

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[5] Other, smaller federal programs also have a tendency to perpetuate housing segregation by steering assisted housing to racially isolated areas. *See* Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs, in The Geography of Opportunity: Race and Housing Choice in Metropolitan America* 197, 197-216 (Xavier de Souza Briggs ed., 2005) (analyzing segregation tendencies built into federal LIHTC, HOME, CRA, HOPE VI, and Project Based Section 8 programs).

[6] Like other governmental practices influencing housing patterns, zoning has a racially exclusionary history. *See Buchanan*, 245 U.S. at 81-82 (striking down race-based Louisville zoning ordinance).

135, even though the Fair Housing Act has long prohibited zoning rules that have the effect of discriminating on the basis of race. *See* 42 U.S.C. § 3604(a); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). Indeed, low-density zoning significantly limits the development of rental housing and therefore the number of Black and Latino residents who may move into municipalities and counties. Pendall, *supra*, at 126. Closely related to the delegation of exclusionary land use powers to local governments is the fragmentation of local control over assisted housing programs, which also has a tendency to promote segregation. *See* David Rusk, *Cities Without Suburbs* 3, 121 (1993); Peter D. Salins, *Metropolitan Areas: Cities, Suburbs, and the Ties That Bind, in Interwoven Destinies* (Henry Cisneros ed., 1993); Philip Tegeler, *Housing Segregation and Local Discretion*, 3 J.L. & Pol'y 209 (1994).

C. School integration is unlikely to occur naturally because of private discriminatory practices that continue to skew the housing market.

Aside from the continuing governmental actions that promote segregation, a multitude of private discriminatory practices continue to perpetuate residential segregation and, consequently, school segregation.

1. Steering and other forms of housing discrimination.

As has been well-documented by numerous HUD and private studies, African-Americans and Latinos frequently encounter discrimination when searching for housing at all stages: upon entering a realtor's office they receive inferior service; they are told fewer homes are available; and they are shown fewer homes than Whites are. John Yinger, *Closed Doors, Opportunities Lost* 19-49 (1995).

HUD's Housing Discrimination Study 2000 ("HDS 2000"), the most recent comprehensive study of housing discrimination in the United States, indicates that housing

discrimination remains a serious problem, with some illegal practices actually on the rise. *See* Margery Austin Turner et al., Urban Inst., *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* (2002).

The most universal discriminatory practice is rampant "steering" by real estate agents. This Court has defined "steering" as "directing prospective home buyers interested in equivalent properties to different areas according to their race." *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 94 (1979). Of course, steering violates the Fair Housing Act. *See* 42 U.S.C. § 3604(a); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 370 (1982); *Gladstone*, 441 U.S. at 115 n. 32; Schwemm, *supra*, at § 13:5. As a result of steering, minority homebuyers are directed to predominately minority neighborhoods, and White homebuyers are directed to predominately White neighborhoods, thus reinforcing segregation. Yinger, *supra*, at 51-61.

Remarkably, HDS 2000 indicates that steering remains a stubbornly persistent practice – evidenced in 12% to 15% of tests – that has increased since 1989. *See* Turner et al., *HDS 2000 Phase I, supra*, at 6-16.[7] Overall, "[w]hite homebuyers were significantly more likely than comparable blacks to be recommended and shown homes in more predominantly white neighborhoods." *See id.* at 3-11.

Some examples of steering by real estate agents gathered during HDS 2000 include the following statements:

- "[Area] has a questionable ethnic mix that you might not like. I could probably lose my license for saying this!"

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[7] Recent studies indicate that steering continues, and often with explicit reference to a neighborhood's schools. *See, e.g.*, Nat'l Fair Hous. Alliance, *Housing Segregation Background Report: Long Island, New York* (June 21, 2006); Nat'l Fair Hous. Alliance, *Housing Segregation Background Report: Westchester, New York* (Mar. 23, 2006) (finding that real estate agents disparaged a neighborhood and its schools to White testers, but showed and marketed homes in the same neighborhood to Latinos).

- "[Area] is different from here; it's multicultural . . . . I'm not allowed to steer you, but there are some areas that you wouldn't want to live in."
- "I would not send you to this area. I'm not supposed to say this but I'm probably old enough to be your father. [When tester asked why, agent said tentatively] Because it's primarily an ethnic neighborhood and I wouldn't send you there."

See George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. Am. Plan. Ass'n 251, 262 (2005). Likely causes of steering include both real estate broker and White customer prejudice.[8] *See* Bo Zhao et al., *Why Do Real Estate Brokers Continue to Discriminate? Evidence from the 2000 Housing Discrimination Study*, 59 J. Urb. Econ. 394 (2006).

In addition, traditional forms of discrimination also play a role in the housing market. HDS 2000 indicated that in home sales markets, Whites consistently received favored treatment over Blacks 17% of the time, and over Latinos approximately 20% of the time. Turner et al., *HDS 2000 Phase I, supra*, at 4-7, 4-12. Non-racial explanations for differential treatment were considered and found to be unlikely. *Id.* at 5-1-5-16.

Indeed, housing discrimination appears to be so pervasive that people are reluctant to report it. A recent HUD-sponsored study found that over 80% of people who thought that they were the victims of housing discrimination did nothing about it. Martin D. Abravanel & Mary K. Cunningham, Urban Inst., *How Much Do We Know? Public*

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[8] Similar to steering, real estate agents respond differently to the expressed interests of White and minority homebuyers. For example, "agents typically accept the initial request as an accurate portrayal of a White's preferences but adjust the initial request made by a Black to conform to the real estate agents' preconceptions." Jan Ondich et al., *Now You See It, Now You Don't: Why Do Real Estate Agents Withhold Available Houses from Black Customers?*, 85 Rev. of Econ. & Stat. 854, 872 (2003).

Awareness of the Nation's Fair Housing Laws 25 (2002). "Almost two of every five people in this situation believed there was no point in responding, that it would not have solved the problem, or in some instances, that it could have made the problem worse." *Id.* at 27. Of the few who took action, about one-third simply complained to the perpetrator. *Id.* at 28. Unfortunately, these responses "suggest[] a much greater incidence of perceived housing discrimination among the general public than a tally of complaints to government agencies, fair housing groups, or the legal system would indicate." *Id.*

2. Mortgage lending and insurance discrimination.

Similarly, discrimination against people of color by mortgage lending institutions and insurance companies is also pervasive. Private lenders continue to deny mortgages to potential minority homebuyers at disproportionate rates. Stephen Ross & John Yinger, *The Color of Credit* 5-8 (2003). In addition, insurance companies often refuse to offer policies in minority neighborhoods. These practices effectively deny housing to many minority families.

A number of sources confirm that mortgage lending discrimination continues to be a significant problem. As some scholars have described:

> A hint about the potential power of mortgage discrimination is provided by the long-standing gaps in homeownership rates between black and white households and between Hispanic and white households. In 2001, the homeownership rate for non-Hispanic whites . . . was 26.6 percentage points higher than the homeownership rate for blacks . . . and 27.0 points higher than the homeownership rate for Hispanics . . . .

Id. at 2. Similarly, a recent HUD study that used paired testers posing as first-time homebuyers indicated that African-American and Latino homebuyers faced "a

significant risk of receiving less favorable treatment than comparable whites," when visiting mainstream mortgage lending institutions to make pre-application inquiries. Margery Austin Turner et al., Urban Inst., *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions* iii (2002). Among the most serious forms of discrimination discerned by the study were differential estimates of home price and total loan amount. *Id.* at 37. Obviously, these differences determine which neighborhoods are available to potential homebuyers.

Moreover, some studies have indicated that large differences in mortgage rejection rates come about because "[l]oan officers [ar]e far more likely to overlook flaws in the credit scores of white applicants or to arrange creative financing for them than they [ar]e in the case of black applicants." Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth* 139 (1995). In addition, the types of mortgages made available to potential homebuyers vary by race, with minorities more likely to receive higher cost loans than Whites.[9] Overall, minority neighborhoods receive a high percentage of subprime refinance loans as compared to White neighborhoods. *See id.*; William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending, in The Geography of Opportunity, supra,* at 101, 101-23.

All of these factors together likely contribute to the disproportionate declinations of mortgage applications submitted by minorities in both Seattle and Louisville. In Seattle, 21% of completed mortgage applications submitted by African-Americans, and 19% submitted by Latinos (of all

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[9] Robert B. Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, Fed. Res. Bull. A123, A156 (2006) (noting higher-priced lending is most common in census tracts with, among other characteristics, high percentages of minorities); *id.* at A159 (noting White-African-American gap of ten percentage points for conventional home-purchase loans and 6.2 percentage points for refinancings after controlling for other variables).

races), are denied, as compared to only 11% for Whites. *See* Fed. Fin. Insts. Examination Council, *Home Mortgage Disclosure Act: Central Depository Database, available at* http://www.ffiec.gov/CentralDepository/default.aspx.[10] Completed mortgage applications in Louisville are approved with a similar gap, as the denial rates are 26% for African-Americans, and 21% for Latinos (of all races), but only 15% for Whites. *See id.*[11]

The problem of limited access to mortgages for minorities is compounded by limited access to insurance, which is critical to the home purchasing process: "No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable." *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992). Unfortunately, this is yet another area of the housing market plagued by racial discrimination. *See* Gregory D. Squires, *Racial Profiling, Insurance Style: Insurance Redlining and the Uneven Development of Metropolitan Areas*, 25 J. Urb. Aff. 391 (2003). Some studies indicate that minority neighborhoods are excluded from the best insurance coverage. *See* Shanna L. Smith & Cathy Cloud, *Documenting Discrimination by Homeowners Insurance Companies Through Testing, in Insurance Redlining* 97, 97-117 (Gregory D. Squires ed., 1997).

There is no doubt that these practices and policies continue to skew the housing market, making the achievement of meaningful residential integration extraordinarily difficult. Accordingly, as long as housing is not fair to all Americans and residential integration stymied,

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[10] Aggregate Table 4-2: Disposition of Applications for Conventional Home-Purchase Loans, 1 to 4 Family and Manufactured Home Dwellings, By Race, Ethnicity, Gender and Income of Applicant, 2004. MSA/MD: 42644 - Seattle-Bellevue-Everett, WA.

[11] Aggregate Table 4-2: Disposition of Applications for Conventional Home-Purchase Loans, 1 to 4 Family and Manufactured Home Dwellings, By Race, Ethnicity, Gender and Income of Applicant, 2004. MSA/MD: 31140 - Louisville, KY-IN.

there can be no reasonable expectation that school integration will naturally follow.

D. Americans are increasingly willing to live in integrated communities.

Despite the glacial progress toward residential integration, social science research indicates that over the last 25 years, American preferences regarding neighborhood racial composition have shifted positively toward increased tolerance for sharing neighborhoods with other racial groups. Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes, in The Geography of Opportunity, supra,* at 45, 61-63. In particular, Whites exhibit a willingness to live among more than a token number of Blacks and members of other minority groups, and Blacks want to live in communities with non-trivial numbers of both Black and non-Black populations. Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation,* 29 Ann. Rev. Soc. 167, 182-85 (2003). These evolving preferences are evidenced by the fact that the number of exclusively White neighborhoods dropped significantly during the 1990s. Ingrid Gould Ellen, *Sharing America's Neighborhoods: The Prospects for Stable Racial Integration* 21-23 (2000).

The prospects for integration are not, therefore, a simple matter of whether people of different races have compatible preferences. Preferences evolve and change over time, especially when informed by experience, making meaningful residential integration both a valuable and achievable goal. *See* Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society, in In Pursuit of a Dream Deferred, supra,* at 121, 136. Moreover, social science research evidences diverse and changing attitudes about integration around the United States. In *Freeman v. Pitts,* 503 U.S. 467 (1992), this Court cited evidence presented to the District Court "that racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80% white and 20% black, while blacks prefer a 50-50 mix." *Id.* at 495. The study

relied upon was, however, limited to a 1976 study about racial residential preferences in the Detroit area. *See* Reynolds Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 Hous. Pol'y Debate 763, 771 (1997). In a multi-city study following *Freeman*, the lead author of the 1976 study and his co-authors concluded – contrary to the Court's analysis – that "it is not appropriate to generalize to the entire United States from the 1976 and 1992 Detroit Area Studies." *Id.* at 793. In addition, they concluded that the overlapping racial residential preferences of Whites and Blacks indicate that preferences change over time, and that increasing residential integration is possible. *Id.* at 794-96.

Rather than a utopian dream, meaningful residential integration is an attainable and desirable goal, as Americans of all backgrounds have expressed a greater willingness to share their neighborhoods with people of different races. But current public policies and private actions continue to make this goal elusive.

****

"As long as the traditional, geographic idea of neighborhood schools continues to hold sway, neighborhood segregation will naturally determine school segregation." Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation, in In Pursuit of a Dream Deferred, supra*, at 89, 89. As *Keyes* made clear, school districts cannot make decisions about student assignment policies without considering residential patterns. To do so would run contrary to national policy promoting fair housing and integration, and fail to account for the myriad forces – public and private, historical and contemporary – that have created America's deep residential racial divisions. Local school districts have a compelling interest in addressing a problem much larger than one inside classrooms when they adopt programs promoting integration.

II. THE POSITIVE IMPACT OF SCHOOL INTEGRATION POLICIES ON RESIDENTIAL INTEGRATION UNDERSCORES THE DISTRICTS' COMPELLING INTEREST IN COMBATING SCHOOL SEGREGATION.

A meaningfully integrated democratic society is a result of *both* integrated neighborhoods and integrated schools. Thus, one concrete way to promote the goal of fair and integrated housing is through the implementation of narrowly tailored school integration programs. Social science research indicates that, in both the short and long term, such school integration programs powerfully promote residential integration.

As this Court recognized in *Brown*, the harms of racially identifiable schools are significant and deserving of remediation, in no small part because the "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children." 347 U.S. at 494. More recently, this Court recognized that "the educational benefits that diversity is designed to produce . . . are substantial," *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), not just for minority students but for all students. Since *Brown*, both Congress and this Court have also identified the extraordinary societal benefits of housing integration, condemned the ills of residential segregation, and recognized the link between school desegregation and housing integration.

The compelling nature of a school district's interest is underscored by the positive impact of school desegregation programs on residential integration. *See* Diana Pearce, Ctr. for Nat'l Pol'y Rev., *Breaking Down Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns* 3 (1980) (citing evidence of increased housing integration in places with metropolitan desegregation programs). During the 1970s, cities that had undergone metropolitan school desegregation experienced "markedly greater rates" of housing integration than did other cities.

Pearce, *supra*, at 26-27. Between 1970 and 1990, residential integration occurred at twice the national average in communities with metropolitan school desegregation programs. Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina, in School Resegregation: Must the South Turn Back?* 164, 180 (John Charles Boger & Gary Orfield eds., 2005). A recent study of 15 metropolitan regions explains that comprehensive school desegregation programs are strongly correlated with *stable* residential integration. Inst. on Race & Poverty, *Minority Suburbanization, Stable Integration, and Economic Opportunity in Fifteen Metropolitan Regions* (2006); *see also* Pearce, *supra*, at 51-52 (finding school desegregation supports stable, integrated communities). Concomitant with the extensive segregation revealed by the 2000 Census, described above, "[m]any neighborhoods that are integrated at a given time actually are in transition to a less diverse status."[12] Inst. on Race & Poverty, *supra*, at 22; *see also* Orfield, *Metropolitan School Desegregation*, *supra*, at 136-37. Therefore, "encouraging findings about the potential for metro-wide school integration to stabilize neighborhoods while increasing equal access to educational opportunity" are particularly important. Inst. on Race & Poverty, *supra*, at 27.

Integrated schools promote stable integrated neighborhoods. As this Court recognized, "The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods." *Swann*, 402 U.S. at 20-21. Parents frequently choose their homes based at least partly on the schools that their children will attend, and they see segregated schools as powerful signals that may discourage them from buying homes in certain

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[12] This conclusion is reflected in the Institute on Race and Poverty's finding that White-Black integrated communities with a Black population share of 29% or greater in 1980 were likely to resegregate over the next 20 years. *See* Inst. on Race & Poverty, *supra*, at 27, 28 fig. 7.

neighborhoods. Frankenberg, *supra*, at 179; Pearce, *supra*, at 4. Where racially identifiable schools exist, White parents who can afford to do so frequently move to White districts on the belief that the schools in those neighborhoods will be better. Frankenberg, *supra*, at 179; Pearce, *supra*, at 9-10. By influencing where people with means choose to live, segregated schools perpetuate and exacerbate residential segregation.

Meaningful school integration eliminates the incentive to move to White enclaves because children attend integrated schools no matter where in the district they live. Frankenberg, *supra*, at 180; Pearce, *supra*, at 41. Fully integrated schools open all areas of a community to parents, who may live anywhere in the district and know that their children will not become racially isolated in their schools. Frankenberg, *supra*, at 180; Pearce, *supra*, at 4, 40-41. "[W]hite households are less likely to flee racially mixed environments if they are confident that their children will continue to attend integrated schools even if the racial mix of the neighborhood changes." Inst. on Race & Poverty, *supra*, at 27; Pearce, *supra*, at 4, 41. Greater residential integration, in turn, produces school integration organically, as the diversity of the neighborhoods from which schools draw their pupils increases. *See* Pearce, *supra*, at 32, 35 (finding, generally, much larger and lasting reductions in residential segregation in cities that had experienced metropolitan school desegregation). For that cycle to perpetuate, full integration is necessary; the presence of any racially identifiable schools as a result of only partial integration revives parents' fear that their children might become racially isolated in their schools and contributes to residential resegregation as those with the means again seek to move to White enclaves. Frankenberg, *supra*, at 181; Pearce, *supra*, at 40-41.

Real estate agents even market homes differently based on whether schools in the district are racially identifiable. To provide legal signals about the racial composition of

neighborhoods, advertisements for homes in districts with segregated schools list the names of schools, if they are predominantly White, from two to ten times more frequently than do advertisements for homes in districts with integrated schools. Orfield, *Metropolitan School Desegregation, supra*, at 135; Pearce, *supra*, at 9, 14-18. In districts with truly integrated schools, home advertisements mention schools much less often and focus instead on things like distance to offices, stores, and recreational facilities. Orfield, *Metropolitan School Desegregation, supra*, at 135; Pearce, *supra*, at 12, 14. By including White school names in advertisements, real estate agents reinforce the notion that the ability to attend segregated schools is an important – and desirable – feature of a property.[13] Pearce, *supra*, at 18.

In addition, among the long-term benefits of school policies promoting integration is the greater likelihood that students who have attended integrated schools will live in integrated neighborhoods later in life. The Seattle School District explicitly recognized the benefits of residential integration when it adopted its "racial tiebreak" for oversubscribed high schools. Along with improved critical thinking skills among both White and minority students, and "the socialization and citizenship advantages of racially diverse schools," the Seattle School District identified as a compelling interest the following conclusion reached by its expert: "that '*research . . . strongly shows that graduates of desegregated high schools are more likely to live in integrated communities than those who do not, and are more likely to have cross-race friendships later in life.*'" *Parents Involved in Cmty. Sch.*, 426 F.3d at 1175 (emphasis added); *see also* Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Educ. Res. 531,

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[13] Recent testing studies actually indicate that real estate agents describe schools as "good" or "bad" as a proxy for the racial or ethnic composition of neighborhoods. *See* Nat'l Fair Hous. Alliance, *Unequal Opportunity – Perpetuating Housing Segregation in America: 2006 Fair Housing Trends Report* (Apr. 5, 2006).

551-52 (1994) (reviewing studies finding students in integrated schools more likely to have lasting cross-racial relationships and concluding "interracial contact in elementary or secondary school can help blacks overcome perpetual segregation").

These findings affirm the significant value of school desegregation efforts. Aside from their obvious impact on a single school's racial composition, school desegregation programs also make powerful contributions to residential integration in both the short and long term, which is a worthy goal, in accordance with local and national policy.

CONCLUSION

The integral connection between housing and school integration makes consideration of residential segregation critical to any analysis of school integration programs. America's distorted housing markets are the legacy of state-sponsored discrimination, and are bolstered by government programs and private discrimination. Natural school integration is, therefore, often unavailable, and programs like the Districts' are critically important for achieving school integration. The ability of integrated schools to support residential integration further underscores the compelling nature of the Districts' interest in such programs.

For the foregoing reasons, *amici* urge this Court to affirm the Courts of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

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Institute on Race & Poverty, Minneapolis, MN

National Fair Housing Alliance, Washington, DC

National Low Income Housing Coalition, Washington, DC

National Housing Law Project, Oakland, CA

Gamaliel Foundation, Chicago, IL

Center for Cities and Schools, Berkeley, CA

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In the Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF HUMAN RIGHTS ADVOCACY GROUPS AND INTERNATIONAL LAW PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a metropolitan-wide school system may voluntarily pursue a race-conscious student assignment plan to correct *de facto* segregation and promote integration?

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INTERESTS *OF AMICI CURIAE*[*]

The **University of Minnesota Human Rights Center** is a national leader in human rights advocacy and research. The Human Rights Center was established in 1988 at the University of Minnesota. The Center's most visible educational activity is its sponsorship of the University of Minnesota Human Rights Library on the World Web, which contains over 25,000 core human rights treaties, instruments, and other documents in seven languages and is used by about 200,000 individuals from more than 150 nations each month. The Human Rights Center also does applied human rights research on such issues as corporate social responsibility, the rights of non-citizens, contemporary forms of slavery (including trafficking and child labor), human rights fact-finding, the right to a fair trial, and other subjects of current concern. Another visible project of the Human Rights Center is its sponsorship of the Upper Midwest Human Rights Fellowship Program and its cooperation with the Hubert Humphrey International Fellowship Program. The Upper Midwest Fellowship Program provides opportunities for approximately 30 students and community leaders each year to work with human rights organizations throughout the world. The Humphrey Fellowship Program is sponsored by the U.S. Department of State and provides exchange opportunities to mid-career professionals from developing countries.

The University of Minnesota Human Rights Center and its leadership have submitted amici curiae briefs in several significant U.S. cases, including *Grutter v. Bollinger*,

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[*]All parties in this case have given blanket consent to participation of *amici curiae*. *Amici* sign this memorandum on their own behalf. No counsel for a party authored this brief in whole or in part and no person, other than Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

539 U.S. 306 (2003); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Roper v. Simmons*, 543 U.S. 551(2005).

Human Rights Advocates is a non-profit California corporation founded in 1978 with national and international membership. It has Special NGO Consultative Status in the United Nations. It endeavors to ensure that the most basic protections are afforded to everyone and has submitted briefs in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue. Examples of amicus briefs that Human Rights Advocates has filed include those in the following cases: *Grutter v. Bollinger; Roper v. Simmons; Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2nd Cir. 1985); and *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

The **Midwest Coalition for Human Rights** is a network of 32 U.S.-based advocacy organizations and academic centers collaborating to promote and protect human rights both in the United States and abroad.

The **Centre on Housing Rights and Evictions (COHRE)** is a worldwide organization, headquartered in Geneva, Switzerland, but with offices in Duluth, Minnesota.

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SUMMARY OF ARGUMENT

The United States has traditionally been a leader of the international community in protecting and promoting human rights. U.S. leadership has, in large part, been due to our Constitution's power to promote and protect human rights. Numerous countries have followed the U.S. lead by citing and deferring to our human rights precepts, practices, legislation, and jurisprudence.

As a leader in promoting human rights, the United States should not interpret the Constitutional guarantee of equal protection under the law as a lesser right than those articulated in treaties which the U.S. has accepted or as a lesser right than those adopted by other nations with which the United States ordinarily compares itself. In deciding whether schools may voluntarily take action to address *de facto* segregation, international law and treaties that the United States has accepted and helped to create may provide guidance to this Court. The Fourteenth Amendment's Equal Protection guarantee, read consistently with treaties the United States has ratified as well as other international law, upholds the use of voluntary state action to correct *de facto* segregation in public schools.

Both the International Covenant on Civil and Political Rights ("Civil and Political Covenant") and the Convention on the Elimination of All Forms of Racial Discrimination ("Race Convention") permit race-based distinctions to redress past discrimination and promote the benefits of diversity. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, http://www1.umn.edu/humanrts/instree/b3ccpr.htm; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14), U.N. Doc. A/6014

(1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, http://www1.umn.edu/humanrts/ instree/d1cerd.htm.

By becoming a party to these treaties, the United States is obligated to take the affirmative steps necessary to guarantee all persons equal and effective protection against all forms of racial discrimination. International law and international interpretive bodies uphold and encourage state action to address both *de facto* and *de jure* segregation. Such action is appropriate whenever a law, regulation, or action has the effect, not just the intent, of race-based discrimination. Should this Court find that race-based integration measures are unconstitutional, public schools will be encouraged to re-segregate. Such re-segregation will not only violate the Equal Protection Clause, but it will also have the effect of jeopardizing the reputation of the United States as a human rights leader in the world community.

SUMMARY OF FACTS

Jefferson County, Kentucky, has a long history of *de jure* and *de facto* segregation in its neighborhoods and schools. In response to litigation over Jefferson County's segregated school system, the U.S. Court of Appeals for the Sixth Circuit directed district court Judge James Gordon to devise a student assignment plan that abolished all vestiges of state-imposed school segregation. *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 489 F.2d 925, 932 (6th Cir. 1973). Judge Gordon's direct monitoring of the plan ended in 1981. *McFarland v. Jefferson County Pub. Sch.*, 330 F.Supp.2d 834, 841 (W.D.Ky. 2004). Since 1981, Jefferson County has modified its student assignment plan to address growth while keeping its policies consistent with previous desegregation decrees.

In 1998, a group of parents challenged the student assignment plan, alleging that their children were denied

admission to a magnet high school based on race. *Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 774 (W.D. Ky. 1999) ("*Hampton I*"). The district court held that Judge Gordon's original 1975 desegregation decree was still in effect. *Hampton I*, 72 F. Supp. 2d at 744. In 2000, the desegregation decree was lifted and the court held that the school board could not use racial quotas at magnet and other schools that offered unique programs not available at other schools in the district. *Hampton v. Jefferson County Bd. of Educ.*, 102 F.Supp.2d 358, 376, 381 (W.D.Ky. 2000) ("*Hampton II*").

In response to the court's ruling and in an effort to avoid undermining all the court-ordered progress in integration, Jefferson County adopted the 2001 Plan. The 2001 Plan uses a system of managed, voluntary choice to promote integration in the county's schools without using racial quotas. Enrolment decisions are based on place of residence, student choice (through a system of student preference ranking, application to magnet or traditional programs, transfer, or open enrolment), and racial guidelines. Jefferson County's 2001 Plan was found constitutional by the Western District of Kentucky and this decision was affirmed *en banc* by the Sixth Circuit. *McFarland ex rel. McFarland v. Jefferson County Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005).

The present case challenges the constitutionality of Jefferson County's continued commitment to integration. Without a voluntary race-conscious student assignment plan, neighborhood schools would be highly segregated. The 2001 Plan is necessary to prevent wide-spread re-segregation throughout the county's schools. The 2001 Plan tries to ensure that each child, regardless of their race or ethnicity, receive an education of equal quality in a diverse and productive environment.

This case has been joined with an appeal from *Parents Involved in Community Schools v. Seattle School District,*

NO.1, 426 F.3d 1162 (9th Cir. 2005). The Seattle school district, like Jefferson County, utilized a voluntary open choice student assignment plan. In an effort to address the city's historical struggle with de facto segregation, the school district used a race based tiebreaker in assigning students to oversubscribed high schools. Without a voluntary race-conscious student assignment plan, Seattle schools would also re-segregate.

ARGUMENT

I. INTERNATIONAL AND COMPARATIVE LAW ARE RELEVANT TO THE ISSUES BEFORE THIS COURT

From its earliest opinions, the Supreme Court has stated that the Constitution and relevant statutes should be read consistently with treaties and international law. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). The Constitution protects a wide range of human rights, especially under the Fifth, Eighth, and Fourteenth Amendments. Treaties and other nations' concepts of equal protection can help the United States better understand the protections available under the Fourteenth Amendment.

Supreme Court decisions have consistently acknowledged human rights treaties and used them to better understand U.S. human rights obligations. Justice Ginsburg's concurrence in *Grutter v. Bollinger* noted that international human rights treaties approve affirmative action by states to alleviate discrimination and segregation. 539 U.S. 306, 344 (2003). Justice Ginsburg stated:

> The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms". But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for

> different racial groups after the objectives for which they were taken have been achieved.

Grutter, 539 U.S. at 344 (citations omitted). Justice Ginsburg also noted that the Convention on the Elimination of All Forms of Discrimination Against Women[1] authorizes "temporary special measures aimed at accelerating *de facto* equality [that] shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." *Id.*

Similarly, in *Roper v. Simmons*, Justice Kennedy's majority opinion referred to the Civil and Political Covenant to gauge consensus on the prohibition of juvenile execution and ultimately determine whether or not juvenile execution was constitutional. 543 U.S. 551, 567 (2005). Further, in *Thompson v. Oklahoma*, Justice Stevens observed that the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War explicitly prohibit juvenile death penalties. 487 U.S. 815, 831 n.34 (1988). The same Justices also referred to the Civil and Political Covenant, the American Convention on Human Rights, and the Geneva Convention in their constitutional analysis of whether juvenile execution was constitutional. *Stanford v. Kentucky*, 492 U.S. 361, 389 (1989).

It has been established for more than one hundred years by U.S. Supreme Court precedent that international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as

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[1] Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp.

questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). In addition to looking at treaties and customary international law obligations, courts have also found non-binding international and foreign law persuasive authority in constitutional interpretation. Throughout history, the Court has given persuasive weight to international standards in its Constitutional analysis[2]

In *Trop v. Dulles*, 356 U.S. 86, 102 (1958), the plurality explored international consensus on the death penalty in relation to U.S. law. Writing for the Court in *Roper v. Simmons*, Justice Kennedy stressed the importance of international law as persuasive authority in constitutional analysis when he stated that, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of

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[2] *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J.) (stating that detention of aliens accords with international views. The Court also referenced the U.N. Working Group Report on Arbitrary Detention and the U.N. High Commissioner for Refugees' Guidelines on Detention of Asylum-Seekers); *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J.) (citing case law of Canada, Great Britain, India, Zimbabwe, and the Universal Declaration of Human Rights to support the conclusion that lengthy delay in administering lawful death penalties may be unusually cruel); *Washington v. Glucksberg*, 521 U.S. 702, 785-87 (1997) (Souter, J.) (examining Dutch constitutional practice of physician-assisted suicide); *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (O'Connor, J.) (stating that it is a frequently reiterated principle that federal common law is necessarily informed by international law); *Enmund v. Florida*, 458 U.S. 782, 796-797 n.22 (1982) (O'Connor, J.) (noting elimination or restriction of felony murder in Canada, England, India, and a "number of other Commonwealth countries"); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (White, J.) (noting that only three out of sixty major nations in the world use the death penalty as a punishment for rape); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J.) (defining privacy in the home by looking to "common understanding throughout the English-speaking world").

those same rights within our own heritage of freedom." 543 U.S. 551, 578. In *Atkins v Virginia*, the 6-3 majority noted national and international consensus against the execution of a mentally retarded individual. 536 U.S. 304, 316 n.21 (2002). The Court found the practice unconstitutional, observing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is universally disapproved." *Id.* Similarly, in *Lawrence v. Texas*, the majority of the Court referred to a decision by the European Court of Human Rights and noted that the right the petitioners sought had been accepted as an integral part of human freedom in many other countries. 539 U.S. 558, 573 (2003). This attention to foreign law recognizes international law as a useful source or context for constitutional interpretation.

A number of Supreme Court Justices have been vocal in their support of international law as a valuable resource for interpreting U.S. law. Justice Souter, speaking for the majority in *Sosa v. Álvarez-Machain*, said that the First Congress

> assumed that federal courts could properly identify some international norms as enforceable [under the law it wrote.] It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

542 U.S. 692, 730 (2004). More specifically, Justice Ginsburg has said that "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups." Ruth Bader Ginsburg and Deborah Jones Merritt, *Lecture: Fifty-First*

Cardozo Memorial Lecture - Affirmative Action: An International Human Rights Dialogue, 21 CARDOZO L. REV. 253, 282 (1999). Justice Breyer has explained that comparative use of international law will not lead courts blindly to follow foreign law, but will aid Constitutional interpretation by casting an empirical light on relevant problems. Stephen Breyer, *The Supreme Court and the New International Law*, Keynote Address to the American Society of International Law (Apr. 4, 2003), 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003).

This understanding that the U.S. Constitution should be interpreted consistently with international law is held by an increasing number of courts. The Constitutional guarantee of equal rights under the law has helped drive the United States' role as a leader in international human rights. The U.S commitment to equality has been relied upon by many nations and international organizations. The United States should not interpret the right to equal protection under the law as a lesser right than those adopted by other nations. In deciding whether schools may voluntarily take action to address *de facto* segregation, the Court should look to the international law and treaties the United States has helped create and ratify.

There is a national consensus on eradicating all forms of discrimination. The Constitution guarantees equal protection under the laws. This Court has ruled that "segregation is a denial of the equal protection of the laws." *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). The Race Convention and the Civil and Political Covenant reflect this national commitment and promote affirmative action as a permissible means of addressing *de facto* segregation. That the President of the United States has signed and the United States Senate has agreed by a two-thirds majority to ratification of these treaties, demonstrates the United State's commitment to these principles. The use of voluntary measures to address *de facto* discrimination by many

educational institutions indicates a collective understanding of these rights under the Equal Protection Clause.

There is also international consensus on eradicating discrimination and on the importance of voluntary measures in eliminating *de facto* discrimination. The overwhelming majority of nations have ratified the Race Convention and the Civil and Political Covenant.[3] Looking to other countries' interpretations of these documents further confirms that our own understanding of these principles is correct.

This commitment to abolish all forms of discrimination is so implicit in our concept of ordered liberty that it occupies a place in our Constitution. *See Thompson*, 487 U.S. 815, 868-69 n.4 (Scalia, J. dissenting) (stating that the practices of other nations are relevant only if there is a settled consensus among Americans and the practice is so implicit in the concept of ordered liberty that it occupies a place in our Constitution). Further, the use of voluntary measures to eradicate all forms of discrimination has occupied a place in our jurisprudence, in our history, and in learning institutions throughout the country. The fact that it occupies a place in the global consciousness only strengthens our own commitment.

The United States Constitution through the Fourteenth Amendment has endowed the states with the authority and the obligation to take action to ensure that all persons are treated equally under the law. When read in conjunction with the Race Convention and the Civil and Political Covenant, it is clear that equal protection under the law cannot be secured if states do not address both *de jure* discrimination and policies and practices that have discriminatory effects. Jefferson County's 2001 Plan meets these requirements and is an important tool in helping to eradicate all forms of discrimination.

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[3] There are 171 State parties to the Race Convention and 159 State parties to the Civil and Political Covenant.

II. TREATY OBLIGATIONS SUPPORT A FINDING THAT THE U.S. INTEREST IN CONSIDERING RACE AS A FACTOR IN SCHOOL ASSIGNMENT IS COMPELLING

A. The Race Convention

The Race Convention is the definitive treaty-based international standard on racial discrimination. As of October 1, 2006, there were 171 State parties to the Race Convention. *See* United Nations treaty database, http://untreaty.un.org /ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty2.asp President Johnson signed the Race Convention in 1966, and it was ratified after the Senate gave its advice and consent in 1994. The Race Convention addresses purposeful discrimination as well as actions that have discriminatory effects. Discrimination is defined as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise, *on equal footing*, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Race Convention, art. 1, http://www1.umn.edu/humanrts/instree/d1cerd.htm (emphasis added).

Furthermore, the Race Convention requires State parties to: "take effective measures to review governmental, national, and local policies and to amend, rescind, or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination wherever it exists." *Id.*, art. 2(1)(c). In addition, State parties are required to take specific

action to guarantee human rights, which include the right to education. *Id.* art. 2(2). These remedial measures should not in any way be considered discrimination. Article 1(4) of the Race Convention states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms *shall not be deemed racial discrimination* . . ..

(emphasis added).

The Race Convention established the Committee on the Elimination of Racial Discrimination (Race Committee) to monitor state parties' implementation of and compliance with treaty obligations. The Race Committee is composed of independent experts who are nationals of State parties. *Id.* art. 8(1). State parties must submit periodic reports on their implementation of the rights enshrined in the Race Convention. *Id.* art 9. The Race Committee is authorized to review country reports, hear individual and interstate complaints, and make recommendations to State parties with regard to treaty implementation. Additionally, the Race Committee interprets the content of the human rights provisions in the Race Convention in its General Recommendations.

The Race Committee has consistently held that *de facto* discrimination violates the Race Convention. In *L.R. v. Slovakia*, the Committee held the State party responsible for actions that have discriminatory effects, regardless of whether they were committed with discriminatory intent. L.R. et al. v. Slovakia, Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/ 2003 (2005), http://www1.umn.edu/

humanrts/country/decisions/31-2003.html. Specifically addressing the treatment of Roma people, the Race Committee found that Slovakia had failed its treaty obligation to "[n]ullify any laws or regulations which have the effect of creating or perpetrating racial discrimination." *Id.* The Committee reiterated that discrimination, as defined in Article 1(1) of the Race Convention, extends beyond explicitly discriminatory measures to reach those which are also discriminatory in fact and effect. Article 5 states that the right to equality in education is especially important. Race Convention, Article 5(e)(v), http://www1.umn.edu/humanrts/instree/d1cerd.htm.

The Race Committee has specifically addressed *de facto* discrimination in the United States. In response to the United States' most recent report, the Race Committee stated:

> The Committee draws the attention of the State party to its obligations under the Convention, and in particular to article 1 paragraph 1, and General Recommendation No. XIV, to undertake to prohibit and to eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect. The Committee recommends the State party to take all appropriate measures to review . . . local policies to ensure the effective protection against any form of racial discrimination and any unjustifiable disparate impact.

Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (2001); *see* http://www1.umn.edu/humanrts/usdocs/conclcomments-usa.html. These findings, which emphasize the duty of the United States to prohibit and eliminate racial discrimination, are

consistent with the Constitutional prohibition of discrimination under the Equal Protection Clause. The Committee's conclusions underscore the global consensus on the necessity of eradicating the pernicious effects of *de facto* segregation.[4] *See* Theodore Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 288 (1985).

The Race Convention satisfies the constitutional requirements of equal protection. The goal of the Race Convention is to eliminate all forms of racial discrimination, including *de facto* segregation. The Court stated in *Brown*, that the government has a compelling interest in abolishing discrimination, especially in school segregation. 347 U.S. 483. The 2001 Plan does not maintain separate or unequal rights for any group; each student is assigned to a school that is, by design, the equal of any other school in the area. The 2001 Plan addresses discriminatory housing practices such as racial steering, location of low income housing, and racial preferences by voluntarily using a race-conscious plan to

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[4] Several other states have implemented racial guidelines to eliminate *de facto* segregation in education. Brazil recently introduced race-conscious guidelines for University admissions to afford Afro-Brazilians equal access to post-secondary education. Italo Ramos, *Affirmative Action in Brazil, The Day of the Lambs*, THE BLACK COMMENTATOR (Feb. 23, 2006), http://www.blackcommentator.com/172/172_guest_ramos_brazil_affirmative_action.html; Rodrigo Davies, *Brazil Takes Affirmative Action in Higher Education*, THE GUARDIAN, August 4, 2003, http://www.education.gaurdian.co.uk/higher/worldwide/story/0,9959,1012157,00.html. India has adopted numerous racial guidelines in education. Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 275-76 (1999). South Africa expressly condones racial guidelines to achieve equal protection in Article 9(2) of its constitution. *See* CONST. S. AFR. (Act 108 of 1996) ch.2 (Bill of Rights), 9(2), http://www.info.gov.za/ docusments/constitution/1996/1996/96cons2/htm#9.

ensure that students have substantially similar educational experiences. Jefferson County students should not bear a badge of inferiority based on where they attend school. All students should be able to attain the benefits of a diverse educational environment.

The Race Convention also states that remedial measures should be narrowly tailored in that the measures "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." Race Convention art. 2(2). The race-conscious measures included in the 2001 Plan are not permanent, nor are they the only measures used in determining student assignments. These race-conscious measures will no longer be necessary when the county has achieved desegregation in its housing patterns. Jefferson County's 2001 Plan should be upheld under the Constitution and under U.S. treaty obligations because it is based on a compelling government interest,[5] and it is narrowly tailored.

B. The Civil and Political Covenant

The Civil and Political Covenant is the leading treaty addressing fundamental civil rights and political freedoms. President Carter signed the Civil and Political Covenant in 1977, and the United States ratified it in 1992 during the Presidency of George H.W. Bush. *See* United Nations Treaty Database, http://untreaty.un.org/ENGLISH/bible/english internetbible/partI/chapterIV/treaty6.asp; ICCPR, 138 Cong. Rec. S4781-84 (Apr. 2 1992). The United States is one of 159 State parties to the Civil and Political Covenant. *See Id.*

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[5] Treaty obligations themselves can constitute a compelling state interest to justify the establishment of such programs. *See* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 CINN. L. REV. 423, 468 (1997).

Article 26 of the Civil and Political Covenant, requires the United States to "guarantee to all persons equal and *effective* protection against discrimination on any ground such as race . . ." International Covenant on Civil and Political Rights, art. 26 (emphasis added). Furthermore, Article 2(2) places an affirmative duty on State parties to: "take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." *Id.* art. 2(2).

The Civil and Political Covenant established the Human Rights Committee to monitor State parties' compliance. The Human Rights Committee reviews State parties' reports, issues authoritative adjudicative decisions on individual complaints, and interprets the Covenant's provisions in its General Comments. The Human Rights Committee is composed of eighteen independent experts who are nationals of State parties. *Id.* Art. 28(2). State parties are obligated to submit periodic reports to the Committee for its review. *Id.* Art. 40(1). The Human Rights Committee's definition of discrimination is consistent with the definition found in the Race Convention. General Comment 18 ¶ 7, http://www1.umn.edu/humanrts/gencomm/hrcom18.htm. The Civil and Political Covenant defines discrimination as "any distinction, exclusion, or preference . . . which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment, or exercise by all persons, *on equal footing*, of all rights and freedoms. *Id.* (emphasis added).

On October 25, 2005, the United States submitted its second and third periodic reports to the Human Rights Committee. Full report available at: http://www.state.gov/g/drl/rls/55504.htm. After reviewing the U.S. reports and questioning the United States representative in July 2006, the Human Rights Committee noted its concern about *de facto* segregation in U.S. schools.

The Committee noted the failure of the United States to eliminate racial discrimination, as evidenced by the wide disparities in the quality of education available to different groups of students. Specifically, the Committee expressed concern about:

> reports of de facto racial segregation in public schools, reportedly caused by discrepancies between racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated. The Committee is concerned that the State party, despite measures adopted, has not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students.

Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee: United States, U.N. Doc. CCPR/C/USA/CO/3 (July 28, 2006), ¶ 23, http://www1.umn.edu/humanrts/usdocs/ hrucomments2.html.

Voluntary race-conscious plans, such as the Jefferson County 2001 Plan, were expressly considered when the U.S. ratified the Civil and Political Covenant. Statement by Conrad K. Harper to the Human Rights Committee, USUN Press Release #49-(95), at 3 (Mar. 29, 1995), http://www.state.gov/s/l/65762.htm. The U.S. entered an understanding upon ratification, which effectively stated that the United States could make distinctions based upon race if they are rationally related to a legitimate government objective. U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), http://www1.umn.edu/humanrts/usdocs/civilres.html.

C. Affirmative Action, as Supported by National and International Law, is Necessary to Assure Equality

The state government has a legitimate objective in addressing the *de facto* discrimination that exists in Jefferson County, like those in many large U.S. cities.[6] This discrimination is largely a remnant of *de jure* segregation and underlying racial hostilities and preferences that carry over into school systems. Without race-conscious plans to counteract *de facto* segregation, both black and white students are deprived of the opportunity to interact across racial barriers, establish friendships with those of a different background, and receive an education similar to that of their peers across town. Diversity benefits students throughout their education and in the workforce. *See Grutter v. Bolinger*, 539 U.S. 306 at 313, 323-24. Jefferson County's 2001 Plan is a voluntary race-conscious student assignment plan that addresses *de facto* discrimination by promoting equality and diversity throughout the county's schools. Should the Court find the Plan unconstitutional, schools will be severely hampered in their ability to address *de facto* discrimination, and the United States will have greater difficulty meeting its treaty obligations.

The widespread repercussions of prohibiting schools from addressing *de facto* segregation would undermine good faith actions which implement provisions of the Race Convention and the Civil and Political Covenant. The

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[6] Housing in Jefferson County is still highly segregated. Forty-seven percent of all blacks live on blocks that are 80 percent or more black. Among whites, 86.9 percent live on blocks that are 80 percent or more white. *See* Lois M. Quinn and John Pawasarat, *Racial Integration in Urban America: A Block Level Analysis of African American and White Housing Patterns*, Employment and Training Institute, School of Continuing Education, University of Wisconsin-Milwaukee, 18, 21 (2003), http://www.uwm.edu/Dept/ETI/integration/integration.pdf.

discriminatory effects of re-segregation would violate article 2(2) of the Race Convention and Articles 2 and 26 of the Civil and Political Covenant. *See* Race Convention, art. 2; Civil and Political Covenant, art. 2, 26. The U.S. will be obligated to report re-segregation when it reports again to the Race Committee and the Human Rights Committee.

As this Court stated almost a century ago, "[T]reaties are to be executed in the utmost good faith, with a view to make effective the purposes of the high contracting parties." *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921). Treaties to which the U.S. is a party, authoritative interpretations of those treaties, and constitutional courts of other States recognize that policies with discriminatory effects violate equal protection. Recognition of discriminatory effects is essential to achieving equal protection under the law because policy makers rarely, if ever, express their intent to discriminate. *See e.g. Washington v. Davis*, 426 U.S. 229, 254 (Stevens, J. concurring) ("My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not as critical, as the reader of the Court's opinion might assume."). Jefferson County's 2001 Plan, like that of many other school systems nation-wide, is based on the recognition that discrimination did not die with *de jure* segregation. Addressing *de facto* segregation is necessary to ensure all students equal protection under the law.

CONCLUSION

State action is appropriate and necessary whenever a law, regulation, or practice has the effect, not just the intent, of race-based discrimination. If states do not take action, public schools will continue to re-segregate. Such re-segregation violates the Equal Protection Clause as well as U.S. treaty obligations. The United States committed itself to undertake the steps necessary to guarantee all persons equal and effective protection against all forms of racial discrimination by ratifying the Race Convention and Civil and Political Covenant.

The Race Convention and the Civil and Political Covenant embody U.S. standards as well as international standards. Voluntary, race-conscious programs, like Jefferson County's 2001 Plan, are implicit in the United States' concept of equality. Affirming the judgment of the district court will further the Constitutional guarantee of equal protection in addition to promoting U.S. obligations under international law.

Based on the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 9, 2006

Respectfully submitted,

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Nos. 05-908, 05-915

Supreme Court, U.S.
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In The Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Ninth And Sixth Circuits

BRIEF OF INTERESTED HUMAN RIGHTS CLINICS AND ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae Columbia Law School Human Rights Clinic (Columbia Clinic), to bridge theory and practice, provides students with hands-on experience working on active human rights cases and projects. Working in partnership with experienced attorneys and institutions engaged in human rights activism, both in the United States and abroad, students contribute to effecting positive change locally and globally. In recent years, the Columbia Clinic has worked on several matters concerning human rights issues in the United States.

Amicus Curiae the Allard K. Lowenstein International Human Rights Clinic (Yale Clinic) is a Yale Law School program that gives students first-hand experience in human rights advocacy. The Yale Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. The clinic's work is based on the human rights standards contained in international customary and conventional law, at the core of which is the prohibition against discrimination. Since the clinic began more than ten years ago, its students have worked on a number of lawsuits and other projects designed to combat racial, gender, ethnic and other kinds of discrimination. In recent years, the Yale Clinic has focused increasing attention on efforts to ensure respect for international human rights standards in the United States.

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[1] The parties' letters consenting to the filing of *amici curiae* briefs have been filed with the Clerk of the Court. No counsel for any party has authored this brief in whole or part. No person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of the brief.

Amicus Curiae the International Human Rights Clinic at George Washington Law School (GW Clinic) is dedicated primarily to litigating human rights cases before United States and international tribunals. The GW Clinic seeks first to promote the progressive integration of international human rights standards into United States legal practice, and second, to assist victims of injustice in utilizing domestic and international legal regimes to protect their human rights or vindicate violations of those rights. Accordingly, its docket consists largely of cases either in United States courts under the Alien Tort Claims Act (ATCA) and other federal statutes, or before international tribunals, such as those in the Inter-American Human Rights System.

Amicus Curiae the International Human Rights Law Clinic at the University of Virginia School of Law (U.Va. Clinic) gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. Projects are designed to help students build the knowledge and skills necessary to be effective human rights lawyers and to integrate the theory and practice of human rights. The U.Va. Clinic collaborates with non-governmental organizations and individual advocates on a wide range of human rights issues through various means, including litigation. The U.Va. Clinic's work regularly involves comparative legal analyses and international law analyses of alleged human rights violations or domestic legislation.

Amicus Curiae Global Rights – Partners for Justice ("Global Rights") is a non-profit organization of human rights and legal professionals engaged in human rights advocacy, litigation, and training around the world. Founded in the District of Columbia in 1978, Global

Rights (formerly the International Human Rights Law Group) works to empower advocates to expand the scope of human rights protection for men and women and to promote broad participation in creating more effective human rights standards and procedures at the national, regional, and international level. Global Rights has represented individuals and organizations before United States and international tribunals and has appeared as *amicus curiae* in a number of United States cases. Beginning in the 1990s, a central focus of Global Rights' work has been to promote the use of international human rights law and standards in efforts to promote women's rights and to combat racial discrimination. Global Rights joins this brief to emphasize the obligation of the United States to provide remedies for racial and gender discrimination consistent with its obligations under international treaty law, particularly the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as international customary law.

Amicus Curiae the National Economic and Social Rights Initiative (NESRI) promotes a human rights vision for the United States that ensures dignity and access to the basic resources needed for human development and civic participation. The Human Right to Education Program at NESRI works with education advocates and organizers to promote policy change in public education using human rights standards and strategies. NESRI believes that human rights offer a framework for how to transform our public schools based on internationally recognized standards of equality, accountability, dignity, and community participation. The program initiatives work in collaboration with community partners to

generate human rights documentation, analysis, advocacy, public education materials and workshops.

Amicus Curiae the US Human Rights Network was formed to promote United States accountability to universal human rights standards by building linkages between organizations, as well as individuals, working on human rights issues in the United States. The Network strives towards building a human rights culture in the United States that puts those directly affected by human rights violations, with a special emphasis on grassroots organizations and social movements, in a central leadership role. The Network also works towards connecting the United States human rights movement with the broader United States social justice movement and human rights movements around the world. The Network joins this brief to emphasize the United States' obligation to remedy discrimination and promote equality and in recognition of the important role that integrated schools play in realizing the right to education.

SUMMARY OF ARGUMENT

Comparative and international law are relevant to the Court's consideration of the constitutionality of the managed-choice plans adopted by Jefferson County Board of Education and Seattle School District No. 1, and support upholding both plans. The legal tradition of the United States has long embraced looking to foreign and international precedent for guidance on domestic legal questions. The Court's intellectual leadership in the field of international human rights is strengthened by consideration of the human rights jurisprudence of foreign jurisdictions and the law of nations.

The courts of other nations as diverse as Canada, South Africa, and India and international entities such as the European Union have all confronted challenges to race-conscious and gender-conscious policies. These bodies repeatedly have upheld the use of such policies to benefit underrepresented minorities, and in many cases have permitted affirmative action programs that go far beyond the managed-choice programs at issue here. As members of this Court have previously recognized, opinions such as these by colleagues in foreign jurisdictions can assist this Court in reaching sound conclusions under domestic law.

International treaties to which the United States is a party are also sources of guidance in consideration of the validity of the Jefferson County and Seattle plans. These international treaties not only permit but endorse the type of race-conscious programs voluntarily adopted by the Jefferson County and Seattle school districts.

ARGUMENT

I. COMPARATIVE AND INTERNATIONAL LAW ARE RELEVANT TO THE ISSUES BEFORE THE COURT

Respondents argue that the managed-choice plans adopted by Jefferson County and Seattle constitutionally use race as one of several factors in assigning students to public schools. The record amply supports these arguments.

In considering the constitutionality of the Jefferson County and Seattle plans, *amici curiae* urge this Court to look to foreign and international law to inform its decision

regarding the Jefferson County and Seattle managed-choice plans.

The Court has long recognized that the laws of the United States should be construed to be consistent with international law whenever possible. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations"); *see generally* Sandra Day O'Connor, *Federalism of Free Nations, reprinted in International Law Decisions in National Courts* 13, 15-16 (Thomas M. Franck & Gregory H. Fox eds., 1996).

In addition, the Court has recognized that customary international law is a part of American law and should be looked to for guidance in determining issues that fall within its scope. *The Paquete Habana*, 175 U.S. 677, 700 (1900). This recognition of the importance of international law in guiding American jurisprudence is especially true in the area of human rights. The fundamental rights that are guaranteed by the Constitution of the United States have found iterations in the laws of other nations as well as in international treaties and covenants. In *Roper v. Simmons*, Justice Kennedy observed that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." 543 U.S. 551, 578 (2005). The Court has expressly looked to the laws and opinions of other nations in determining issues pertaining

to the rights guaranteed by the Eighth and Fourteenth Amendments of the Constitution, *Roper v. Simmons*, 543 U.S. at 575-78; *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958), as well as issues pertaining to the fundamental rights of freedom and privacy, *see, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003), *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

There are practical as well as historic reasons to look to international law for guidance in resolving domestic legal issues. Experience has a longstanding role in the development and evolution of legal jurisprudence – as Justice Holmes wrote, "the life of the law has not been logic, it has been experience," Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881). Looking to the experience of other legal systems for ideas and guidance is particularly practical when those other systems "have struggled with the same basic constitutional questions as we have: equal protection, due process, the rule of law in constitutional democracies." Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Lawyer 20 (1998); *see also New York v. Quarles*, 467 U.S. 649, 672-74 (1984) (O'Connor, J., concurring) (supporting the application of other nations' relevant experiences to determine scope of Fifth Amendment exclusionary rule); *United States v. Then*, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (noting that other countries draw from American constitutional theory and practice and that, as a result, the ways in which those countries have dealt with problems analogous to issues arising in American jurisprudence can be

very useful in analyzing and interpreting difficult American constitutional issues).

International and foreign law rulings on constitutional issues such as those facing the Court can also illustrate the ramifications of different solutions to similar legal problems, *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting), shedding light on potential consequences of a given constitutional interpretation or ruling.

Justice Ginsburg has repeatedly exhorted the value of legal decision-making processes that take into account the decisions and opinions of international law and foreign jurisdictions. *See, e.g.*, Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, Keynote Address to the American Society of International Law (Apr. 1, 2005). Justices Kennedy, Breyer, and Stevens have also demonstrated a belief that both comparative and international law materials are valuable aids to constitutional interpretation. *See, e.g., Roper*, 543 U.S. at 575 (Kennedy, J.) (noting that the Court's determination that the death penalty is disproportionate punishment for juvenile offenders "finds confirmation" in the fact that the United States was the only country in the world that officially sanctioned the practice), *Lawrence*, 539 U.S. at 576 (Kennedy, J.) (noting that the European Court of Human Rights and other nations "have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."); *Atkins*, 536 U.S. at 316 n.21 (Stevens, J.); *Patterson v. Texas*, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting from denial *of certiorari*) (citing an apparent international

consensus against the execution of a capital sentence imposed upon a juvenile to urge the Court to revisit the issue of the constitutionality of the sentence); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (noting that other nations' approaches to campaign finance are consistent with Supreme Court majority's approach); *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting from denial of *certiorari*) (considering the decisions of the European Court of Human Rights, the U.N. Human Rights Committee, and the case law of other countries in determining if a lengthy delay in administering the lawful death penalty may be unusually and impermissibly cruel); *Printz v. United States*, 521 U.S. at 976-77 (Breyer, J., dissenting) (discussing experiences of federal systems in Switzerland, Germany, and the European Union as aids to deciding question of United States federalism); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J.) (looking to opinions of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as aids to deciding questions arising under the Eighth Amendment). *See also* William Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), *reprinted in Germany and its Basic Law: Past, Present and Future – A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (noting "it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process").

Furthermore, recognizing the validity of interpretations from foreign and international courts ensures the Court's continued presence and leadership in the international arena of human rights issues. *See* Martha F. Davis,

International Human Rights and United States Law: Predictions of a Courtwatcher, 64 Alb. L. Rev. 417, 421-28 (2000) (arguing that in the twenty-first century, judicial legitimacy requires that courts acknowledge international context of decisions). Decisions rendered by this Court have long served as a model for countries around the world; high courts in other countries have historically looked to the jurisprudence of this Court for guidance, and the United States government has been an international leader in proclaiming the importance of international law and the promotion of human rights. *See* Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 16-17 (1998). Increased engagement with the constitutional courts of other countries can help to ensure a leading position in international human rights for American courts and for the United States more generally.

The practical and historic rationales for taking international and comparative perspectives into consideration in resolving domestic legal issues are directly relevant to determining the constitutionality of the Jefferson County and Seattle plans. The United States is not alone among nations in instituting programs promoting diversity and remedying lingering effects of discrimination against certain social groups, nor has the United States been alone in requiring that such programs be reconciled with guarantees of equality under existing law. Indeed, the legal systems in other countries have been profoundly influenced by the legacy of this Court's decision in *Brown v. Board of Educ. of Topeka*, 349 U.S. 294 (1955). *See* L'Heureux-Dubé, 34 Tulsa L.J. at 20 (noting that *Brown* has "had a large impact on the spirit and development of human rights protections worldwide"). *Brown* has been

widely cited by courts all over the world. *See, e.g., Canada (Attorney General) v. Moore*, 55 C.R.R. (2d) 254; 1988 C.R.R. LEXIS 287; *Summayyah Mohammed v. Moraine & Another* (1996), 3 L.R.C. 475 (Trinidad & Tobago); *Te Runanga O Muriwhenua Inc. v. Attorney-General* [1990] 2 N.Z.L.R. 641, 1990 N.Z.L.R. LEXIS 845 (C.A.) (New Zealand). Taking into account other nations' interpretations of human rights issues will only enhance the Court's reasoning, prestige and influence in the areas of international human rights law and constitutional law.

II. OTHER NATIONS HAVE UPHELD RACE-CONSCIOUS AND GENDER-CONSCIOUS MEASURES UNDER COMPARABLE CIRCUMSTANCES

Numerous countries have upheld the use of "special measures" – both race-conscious and gender-conscious factors – in programs to benefit underrepresented populations. In many countries, permissible programs to promote integration and remedy past discrimination are much more aggressive than the narrowly-tailored managed-choice programs at issue here, and even jurisdictions that have set limits on affirmative action have upheld race-conscious or gender-conscious measures.

Most notably, the Court of Justice of the European Communities has endorsed programs that use gender as a factor in employment decisions in order to remedy gender discrimination in employment. In two recent cases, the Court of Justice upheld national measures giving priority to women for promotion to public service positions in which women were underrepresented. *See* Case C-158/97, *Badeck & Others*, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6, 2000 All ER (EC) 289 (E.C.J. 2000) (*available on* Westlaw); Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*,

1997 E.C.R. I-6363, 1997 All ER (EC) 865 (E.C.J. 1997) (*available on* Westlaw).

Significantly, in the Hessen, Germany plan under review in *Badeck* and the German national rule considered in *Marschall*, gender was used as a "plus" factor for promotion. *Cf. Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 318 (1978); *see also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture – Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 279 (1999) (acknowledging that race and gender may be plus factors in employment, promotion, or educational admissions). The plans under review in *Badeck* and *Marschall* did not give automatic or unconditional priority to women over men. Similarly, the Jefferson County and the Seattle school integration plans under review in the case at bar do not give automatic or unconditional priority in school assignment to students of any race. Rather, in the Jefferson County program, students are initially assigned to schools in their "resides" area, the boundaries of which are drawn taking race into account, but that assignment may be superseded by student choice and other factors. In the Seattle program, race is but one of several factors that may be utilized, after consideration of the student's preference among schools to attend. Thus, student choice is the primary selection criteria under both plans.

Although in *Badeck* and *Marschall* the European Court of Justice did not explicitly adopt the concept of "narrow tailoring" from United States jurisprudence, it engaged in analysis similar to that invoked by American courts reviewing government action with regard to race-conscious programs. Thus, in *Badeck*, for example, the European Court investigated whether the priority given to

females in appointments and promotions pursued a legitimate social objective and used means that were proportionate "in relation to the real needs of the disadvantaged group." *Badeck*, 2000 E.C.R. at 1889. Applying this standard, the court concluded that the program passed muster under Community law. *Id.* at 1919.

Since *Badeck*, the European Court of Justice and the European Free Trade Association ("E.F.T.A.") Court have upheld affirmative measures to promote employment of underrepresented groups. In Case E-1/02, *EFTA Surveillance Authority v. The Kingdom of Norway*, [2003] IRLR 318 (E.F.T.A. 2003), the E.F.T.A. Court affirmed that states may adopt measures providing specific advantages for women in employment sectors in which they were previously underrepresented, so long as such measures take into account the principle of proportionality, "which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim pursued." *Id.* at paras. 43, 56. Similarly, in Case C-476/99 *Lommers v. Minister van Landbouw Natuurbeheer en Visserij*, [2002] IRLR 430 (E.C.J. 2002), the European Court of Justice found that the Dutch Ministry's program reserving a limited number of subsidized places for female officials was proportional and compatible with the European Community Equal Treatment Directive 76/207 since it did "not totally exclude male officials from its scope" and promoted the employment of a previously underrepresented group.

Other countries also permit race-conscious and gender-conscious programs to correct systemic underrepresentation of minority populations.

The Canadian Charter of Rights and Freedoms, permits governmental programs to redress past discrimination, and its equal protection provision specifies that the Charter "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race." Can. Const. (Constitution Act, 1982) Schedule B, Pt. I (Canadian Charter of Rights and Freedoms), § 15(2); *see generally Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 Can. Sup. Ct. LEXIS 33, at *87-*100 (Can.) (discussing relationship between § 15(2) and Charter's equal protection provision).

In addition, the Canadian Human Rights Act of 1985 (R.S.C. 1985, c. H-6, s. 16) and Employment Insurance Act of 1996, Part II Employment Benefits and National Employment Service (S.C. 1996, c. 23, s. 60) both exclude from the definition of prohibited discrimination special programs "designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group."

In interpreting the Canadian Human Rights Act, the Supreme Court of Canada upheld an affirmative action measure imposed on the Canadian National Railway to combat systemic discrimination in the hiring and promotion of women. *Canadian Nat'l Ry. Co. v. Canada*, [1987] 1 S.C.R. 1114, 1143-45, 1987 S.C.R. LEXIS 1136, at *48-*52 (Can.). The special, temporary measure – far more interventionist than the voluntary school integration programs at issue here – required hiring at least one woman for

every four positions traditionally filled by men until women had achieved greater representation. *Id.* at 1125-27, 1141, 1987 S.C.R. LEXIS at *17-*21, *44-*45.

Similarly, the South African Constitution adopted in 1996 specifically acknowledges the injustices of the past and promotes affirmative action policies to assist groups that have been disadvantaged under prior laws. S. Afr. Const. pmbl.; ch. 2, § 9(2). Indeed, the lack of quality education available to African students in South Africa led the dean of a medical school to create an affirmative action program targeted to benefit African students. *Motala & Another v. Univ. of Natal*, 1995 (3) BCLR 374 (Durban Sup. Ct.), 1995 SACLR LEXIS 256 at *16-*17 (S. Afr.). An Indian woman who was denied admission challenged the school's program. *Id.* at *13-*14. In rejecting her claim, the court observed that, although Indians also suffered discrimination under apartheid, the experience for Africans was significantly worse, and compensating for this long-standing mistreatment of African applicants to the medical school did not represent unfair discrimination against Indian students under the constitution. *Id.* at *28.

South African legislation also reflects a commitment to the adoption of polices to redress past educational discrimination and promote equality. In South Africa, the Schools Act 84 of 1996 (No. 27 of 1996), Section 34(1), requires equitable funding of public schools in order to ensure the "proper exercise" of the right to education and to redress past inequalities; the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (4 of 2000), Section 25, requires the state to take measures and implement programs to promote equality and where necessary or appropriate develop action plans to address unfair discrimination; and the Employment Equity Act

(No. 55 of 1998), Sections 6(2)(a) and 15(3), states that it is not unfair discrimination to "take affirmative action measures consistent with the purposes of this Act" if such measures "include preferential treatment and numerical goals, but exclude quotas."

In India, the Indian Constitution of 1950 and its subsequent amendments set forth a comprehensive equality doctrine that has laid the foundation for extensive affirmative action measures through a system of quotas (referred to as "reservations") in the areas of higher education and participation in government employment to remedy past injustices against members of the lower levels of India's caste system as well as other historically-disadvantaged groups. The Constitution reserves seats for members of India's most disadvantaged social castes and tribes (known in Ugal parlance as "scheduled castes" and "scheduled tribes") in the House of the People, state legislative assemblies, and local governmental units (Indian Const. Arts. 243D, 243T, 330, 332) and permits the government to "reserve" civic "appointments or posts" for members of "any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State" (Indian Const. Art. 16(4)) and make "promotion[s], with consequential seniority," of members of historically underrepresented castes and tribes to governmental positions. (Indian Const. Art. 16(4A)).

In response to a legal challenge to affirmative action over a half century ago in *State of Madras v. Champakam Dorairajan*, A.I.R. (S.C.) 226 (1951), India amended its Constitution in 1951 to affirm its commitment to affirmative action: "Nothing in [the constitution's anti-discrimination provisions] shall prevent the State from

making any special provision for the advancement of any socially and educationally backward classes of citizens or for the [lowest castes and tribes]." (Indian Const. Art. 15(4); *see also* Indian Const. Art. 29).

Since 1963, the Indian Supreme Court has consistently upheld the constitutionality of affirmative action programs in the higher education and governmental employment contexts, including the endorsement of a quota system that allows up to fifty percent of positions to be reserved for members of historically disadvantaged groups, going far beyond the ameliorative measures voluntarily adopted by Jefferson County and Seattle. (*See Balaji v. State of Mysore*, A.I.R. (S.C.) 649 (1963); *see also Devadasan v. Union of India*, A.I.R. (S.C.) 179 (1964) (affirming *Balaji* fifty percent ceiling in context of carrying forward unfilled reserved positions in government employment); *Indra Sawhney v. Union of India*, A.I.R. (S.C.) 477 (1993)).

In addition to the countries discussed above, many other nations also take into account the need to redress the effects of past discriminatory laws and practices. In New Zealand and Australia, for example, affirmative action programs are permitted by statute. *See* New Zealand Bill of Rights Act 1990, § 19, 1990 S.N.Z. No. 109; Human Rights Act 1993, 1993 S.N.Z. No. 82 §§ 58, 73(1) (New Zealand); Racial Discrimination Act 1975, § 8(1) (Austl.); *see also Gerhardy v. Brown* (1985) 159 C.L.R. 70 (Austl.). In Northern Ireland, past religious discrimination is addressed through legislation that requires taking religion into account in order to promote a more integrated police force. Specifically, the Police (Northern Ireland) Act 2000, c.32, § 46(1) requires that in recruitment or appointment of trainees, appointments shall be made from

a pool of qualified applicants of whom "one half shall be persons who are treated as Roman Catholic." *Re Parsons: Application for Judicial Review*, [2003] NICA 20; [2004] NI 38 (N. Ir.) (affirmative action in police recruitment did not violate applicant's right to freedom of religion). *See also Committee on the Elimination of Racial Discrimination: Addendum by Israel*, at ¶¶ 485, 486 U.N. Doc. CERD/C/471/Add. 2 (2005) (describing recent Israeli educational programs to redress past marginalization of Arabs and to "lower[] the walls that separate [Arab and Jewish] societies," so that Arabs can "achieve success in higher educational institutions and reach full integration in the public daily life and economy of the country"); Herbert M. Jauch, *Affirmative Action in Namibia* 53-148 (1998) (detailing history of affirmative action in Namibia).

This Court has recently reaffirmed the relevance of international legal norms to its proceedings: "The opinion of the world, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (Kennedy, J.). Accordingly, the legal analyses applied by other countries to uphold successful affirmative action and other race- and gender-conscious policies for groups, like racial minorities in the United States, that have suffered past discrimination should inform this Court as it addresses similar issues, including the voluntary efforts made by public school districts in the United States to promote the racial integration of their schools for articulated benefits to all students and their communities.

III. INTERNATIONAL TREATIES SUPPORT CONSIDERATION OF RACE AS A FACTOR IN SCHOOL ASSIGNMENT

Widely ratified international human rights treaties also represent the cumulative wisdom and experience of nations across the globe. Two treaties are of particular relevance here – the International Covenant on Civil and Political Rights[2] (hereinafter "ICCPR," which has been ratified by 157 nations) and the International Convention on the Elimination of All Forms of Racial Discrimination[3] (hereinafter "CERD," which has been ratified by 170 nations). Together these treaties, both of which have been ratified by the United States, and are the supreme law of the land, represent the international consensus on what constitutes racial discrimination. As such, they provide guidance as courts examine local authorities' remedial efforts to provide equal access to our nation's education system.[4]

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[2] *Adopted and opened for signature* December 16, 1966, 999 U.N.T.S. 171.

[3] *Adopted and opened for signature* December 21, 1965, 660 U.N.T.S. 195.

[4] As stated in the Supremacy Clause, "all Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. *See also* Restatement (Third) of Foreign Relations Law § 115(b) Reporter's Note (1987) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.").

A. The ICCPR and CERD Make Clear that Race-Conscious Policies Designed to Create Diversity Are Not Discriminatory

Both the ICCPR and CERD require parties to the covenants to abstain from engaging in "racial discrimination." The ICCPR guarantees rights without distinction based on race, ICCPR art. 2(1), 999 U.N.T.S. 173, and CERD prohibits conduct that would have the "purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life," CERD, art. 1, 660 U.N.T.S. at 216. *See* ICCPR, art. 26, 999 U.N.T.S. at 179. The CERD also states that parties to the treaty, "condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction," CERD art. 3, 660 U.N.T.S. at 218, and "undertake . . . to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law . . . in the enjoyment of . . . [the] right to education and training" CERD art. 5(e)(5), 660 U.N.T.S. at 222. *See* Convention on the Elimination of All Forms of Racial Discrimination, Gen. Rec. No. 19, *Racial segregation and apartheid*, paras. 2-4, U.N. CERD Comm., 47th Sess., U.N. Doc. A/50/18 (Aug. 8, 1995). Finally, the CERD's general provisions prohibit all forms of racial discrimination, *see* CERD, arts. 2-5, 660 U.N.T.S. at 216-22. Thus, the treaties provide comprehensive protection against discrimination.

Yet, the Human Rights Committee, which is the formal monitoring body for the ICCPR,[5] has noted that

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[5] As a means for regulating compliance with the treaty, the terms of the ICCPR set up a Human Rights Committee (the "Committee").

(Continued on following page)

"not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and ***if the aim is to achieve a purpose which is legitimate under the Covenant.***" [emphasis added] United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment 18, para. 13, at 28 (1994) (hereinafter "General Comment 18"). According to the Human Rights Committee:

> [T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. . . . Such action may involve granting for a time . . . certain preferential treatment in specific matters . . . .

General Comment 18, para. 10.

Similarly, the CERD specifically states that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that

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Parties to the ICCPR submit reports to the Committee on the measures adopted pursuant to the treaty. ICCPR, art. 40, 999 U.N.T.S. at 181-82. Following a review of the reports, the Committee issues concluding observations that often include recommendations for addressing concerns raised by the Committee.

> they shall not be continued after the objectives for which they were taken have been achieved.

CERD, art. 1(4), 660 U.N.T.S. at 216; *see also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsberg, J., concurring) (stating that the CERD endorses "special and concrete measures" to ensure the rights outlined in the CERD, until such objectives have been achieved).

When the Senate ratified the CERD, it recognized that race may be taken into account when necessary to secure equality. In his formal statement to Chairman Claiborne Pell of the Senate Foreign Relations Committee concerning ratification of the treaty, Conrad Harper, the Legal Adviser to the Secretary of State, noted: "Article 1(4) explicitly exempts 'special measures' taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection." Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 Am. J. Int'l L. 721, 722 (1994).

The managed-choice programs at issue here are clearly both reasonable and objective; they are carefully designed to limit the use of race in school assignment to the extent necessary to achieve the goal of school integration, and they do not permit exercise of informal discretion that might mask discriminatory bias. More importantly, the programs are well designed to achieve the central purpose of the covenants, which is to prevent discrimination. They do not in any way lead to the "maintenance of separate rights for different racial groups." *See* CERD, art. 1(4), 660 U.N.T.S. at 216. They represent the most modest of race conscious' remedies, and they stop far short of providing special preferences or benefits to one racial

group. The program benefits all students and, indeed, the entire community, by creating non-discriminatory and diverse school environments. Indeed, the Jefferson County and Seattle school districts have continually and repeatedly determined that integrated educational environments lead to people of all racial backgrounds leading richer lives. The Jefferson County Board of Education has explained that one of its educational goals is to ensure that all students in the district are, "safe, supported, respected and confident in racially integrated schools, classrooms and student activities." Joint Appendix 22.

B. The Managed-Choice Programs Are Consistent with the Obligations of the United States Under the ICCPR and CERD

Upon ratification of the ICCPR and CERD, the Senate acknowledged that it is the responsibility of both our state and local governments to ensure the principles set forth in these treaties.[6] It is also the expectation of the international community. For example, parties to the ICCPR are obligated to undertake the "necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized" in the treaty. ICCPR, art. 2(2), 999 U.N.T.S. at 173. Likewise, Article 2(1)(a) of the CERD provides that "[e]ach State Party undertakes . . . to ensure that all public authorities and public institutions, national and local, shall act in conformity" with their

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[6] U.S. Reservations, Understandings, Declarations, and Proviso, ICCPR, 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992), II(5); *see also* U.S. Reservations, Understanding, Declarations, and Proviso, CERD, 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994), II.

obligations under the treaty. CERD, art. 2, 660 U.N.T.S. at 218. The programs at issue in the instant case, which do not even involve preferential treatment, are appropriate local measures to realize the principle of non-discrimination.

Indeed, the Human Rights Committee recently addressed the issue of de facto racial segregation in United States public schools.[7] The Committee noted that de facto racial segregation had resulted from housing patterns and the manner in which school districts are created, funded and regulated. It expressed concern that the United States "had not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students." *Id.* at ¶ 23. The Committee reminded the United States "of its obligation under articles 2 and 26 of the [ICCPR] to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis." Finally, the Committee recommended that "[t]he [United States] should conduct in-depth investigations into the de facto segregation described above, and take remedial steps, in consultation with the affected communities." *Id.* The steps taken by the Seattle and Jefferson County school districts are precisely the type of measured remedial actions called for by the Committee, and by the ICCPR, in response to de facto segregation.

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[7] Human Rights Committee, *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant*, 87th Sess., U.N. Doc. CCPR/C/USA/CO/3 (2006).

Carefully crafted managed-choice programs tailored to ensure equal enjoyment of rights by all racial groups are thus permissible and even endorsed under the ICCPR and CERD.

C. Self-Execution Is Not an Issue Where, as Here, the Treaty Provisions Are Cited as Aids to Interpretation

When the United States ratified the ICCPR and CERD, it included reservations that many, but not all, of the articles are "non-self-executing." Louis Henkin *et al.*, *Human Rights* 784-86, 1043-44 (1999). A non-self-executing treaty requires additional legislation in order for it to be enforceable by a litigant in Court. While the Human Rights Committee has questioned the validity of such reservations in connection with a human rights treaty (*see* ICCPR, *General Comment Adopted Under Article 40 on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols, or in Relation to Declarations Under Article 41 of the Covenant* (Adopted, November 2, 1994), 34 I.L.M. 839 (1995) (General Comment 24)), the propriety of such reservations need not be resolved here. The *amici* cite the provisions of the ICCPR and CERD not as the foundation for their legal claims, but rather as interpretive support for their position that the school districts' managed-choice programs do not violate the United States Constitution.

As explained in detail above, this Court has looked to international law to provide guidance in various areas of jurisprudence. Even where treaties are viewed as "non-self-executing," they may be used indirectly as aids for interpretation of other laws, defensively in civil or criminal contexts, or – as here – to support race-conscious

managed-choice school integration policies. *See, e.g.*, Jordan J. Paust, *International Law as Law of the United States* 62-64, 68, 97-98, 134-35, 370, 377-78 n.4, 384 (1996); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423, 456 n.206, 460, 467-68, 470 (1997); Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in State Courts*, 90 Am. Soc'y Int'l L. Proc. 259, 262, 264 (1996). In an effort to best understand the need for these programs, their benefits to our communities, and their narrow limits in application, the Court may appropriately consider these treaties here.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the briefs of Respondents, the decisions of the courts below should be affirmed.

Respectfully submitted,

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Nos. 05-908 & 05-915

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeal for the Sixth and Ninth Circuits

BRIEF FOR *AMICI CURIAE* SENATORS EDWARD M. KENNEDY, PATTY MURRAY, MARIA CANTWELL, THOMAS HARKIN, RICHARD J. DURBIN, BARACK OBAMA, AND KEN SALAZAR IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are United States Senators elected from various parts of the Nation. We submit this brief to urge the Court to reaffirm that local school districts may take voluntary action to ameliorate the pernicious consequences of racial isolation and promote the interests of integration and equal opportunity in our Nation's elementary and secondary schools.

As members of the branch of government to which the Constitution assigns responsibility for "enforc[ing], by appropriate legislation," the anti-discrimination guarantees of the Thirteenth and Fourteenth Amendments, *see* U.S. Const. amends. XIII, § 2, XIV, § 5, several of whom are also members of Senate Committees with principal jurisdiction over the Nation's civil rights and education laws and policy, *Amici* have substantial experience and interest in the issues now before the Court. While *Amici* believe that elementary and secondary education remains primarily a local endeavor, appropriate federal involvement is an integral component of promoting educational opportunity and ensuring a quality education for all of the Nation's children. Indeed, through its legislation, Congress historically has played an essential role in supporting local authorities in their efforts to achieve integrated schools and educational opportunities for children of all races.

Amici submit this Brief to bring the Court's attention to the federal legislative branch's long-standing recognition of the compelling national interest in promoting integration in elementary and secondary education and in preventing the harms of segregated education, and to the considered judgments of the legislative branch concerning the questions these cases present.

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[1] No counsel for any party had any role in authoring this brief, and no person other than the named *Amici* and their counsel made any monetary contribution to the preparation and submission of this brief. By letters on file with the Court, all parties have consented to its submission.

SUMMARY OF ARGUMENT

Dating back to *Brown v. Board of Education*, 347 U.S. 483 (1954) ("*Brown I*"), this Court and numerous other federal courts repeatedly have recognized the harms inherent in racially segregated schools and either *ordered* local school authorities to pursue integration through various means or *deferred* to local school authorities that voluntarily did so. Similarly, with the passage of the Emergency School Aid Act more than three decades ago, and as recently as the No Child Left Behind Act, both the executive branch and the legislative branch have consistently, and unambiguously, recognized the important national interests in addressing racial segregation and racial integration in public education.

Nevertheless, Petitioners insist their Equal Protection rights have been violated because they were not assigned to the elementary or secondary public school of their choice under the Respondent local school districts' race-conscious integration plans. In so arguing, Petitioners brush away more than 50 years of Equal Protection Clause jurisprudence in the elementary and secondary school context as a mere "temporary" departure from what they contend is truly required by the Fourteenth Amendment: that government be entirely color-blind, regardless of circumstance, and that remedying "mere" racial segregation and promoting "mere" racial integration can *never* serve a compelling interest. Petitioners' argument disregards Congress's repeated recognition of the necessity of taking race-conscious measures to achieve the national interest in integrated educational opportunities for all of the Nation's children.

Petitioners rely almost exclusively on the Court's recent decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), in which the Court addressed the University of Michigan's use of race as one of several criteria for promoting diversity among students admitted to its higher education programs. Petitioners read

Grutter and *Gratz* to preclude school officials (or any government actor) from considering race, by itself without other factors, when pursuing integration. Certainly, achieving diversity in other respects—in addition to racial diversity—can convey additional benefits in the educational context. Recognizing the benefits of other forms of diversity, however, does not diminish the compelling interest in achieving *racial* integration in schools. As *Grutter* explicitly acknowledged, "race unfortunately still matters." 539 U.S. at 333.

As is clear from the record in these two cases, racially segregated schools and racial isolation among elementary and secondary school children result in negative consequences for *all* students. Racially segregated schools tend to be characterized by lower average test scores and lower levels of student achievement than more integrated schools. In contrast, with racial integration, students learn tolerance toward others of different races, develop relationships across racial lines, and relinquish racial stereotypes. Students from schools with more integrated student bodies are also better prepared for a diverse workplace and develop more advanced social and intellectual maturity. Further, integrated schools help students develop improved critical thinking skills, while also improving race relations among students and expanding their opportunities in higher education and employment.

Accordingly, neither this Court nor Congress has ever foreclosed the pursuit of racial integration, standing alone, nor limited that pursuit to remedying past discrimination. Indeed, all three branches of the government have recognized the compelling national interest in racial integration.

Moreover, the decisions of this Court consistently express *deference* to local school districts' ability to voluntarily use rational, race-conscious measures to reduce *de jure* or *de facto* racial segregation and racial isolation. But, even viewed under a more exacting strict scrutiny analysis, the actions of the local school districts here were narrowly

tailored to serve a compelling interest in reducing racial isolation and promoting racial integration in schools, and therefore do not run afoul of the Equal Protection Clause.

In contrast to the admissions processes at issue in *Grutter* and *Gratz*, no students were denied admission to the public schools in Seattle or Jefferson County on account of their race. In fact, no student was denied admission at all (regardless of race). Nor do the local school districts' voluntary integration plans discriminate against or disadvantage members of any racial group, or establish a "preference" for members of any particular group. They apply to both white students and non-white students, and do not establish quotas or rigid numbers, nor do they displace a merit-based assignment system. To the contrary, they target broad ranges, and the percentage of white and non-white students varies (sometimes widely) from school to school within the districts.

In some instances, the plans operate in such a way that particular students (both white and non-white) are not assigned to the school of their choice. Those students, however, do not have any constitutional right to attend the school of their choice; that is a decision entirely within the discretion of local school authorities.

Without question, the local school districts have used race-conscious policies in order to achieve more racially integrated schools. This does not mean, however, that the local school authorities have pursued racial balancing for its own sake. Rather, they have adopted narrowly tailored integration plans for the associated educational benefits they provide to *all* children. Nothing in the Constitution prevents local school districts from voluntarily using race-conscious measures to pursue these compelling interests. Any ruling to the contrary would not only disregard Congress's repeated recognition of the compelling national interest in achieving racially integrated schools, but would impede Congress's ability to

effectively legislate on matters of civil rights and education in the future.

ARGUMENT

Since the Court's 1954 landmark decision in *Brown v. Board of Education*, the Nation has sought to give full meaning to the important goals of integration and equality, which are a fundamental part of the effort to ensure that all children receive a quality education. With the recent celebrations surrounding the 50th anniversary of the *Brown* decision, and the upcoming celebration next year of the 50th anniversary of the integration of Central High School in Little Rock, Arkansas, much attention has been given—deservedly so—to the significant progress made since 1954. The Court, the President, and Congress, however, all recently have acknowledged the reality that, today, "race unfortunately still matters," especially when it comes to the Nation's schools. *Grutter*, 539 U.S. at 333. *See also* No Child Left Behind Act, 20 U.S.C. § 6301, *et. seq.* (2002). As President George W. Bush remarked at the Grand Opening of the Brown v. Board of Education National Historic Site, "while our schools are no longer segregated by law, they are still not equal in opportunity and excellence. Justice requires more than a place in a school." Remarks by The President at Grand Opening of The Brown v. Board of Education National Historic Site, 40 Weekly Comp. Pres. Doc. 911-12 (May 17, 2004).

The two cases now before the Court involve school districts that have voluntarily undertaken efforts to do more and ensure that they are not merely providing "a place in a school." Their voluntary integration plans comport with established Equal Protection Clause jurisprudence. Indeed, "[t]o say that school officials in K-12 grades, acting in good faith, cannot take steps to remedy the extraordinary problems of *de facto* segregation and promote multiracial learning is to go further than ever before to disappoint the promise of *Brown*." *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328,

391 (D. Mass. 2003), *aff'd* 418 F.3d 1 (1st Cir. 2005). Accordingly, the decisions of the Courts of Appeal for the Ninth and Sixth Circuits should be affirmed.

I. THE LOCAL SCHOOL DISTRICTS' VOLUNTARY INTEGRATION PLANS PASS MUSTER UNDER ANY STANDARD.

The Court recently "decline[d] the invitation" to "make an exception to the rule that strict scrutiny applies to all racial classifications." *Johnson v. California*, 543 U.S. 499, 509 (2005). However, as discussed in Section II, *infra*, we do not believe that strict scrutiny is necessarily the correct standard to be applied here, or that *Johnson* or other decisions of this Court mandate that strict scrutiny be applied. Nevertheless, because the school districts' plans pass muster under even the most stringent scrutiny, and therefore would also pass muster under a more deferential standard of review, this Brief begins with an analysis of the challenged plans under the strict scrutiny standard. The strict scrutiny standard requires that the challenged use of race (1) serve a compelling government interest and (2) be narrowly tailored to do so. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

A. There Is A Compelling National Interest In Promoting Racial Integration In Schools.

The local school authorities' interests in both of the cases at bar are clear and undisputed: to avoid racial isolation and *de facto* racial segregation and promote integration in public school education. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1174 (9th Cir. 2005) ("*Parents*") (noting that the Seattle plan "seeks the affirmative educational and social benefits that flow from racial diversity . . . [and to] avoid the harms resulting from racially concentrated or isolated schools."); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 836 (W.D. Ky. 2004)

(finding Jefferson County school authority's interest to be "[t]o give all students the benefits of an education in a racially integrated school"). Petitioners neither challenge those motives nor suggest that they are a pretext for some illegitimate motive. *See McFarland*, 330 F. Supp. 2d at 855, n.42; *Parents*, 426 F.3d at 1175.

For more than 50 years, and as recently as three years ago, this Court has recognized the compelling interest in advancing integration in the Nation's schools. *See, e.g., Brown I*, 347 U.S. at 493-94; *Grutter*, 539 U.S. at 328 (finding "a compelling interest in attaining a diverse student body"). The Court has deferred to local school boards' "educational judgment that such diversity is essential to [their] educational mission." *Grutter*, 539 U.S. at 328.

Petitioners nonetheless argue that, while race is one component of the diversity recognized as a compelling interest in *Grutter*, attempting to achieve racial integration alone cannot be a compelling interest. That contention is directly at odds with five decades of Equal Protection Clause jurisprudence and the considered judgment of the legislative and executive branches, which repeatedly have recognized the compelling national interest in eradicating racial segregation and promoting integration in public schools.

As this Court recently concluded, "race unfortunately still matters." *Id.* at 333. The local school authorities' plans are designed to move society in a direction that will, one day, change that.

1. The Court has recognized the compelling national interest.

In *Brown I*, the Court acknowledged the inherent harms associated with racial segregation, which apply "with added force to children in grade and high schools." 347 U.S. at 494. Since then, the Court repeatedly has recognized the vital

importance of addressing racial segregation, and has suggested that it is well within local school districts' discretion—to which the Court generally has deferred—to pursue precisely the types of voluntary racial integration plans at issue here. *Brown* and its progeny unquestionably recognize a level of national interest in eliminating racial segregation and achieving racial integration that is at least as compelling as the interests held to satisfy strict scrutiny in other cases.

Brown I itself recognized the "detrimental effect" of segregation on school children and its particular importance in the education context. *Id.* As the Court stated:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required for the most basic public responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.

Id. at 493. *See also Lee v. Nyquist*, 318 F. Supp. 710, 714 (W.D.N.Y. 1970) (stating that "it is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to *all* students, both black and white") (emphasis added). Combining its clear recognition of the importance of affording educational opportunity to all children and the "detrimental effect" of segregation in the education context, the Court expressly recognized the students' "personal interest" in access to equal educational opportunity and the "public interest" in eliminating obstacles to desegregation. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) ("*Brown II*"). If the Court had been employing the nomenclature of the strict

scrutiny test, it no doubt would have labeled these personal and public interests as "compelling."

Indeed, in this context, the Court has recognized the interests to be so compelling as to warrant *deference* to local school authorities that pursue integration. In *Washington v. Seattle School District No. 1*, the Court observed that:

> [T]he power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort.

458 U.S. 457, 479-80 (1982). Similarly, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) ("*Swann I*"), the Court recognized the valid interests in "hav[ing] a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole" and concluded that "[t]o do this as an educational policy is within the broad discretionary powers of school authorities . . .". *Id.* at 16. Likewise, in *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971) ("*Swann II*"), the Court affirmed that "as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *Id.* at 45.

The Court's subsequent decisions are entirely consistent with the view that racial integration is an important, constitutionally permissible goal, and that local school authorities have the discretion to voluntarily pursue racial integration as a matter of sound educational policy. "[T]he power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student as-

signment and desegregation—[is one] firmly committed to the local board's discretion." *Washington*, 458 U.S. at 479-80.[2]

Individual members of the Court have affirmed these principles. In *Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973), for example, Justice Powell noted that local "[s]chool boards would, *of course*, be free to develop and initiate further plans to promote school desegregation" and specifically highlighted the values of racial integration: "[n]othing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience." *Id.* at 242 (Powell, J., concurring in part, dissenting in part) (emphasis added). Similarly, in denying an emergency petition by white parents to stay a state-imposed, race-conscious student assignment plan in Los Angeles County, Justice Rehnquist noted that while the school authority was under no *obligation* to voluntarily pursue racial integration in the public schools, he had "*very little doubt that it was permitted* . . . to take such action." *Bustop, Inc. v. Bd. of Educ. of the*

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[2] *See also Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000) ("local school authorities have the power to voluntarily remedy *de facto* segregation existing in schools and, indeed, such integration serves important societal functions"); *Johnson v. Bd. of Educ. of City of Chicago*, 604 F.2d 504, 518 (7th Cir. 1979), *vacated and remanded on other grounds*, 457 U.S. 52 (1982) ("[T]he absence of a constitutional *duty* on the part of the school authorities to establish racially-based enrollments does not preclude the Board from prescribing a racial balance to remedy the segregative impact of demographic change."); *Willan v. Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416 (E.D. Wis. 1987) ("It is well-settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination."); *Offermann v. Nitkowski*, 248 F. Supp. 129, 131 (W.D.N.Y. 1965) ("[T]he Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system.").

City of L.A., 439 U.S. 1380, 1383 (1978) (Rehnquist, J., in chambers) (emphasis added).

Notwithstanding the Court's and individual Justices' pronouncements, the Solicitor General's *amicus* briefs suggest that the cases currently before this Court are different because the local school districts are not currently operating under a court-ordered desegregation plan. *See Amicus* Br. of the United States, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (No. 05-908) at 7-8; *Amicus* Br. of the United States, *Meredith v. Jefferson County Bd. of Educ.* (No. 05-915) at 7-8. That, however, is a distinction without a difference. In fact, the Court recently and expressly stated that it "ha[s] never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Grutter*, 539 U.S. at 328. The Nation's interest in integrated schools does not depend on whether a school district has been subjected to a desegregation lawsuit. The detrimental effects of segregation and racial isolation exist whether or not a court order is in place. The "lingering effects" of such segregation simply do not "magically dissolve" without affirmative efforts by school districts to improve integration. *See Brown v. Bd. of Educ.*, 978 F.2d 585, 590 (10th Cir. 1992), *cert. denied sub nom. Unified Sch. Dist. No. 501 v. Smith*, 509 U.S. 903 (1993).

Moreover, in the case of former *de jure* systems—such as the Louisville school district—it defies logic that a race-conscious student assignment plan can be used to attain a declaration that the school system has eliminated the vestiges of the prior *de jure* dual system, but that such a plan cannot be used to *maintain* that status after the federal courts have relinquished jurisdiction in favor of local control.[3] By

[3] Indeed, a school district seeking "unitary status" must not only demonstrate past good faith compliance with desegregation orders, it must also demonstrate a good faith commitment to the *future* operation of the

requiring the elimination of the race-conscious plans used to achieve unitary status, the Petitioners' arguments would ensure the resegregation of many, if not most, of the prior *de jure* systems that have now been desegregated. Just as the Court found it "clear that [a] city could take affirmative steps to dismantle" a system of racial exclusion of minority contractors where the city had become a "passive participant," and without any prior history of discrimination by the city itself, the school districts should be permitted to address *de facto* segregation where they have no control over segregated residential patterns. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-93 (1989) (plurality opinion).

2. The legislative and executive branches have recognized the compelling national interest.

Beginning in the early 1970's, with the passage of the Emergency School Aid Act, and as recently as the passage of the No Child Left Behind Act, both the executive branch and the legislative branch that *Amici* represent have repeatedly and unambiguously recognized the important national interests in specifically addressing racial segregation and racial integration in public education.

In anticipation of introducing the legislation that would become the Emergency School Aid Act of 1970 ("ESAA"), President Nixon issued a "Statement About Desegregation of Elementary and Secondary Schools," "plac[ing] the question of school desegregation in its larger context, as part of America's historic commitment to the achievement of a free and open society" and declaring that no issue "is more important to our national unity and progress." Richard Nixon, Statement About Desegregation of Elementary and Secondary Schools, Pub. Papers 304-05 (March 24, 1970). In discussing

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school system. *See Brown*, 978 F.2d at 592; *United States v. Unified Sch. Dist. No. 500*, 974 F. Supp. 1367, 1384 (D. Kan. 1997).

voluntary racial integration, President Nixon specifically noted that "[t]he important point to bear in mind is that where the existing *racial* separation has not been caused by official action, . . . increased integration is and should remain a matter for local determination." *Id.* at 312 (emphasis added).

Two months later, President Nixon introduced legislation that would become the ESAA, which was designed to eliminate segregation not only in the prior *de jure* systems, but also in those school districts in which *de facto* segregation existed. Thus, it explicitly recognized the national interest in addressing racial isolation in the classroom, regardless of its source:

> This Act deals specifically with problems which arise from *racial separation, whether deliberate or not*, and whether past or present. It is clear that *racial isolation* ordinarily has an adverse effect on education. Conversely, we also know that *desegregation is vital to quality education*—not only from the standpoint of raising achievement levels of the disadvantaged but also from the standpoint of *helping all children* achieve the broad-based human understanding that increasingly is essential in today's world.

See Richard Nixon, Special Message to the Congress Proposing the Emergency School Aid Act of 1970, Pub. Papers 449 (May 21, 1970) (emphasis added). The importance of these goals was clear: "doing a better job of overcoming the adverse educational effects of racial isolation, wherever it exists, benefits not only the community but the nation." *Id.* at 452.

Congress enacted the ESAA in 1972, agreeing that "racially integrated education improves the quality of education for all children." H.R. Rep. No. 92-576, at 3 (1971). Congress recognized that "education in an integrated environment, in which [all] children are exposed to diverse backgrounds, is beneficial." S. Rep. No. 92-61, at 7 (1971).

In 1984, recognizing the continued need for federal involvement in efforts to overcome the obstacles to desegregating schools and to prevent racial isolation, Congress passed the Magnet Schools Assistance Program to encourage and support local educational agencies that implemented magnet schools, which were found to be particularly successful in accomplishing these important goals.[4] The program had the stated purposes of:

> meet[ing] the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools [and] to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students.

Pub. L. No. 98-377, Title VII, 98 Stat. 1267, 1299 (1984) (repealed 1988). In reauthorizing the program in 1994, Congress explicitly found that "it is in the best interest of the Federal Government to . . . support . . . school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of . . . education." Pub. L. 103-382, Title V, § 5101, 108 Stat. 3518, 3691 (1994) (amended 2002).

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[4] As the *Amici* brief of the United States acknowledges, in implementing regulations for the program in 1998, the Department of Education acknowledged that the goal of eliminating and preventing racial group isolation was a "compelling interest." *Amicus* Br. of the United States, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (No. 05-908) at 26. While the United States attaches some significance to the fact that the regulations were amended in 2004 to eliminate the explicit reference to "compelling interest," that fact does not render the underlying interest any less compelling. *See id.* at 26-27. In any event, even the 2004 version of the regulations did not impose a *per se* prohibition on race-conscious measures. *See* 69 Fed. Reg. 4992 (Feb. 2, 2004) (merely requiring a "justification" for use of race-conscious student assignments in a voluntary plan).

Most recently, in the No Child Left Behind Act ("NCLB"), enacted in 2002, Congress explicitly endorsed the strong national interest in having local school authorities take voluntary measures to promote racial diversity and integration in public schools. Congress recognized the overarching goal of "ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C. § 6301. In order for states to receive federal funding pursuant to NCLB, the public schools in each state must "adopt[ ] challenging academic content standards and challenging student academic achievement standards." 20 U.S.C. § 6311(b)(1)(A).

To show they have met these standards, states must demonstrate "adequate yearly progress" along certain criteria, including "[t]he achievement of students from major *racial* and ethnic groups." 20 U.S.C. § 6311(b)(2)(C)(v)(II)(bb) (emphasis added). NCLB further requires testing to measure students' progress toward specific goals at specific grade levels. The results of this testing must be "disaggregated . . . by each major racial and ethnic group . . . ," 20 U.S.C. § 6311(b)(3)(C)(xiii), and schools must show that each major group is making progress toward performance standards (and, thus, closing the achievement gap between minority and non-minority students). *See* 20 U.S.C. § 6311(b)(2)(C)(v)(II)(bb). This, of course, is acknowledgment by both the legislative and executive branches that there is a national interest in properly tailored race-conscious measures in the educational setting.

In addition, NCLB specifically included language updating the Magnet Schools Assistance Program and affirming that:

> *It is in the best interests of the United States* . . . to continue the Federal Government's support of local educational agencies that are implementing court-ordered desegregation plans and local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different *racial* and ethnic back-

> grounds; and . . . to continue to desegregate and diversify schools . . .".

20 U.S.C. § 7231(a)(4)(A), (C) (emphasis added). In language that speaks directly to the instant cases, Congress stated that the express purpose of the updated provisions was "to assist in the desegregation of schools" by providing funding to local school authorities for "the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools." 20 U.S.C. § 7231(b)(1).

As demonstrated above, Congress and the Executive Branch have long recognized the compelling national interests in addressing racial segregation and integration of the public schools. It is important that the decision of the Court in the cases at bar accommodate that interest and permit Congress to have the continuing flexibility to legislate effectively in this arena—which may require resort to race-conscious factors to achieve desegregated schools and to eliminate racial isolation in schools.

3. *Grutter* and *Gratz* did not overturn *Brown v. Board of Education*.

Petitioners acknowledge that, since *Brown I*, the Court repeatedly has recognized the national interests in addressing racial segregation and achieving racial integration, and has approved race-conscious means for achieving those goals. Petitioners dismiss this authority, however, as inconsistent with the "color-blindness" they contend is required by the Fourteenth Amendment. Petitioners argue that, "after *Brown v. Board of Education*, . . . the color-blind principle was *temporarily* obscured,"[5] and insist that *Grutter* established an entirely new constitutional regime, implicitly overturning five decades of Equal Protection Clause jurisprudence and

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[5] Petitioner's Brief (Pet'r Br.), *Parents* (No. 05-908) at 25 (emphasis added).

signaling that our society is at the point where concerns about race alone can never be considered compelling.

Grutter did no such thing. To the contrary, the Court in *Grutter* expressly stated that:

> Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which *race still matters*.

539 U.S. at 333 (emphasis added). Nor did *Grutter* hold that educational authorities could never consider racial diversity or pursue racial integration. *Grutter* recognized that certain forms of race-conscious governmental action must be subject to strict scrutiny. *Id.* at 326-27. Even then, however, *Grutter* affirmatively stated that not all race-conscious plans would fail. *Id.* at 328.[6]

What *Grutter* and *Gratz* did establish was that, in the context of the University of Michigan's competitive admissions program, the university could not create a preference for minority students based solely on their race that would insulate them from competition with other students for a limited number of spots. *Id.* at 334; *Gratz*, 539 U.S. at 270-71. Because race was only one of many factors that was considered in pursuing a diverse student body, the Court held

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[6] Petitioners' argument that the Fourteenth Amendment requires "color-blindness" likewise is belied by the fact that the very same Congress that proposed the Fourteenth Amendment also simultaneously proposed and/or enacted several measures that "expressly refer to color in the allotment of federal benefits." Jed Rubenfeld, *Affirmative Action*, 107 Yale L. J. 427, 431 (1997). These included the Freedmen's Bureau Act of 1866 and, despite the fact that the Act explicitly used race-conscious measures, "[n]o member of Congress hinted at any inconsistency between the Fourteenth Amendment and the Freedmen's Bureau Act." Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 784-85 (1985).

that the university could not apply a different set of rules to a subset of applicants, for whom race would essentially be the only grounds on which the university's admission decisions are made. *Gratz*, 539 U.S. at 270-72.

Petitioners seek to expand that holding, arguing that the local school districts may never consider race standing alone, but only as one of many factors—such as socioeconomic status or extracurricular talents. *See* Pet'r Br., *Meredith v. Jefferson County Bd. of Educ.* (No. 05-915) at 7-8; Pet'r Br., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (No. 05-908) at 44. Undoubtedly, achieving diversity in other respects—in addition to race—can convey additional benefits in the educational context, particularly in institutions of higher learning. However, recognizing the benefits of other forms of diversity does not diminish the compelling interest in achieving *racial* integration in the primary and secondary school context.

Indeed, *Grutter* recognized that racial integration, not some proxy for it, is valuable in and of itself. 539 U.S. at 330 (noting the "substantial" benefits of a racially diverse student population). *Grutter* found that racial diversity "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races." *Id.* (internal citations and quotations omitted). Those are the goals the local school districts are pursuing; consideration of other factors is irrelevant to those objectives, which *Grutter* recognized as valid in and of themselves.

4. The local school authorities presented clear evidence of a compelling interest.

As the Ninth Circuit observed below, "each court to review the matter has concluded that because of Seattle's housing patterns, high schools in Seattle would be highly segregated absent race conscious measures." *Parents*, 426 F.3d at 1178.

History reveals that the same would be true in Jefferson County. *See McFarland*, 330 F. Supp. 2d at 836, 842-43.

Regardless of whether segregation is *de jure* or *de facto*, racially segregated schools are "characterized by much higher levels of poverty, lower average test scores, lower levels of student achievement, with less-qualified teachers and fewer advanced courses—'[w]ith few exceptions, separate schools are still unequal schools.'" *Parents*, 426 F.3d at 1177, (quoting Erica Frankenberg *et al.*, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 11 (The Civil Rights Project, Harvard Univ. Jan. 2003), *at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf).

The record below is replete with evidence that, under the challenged integration policies, the detrimental effects of segregation have been reduced and students have increased their tolerance toward others of different races, developed relationships across racial lines, and discarded racial stereotypes. *See, e.g.*, *McFarland*, 330 F. Supp. 2d at 853. This has helped students develop improved critical thinking skills, improved race relations among students, and expanded opportunities in higher education and employment. *Parents*, 426 F.3d at 1174-75. The benefits of racial tolerance and understanding are as "important and laudable" in the primary and secondary school context as they are in a university setting, *Grutter*, 539 U.S. at 330 (internal citation omitted), and perhaps more so. Indeed, these lessons are retained by students well beyond their public school years. As the Court has recognized, "education . . . is the very foundation of good citizenship." *Id.* at 331 (quoting *Brown I*, 347 U.S. at 493).

Petitioners, on the other hand, either did not challenge those conclusions or failed to present sufficient evidence to establish that the voluntary integration plans or the integrated schools they produced lacked benefit. Pet'r Br., *Parents* (No. 05-908) at 21. Petitioners instead argue that the challenged

programs constitute impermissible "racial balancing" because they allegedly prefer members of certain racial groups "for no reason other than race" and solely for the purpose of achieving a racial balance. *Id.* at 26 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., concurring)). Petitioners' racial balancing argument, however, is nothing more than an effort to re-argue that there are no compelling interests associated with racial desegregation and integration. As such, recognition of the clear compelling interests outlined above defeats Petitioners' racial balancing argument.

B. The Local School Districts' Plans Are Narrowly Tailored.

Both the Petitioners and the Solicitor General erroneously apply the traditional "narrow tailoring" factors, and argue that application of those factors to the school districts' plans demonstrates that the plans violate the Equal Protection Clause. Those factors may be summarized as inquiries into: (1) whether individuals are afforded individual and holistic consideration; (2) whether the plans establish a quota; (3) whether the government gave serious, good-faith consideration to workable race-neutral alternatives that could achieve the compelling interest; (4) whether any member of any racial group is unduly harmed; and (5) whether the programs are limited in time. *See Grutter*, 539 U.S. at 334-36.

Those factors are inapposite here, where a race-conscious but non-preferential policy is at issue. The narrow tailoring inquiry is designed to test whether the government's use of race-conscious measures "fits" the asserted compelling interest "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493. Given the nature of the programs at issue here, which are designed to avoid segregation and promote integration without preferring any

member of any group, and the fact that no party has disputed the sincerity of the local school authorities' motives, there is little likelihood that the motive for the use of race-conscious measures here was "illegitimate racial prejudice or stereotype." *Id.* That context is crucial to the narrow tailoring inquiry, which must be "calibrated to fit the distinct issues raised" in the cases at bar, taking "relevant differences into account." *Grutter*, 539 U.S. at 334 (internal quotation omitted).

Indeed, in this context, application of some of the traditional narrow tailoring factors makes little sense. Nevertheless, consideration of these factors confirms that the local school authorities' voluntary integration programs are "specifically and narrowly framed to accomplish [their] purpose." *Id.* at 333 (internal quotation omitted).

1. The individualized, holistic approach to school admission at issue in *Grutter* and *Gratz* is inapplicable in this context.

Grutter and *Gratz* concerned applications for admission to institutions of higher learning, where applicants were competing for a limited number of spaces and unsuccessful applicants would be denied admission. In that context, the Court indicated that "the admissions policy [should be] flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Grutter*, 539 U.S. at 337 (internal quotation omitted). Accordingly, the Court required individualized, holistic consideration of each applicant across a broad range of factors—of which race was only one of many. *Id.* at 338-39.

That type of individualized or holistic approach may be appropriate for examining applicants for admission to institutions of higher learning, but it has no application here—where

there is no competition for admission in the usual sense, no consideration of individual "merits," and all students will gain admission to a comparable school. Students' individual qualifications are irrelevant because, regardless of their test scores, grades, artistic or athletic ability, any student who wants to attend public school in their school district is permitted to do so. Accordingly, the potential dangers that were present in *Gratz* and *Grutter*—of substituting racial preference for qualification-based competition and fostering any associated stigma—are not present here.[7]

Indeed, *Bakke* explicitly recognized that denying admission to institutions of higher learning presented concerns that do not exist in the context of having an elementary school pupil attend a school other than, but comparable to, his neighborhood school in order to achieve desegregation:

> Respondents' position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead it denied him admission and may have deprived him altogether of a medical education.

Bakke, 438 U.S. at 301 n.39.

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[7] While *Grutter* and *Gratz* found that individualized review was necessary to achieve viewpoint diversity across a broad range of factors in the university context, that sort of review is irrelevant to the local school districts' compelling interest here. Because preventing racial isolation and promoting racial integration are themselves the goals, the local school districts necessarily must focus on race, and *not* on the variety of other factors at issue in *Grutter* and *Gratz*. *See Parents*, 426 F.3d at 1182-83; *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005) (when racial integration is the compelling interest, "[t]he only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest").

Here, Respondents did provide for all students to attend comparable elementary or secondary schools.[8] In no instance was the benefit of a public education denied a student in order to give such benefit to another student of a different race. *See, e.g., McFarland*, 330 F. Supp. 2d at 860 (finding that, in Jefferson County, the school board's "policy of creating communities of equal and integrated schools for everyone excludes no one from those communities . . . . When the Board makes a student assignment among its equal and integrated schools, it neither denies anyone a benefit nor imposes a wrongful burden.").

Petitioners complain that they were denied the benefit of assignment to the schools of their choice under the local school districts' plans. However, no student is entitled to attend a particular school. *See Bustop, Inc.*, 439 U.S. at 1383 (rejecting the notion that children have any legally protected right to attend the public school nearest their home); *Johnson v. Bd. of Educ. of Chicago*, 604 F.2d at 516 ("Federal and state courts have uniformly rejected the contention of a constitutional right to attend a particular school.") (citing *McDaniel v. Barresi*, 402 U.S. 39 (1971) and other cases).

Petitioners therefore have suffered no cognizable injury under the Equal Protection Clause, and the individualized type of review at issue in *Grutter* is ill-suited to provide them relief here.

2. The voluntary integration plans do not establish racial quotas.

Just as *Grutter's* requirement of individualized, holistic review in the university setting is inapplicable in this context,

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[8] In both Jefferson County and Seattle, the schools affected by the plans at issue were all governed by the same policies, enforced by the same Board of Education. As in any school district, individual schools will vary to a certain extent based on, *inter alia*, experience of the faculty, age of the facilities, involvement of parents in the school and other factors, but those differences are not constitutionally significant.

so too is the rationale underlying the Court's prohibition on quotas.

"Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Grutter*, 539 U.S. at 335 (quoting *Croson*, 488 U.S. at 496). The concern associated with a quota, as articulated by the Court, is that it insulates members of "certain minority groups" from competition with non-minority candidates for a finite number of positions. *Grutter*, 539 U.S. at 335; *Bakke*, 438 U.S. at 317. This practice substitutes race for qualification-based competition, thereby potentially depriving the non-minority candidates of the opportunity to compete, "[n]o matter how strong their qualifications." *Bakke*, 438 U.S. at 319.

Here, however, those concerns are not present. There is no competitive process for assignment to schools in the school districts. Individual students' qualifications are not taken into account. Therefore, the alleged danger associated with a quota—substituting race for merit—simply does not arise.

Moreover, and more importantly, the integration plans at stake here are not quotas. They do not reserve a fixed number of slots for students based on their race, but instead target a flexible (and broad) range of black or non-white students in each school. The variance is not a hard-and-fast number that must be met—indeed, the percentages of white and non-white students in the relevant schools vary significantly from school-to-school and from year-to-year. *Parents*, 426 F.3d at 1184-85; *McFarland*, 330 F. Supp. 2d at 856-58.

For example, under the Seattle plan, if the pool of non-white students who have voluntarily applied to a particular over-subscribed school is exhausted, no further action is taken—even if the non-white student enrollment is less than the 15% figure that the local school authorities have targeted. Or, stated differently, if the voluntary applicant pool is exhausted, no

students are recruited or forced to attend (or prevented from attending) a particular Seattle high school in order to make sure that its student population is 15% non-white. Moreover, the racial considerations do not even come into play unless a school is oversubscribed. Thus, the plan reflects an entirely permissible effort by the local school districts—as in *Grutter*—to obtain a critical mass of white and non-white students in the oversubscribed schools in order to achieve their compelling interests. *See Grutter*, 539 U.S. at 318.

3. The other traditional narrow tailoring factors confirm that the integration plans are permissible.

Consideration of the remaining narrow tailoring factors confirms that the local school districts' plans are constitutionally permissible.

Petitioners and the United States suggest that the voluntary integration plans are constitutionally suspect because the school districts failed to give "serious, good faith consideration" to race-neutral alternatives. Pet'r Br., *Parents* (No. 05-908) at 42-43; *Amicus* Br. of the United States, *Parents* (No. 05-908) at 23-24 (citing *Grutter*, 539 U.S. at 339); *see also Amicus* Br. of the United States, *Meredith* (No. 05-915) at 22. However, *Grutter* explained that such consideration need only be given to "*workable* race-neutral alternatives *that will achieve the diversity the university seeks.*" 539 U.S. at 339 (emphasis added). In other words, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," only those that will actually succeed and promote the compelling interest. *Id.* at 309.

Here, the local school authorities properly concluded that a race-neutral alternative would not meet their goals.[9] As the

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[9] The Court repeatedly has deferred to the judgment of local school authorities in these areas. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("As we have long observed, local autonomy of school districts is

Ninth Circuit succinctly concluded: "[W]hen a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution." *Parents*, 426 F.3d at 1191. Indeed, "[i]f reducing racial isolation is—standing alone—a constitutionally permissible goal" (and it is), then "there is no more effective means of achieving that goal than to base decisions on race." *Brewer*, 212 F.3d at 752. The Court has recognized as much in uniformly adopting race-conscious remedies to address judicial findings of unconstitutional segregation. *See, e.g., Swann II*, 402 U.S. at 46 ("assignments made on the basis of race" are "the one tool absolutely essential to . . . eliminat[ion] of existing dual systems"); *McDaniel*, 402 U.S. at 41 ("In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race'. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes.") (internal citation omitted). The efficacy of race-conscious measures is no different in cases of *de facto* segregation.[10]

Petitioners further argue that the challenged plans burden both individuals denied assignment to the school of their choice and groups (presumably white students). However, as

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a vital national tradition. . . .") (internal quotations omitted); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."); *Washington*, 458 U.S. at 481 ("no single tradition in public education is more deeply rooted than local control over the operation of schools") (internal quotation omitted).

[10] History has shown that race neutral policies such as "freedom of choice" policies, standing alone, have been ineffective, resulting in "precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws." *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 435 (1968).

addressed above, regardless of whether race is taken into account, no individual student has a right to attend a particular school. *See Bustop, Inc.*, 439 U.S. at 1383 (rejecting the notion that children have any legally protected right to attend the public school nearest their home); *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring) ("school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend"). Moreover, unlike paradigmatic affirmative action plans or quotas, the voluntary integration plans here do not uniformly "benefit" any group. For example, in some schools subject to the Seattle plan, white students are admitted into schools over non-white students while, at other schools, non-white students are admitted over white students. *See Parents*, 426 F.3d at 1192. The voluntary integration plans therefore do not unduly burden any individual or group.

Finally, the plans are sufficiently narrowly tailored in scope and in time. *Grutter*, 539 U.S. at 342. This durational requirement is satisfied where, as here, the government entity conducts "periodic reviews to determine whether racial preferences are still necessary to achieve" the compelling interest. *Id.* Both of the plans at issue here are subject to such periodic reviews. *See Parents*, 426 F.3d at 1192; *McFarland*, 330 F. Supp. 2d at 842.

Accordingly, each of the narrow tailoring factors warrant affirmance.

II. THE LOCAL SCHOOL DISTRICTS' PLANS SHOULD NOT BE SUBJECT TO STRICT SCRUTINY.

While, as demonstrated above, the challenged plans survive under the strictest of scrutiny, that should not be the standard of review. Although race-conscious programs generally are reviewed under the strict scrutiny standard, *Adarand*,

515 U.S. at 225-26, the Court has recognized that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. The present context is very different from the circumstances in which strict scrutiny has been applied.

As Judge Kozinski stated in his concurring opinion in the decision of the Ninth Circuit below, strict scrutiny has been invoked in cases involving "old-fashioned racial discrimination laws, aimed at oppressing blacks," in affirmative action cases such as *Adarand*, where the racial classification "seek[s] to give one group an edge over another," and in cases such as *Johnson*, 543 U.S. 499, where the government actor sought to "segregate persons by race." *Parents*, 426 F.3d at 1193 (Kozinski, J., concurring) (quoting *Comfort*, 418 F.3d at 27 (Bouding, C.J., concurring)).

The challenged school integration plans here involve none of these concerns. In cases such as the present, where race was considered for the purpose of *remedying* segregation and *promoting* racial integration in elementary and secondary education, the Court has not applied strict scrutiny. Instead, it has *deferred* to the judgment of local school authorities in pursuing these important objectives.

For example, in *Swann I*, the Court was asked to address the constitutionality of a local school district's race-conscious efforts to address segregation in the public schools (through busing of African-American students). The Court did not apply strict scrutiny; instead, in affirming the constitutionality of the district's race-conscious integration effort, it made clear that local school authorities have broad discretion to assign students in such a manner as to specifically promote the interests of racial integration in a manner very similar to the challenged plans here:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to

> prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . .

Swann I, 402 U.S. at 16.

In a companion case, the Court again did not apply strict scrutiny, but affirmed that "as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *Swann II*, 402 U.S. at 45; *see also, supra* at 9-11.

To be sure, certain subsequent opinions of the Court, arising in different contexts, suggest that strict scrutiny should apply in *every* circumstance, even for so-called "benign" racial classifications. In *Croson*, for example, the Court reviewed, under strict scrutiny, the city's plan requiring contractors with city contracts to sublease at least 30% of the value of each contract to minority-owned businesses. 488 U.S. 469. Likewise, in *Adarand*, the affirmative action program at issue sought to give an advantage to one racial group over another, questioning the ability of minority-owned businesses to compete on an even playing field. 515 U.S. 200. Both programs provided *preferential* treatment based on race.

In contrast, neither of the school districts' plans here provide preferential treatment, and both promote integration. In the contexts of school desegregation and voluntary school integration cases, students of *all* races benefit from the school districts' plans, and the Court has *never* applied strict scrutiny in these contexts.

In fact, in *Johnson v. California*, the Court's most recent decision on this issue, a majority of the Court acknowledged that, depending on the context, strict scrutiny should not necessarily apply to every race-conscious government action and

that government officials are entitled to some level of deference, even when acting in a race-conscious manner. *See Johnson*, 543 U.S. at 516 (Ginsburg, J. concurring, joined by Souter, J. and Breyer, J.) ("the same standard of review ought not control judicial inspection of every official race classification" and "[d]isagreeing . . . that 'strict scrutiny' properly applies to any and all racial classifications"); *id.* at 524 (Thomas, J., dissenting, joined by Scalia, J.) (concluding that the "strict scrutiny" standard should not apply to racial classifications by prison officials, to whom some level of deference instead should be afforded). That only makes sense where, as here, the challenged government action is not intended for, and does not have the effect of, oppressing minorities, segregating the races, extending preferences or denying benefits based on race, and does not attach any stigma to a person's skin color. *See Parents*, 426 F.3d at 1194 (Kozinski, J., concurring). Under this standard, the challenged school integration plans clearly pass constitutional muster.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions of the Sixth Circuit and Ninth Circuit and hold that local school districts may undertake voluntary efforts to promote integration in the Nation's public schools.

Respectfully submitted,

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PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,

Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Ninth And Sixth Circuits

BRIEF OF LATINO ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici are organizations with roots in the Latino community and whose missions include serving the interests of the Latino community. Some, like the Mexican American Legal Defense and Educational Fund (MALDEF), are national in scope, while others are local organizations. These Latino groups have concluded that decreasing racial isolation and promoting diversity in elementary and secondary education is important to the advancement and success of the Latino community. Accordingly, each has a strong interest in these proceedings. The individual statements of interest of all *amici* appear in the Appendix.

This brief urges the Court to affirm the decisions of the United States Court of Appeals for the Sixth Circuit in *McFarland ex rel. McFarland v. Jefferson County Public Schools*, 416 F.3d 513 (6th Cir. 2005), *reh'g denied*, No. 04-5897, 2005 U.S. App. LEXIS 22940 (6th Cir. Oct. 21, 2005), *cert. denied*, 126 S. Ct. 2351 (2006), and the United States Court of Appeals for the Ninth Circuit in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (*en banc*), *cert. denied*, 126 S. Ct. 2351 (2006).[1]

[1] The parties have filed letters consenting to the filing of this brief with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT[2]

Our nation's guiding vision of equal opportunity rests upon the premise that any one of us can succeed with enough effort, dedication, and natural talent. This Court has long acknowledged the role of American public education in equipping youth with the tools to realize this vision. Effective public schools prepare their charges to function in the workplace and to meaningfully participate in civic and democratic life. In popular and deeply-rooted conceptions of our nation's public schools, they are the key to achieving the American dream.

For Latinos, the nation's largest and most youthful minority group, the promise of public education remains elusive, and the path to the American dream remains obscured by barriers. Prominent among these barriers has been deep and persistent school segregation – a defining, if largely unrecognized, feature of the Latino educational experience both before and since this Court's unanimous ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954). Despite *Brown* and its progeny, Latino students have never experienced an overall decline in racial isolation; at ever-growing rates, they languish in segregated settings with drastically limited opportunities. For Latino schoolchildren, decreasing this racial isolation holds the promise of improved academic opportunities and attainment, as well as greater civic and political engagement – all significant and important goals as the Latino community grows into its role as the largest minority group in the nation's more diverse racial landscape.

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[2] Counsel wishes to acknowledge the important contributions of Alexandra O'Rourke and Allen O'Rourke, students at Harvard Law School, to the preparation of this brief.

Indeed, America's racial landscape looks far different today than it did when this Court issued its ruling in *Brown*. The Latino population has climbed dramatically, both overall and, even more strikingly, as a share of the nation's primary and secondary school enrollment. Today, one in five children in our public schools is Latino. Combating Latinos' growing racial isolation has become critical not only to their success, but also to the success of our increasingly multiracial society, of which Latinos now comprise a substantial segment. Educational settings that promote contact and interaction between children of different races can better prepare those children to live and work in this ever-more diverse society by instilling values of tolerance and cross-racial understanding. In this way, integrated schools yield benefits that are reaped not only by minority students, but also by their classmates and the broader community.

As public school administrators grapple with demographic changes, including increased Latino, immigrant, and English Language Learner enrollment, they must retain the flexibility to respond to new, more complicated paradigms.[3] Local school officials are well positioned to evaluate these newly-complex dynamics in determining how best to carry out their pedagogical and civic objectives. Voluntary integration programs are flexible and effective tools for districts, teachers, and parents that are committed to counteracting racial isolation in their schools and realizing *Brown*'s promise of equal and integrated education – a goal that has so far eluded the Latino community.

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[3] The term "English Language Learner" ("ELL") is used interchangeably with and refers to the same group of students as the term "Limited English Proficient" ("LEP").

ARGUMENT

I. THE LATINO EDUCATIONAL EXPERIENCE HAS BEEN MARKED BY PERSISTENT *DE JURE* AND *DE FACTO* SEGREGATION

Segregation, both official and unofficial, has long been a feature of Latino public education. As early as 1900 and through the 1950s and 1960s, districts intentionally channeled students into substandard "Mexican" and "migratory" schools throughout the Southwest. Although the Puerto Rican and Dominican communities of the Northeast sprung from an entirely different historical experience than the Mexican-American communities of the Southwest, they endured similar segregation and barriers to educational equity.[4] Despite these realities, the Latino experience has been largely absent from academic, legal and popular discourses on racial isolation in public schools, and Latino students largely excluded from serious efforts to root out segregation. This neglect has coincided with a dramatic rise in Latino public school enrollment, resulting in an unremitting trend of racial isolation for Latino students. Latinos are now more segregated and more concentrated in high-poverty schools than any other minority group.

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[4] Albert Camarillo, *The Compelling Need for Diversity in Higher Education* Expert Report submitted on behalf of the University of Michigan: 5 Mich. J. Race & L. 339, 350 (1999) (noting that Puerto Rican and Dominican students "faced a reality of separation and exclusion . . . that paralleled that of their ethnic kin in the Southwest").

A. Throughout the Early Part of the 20th Century, Latino Students in the Southwest Were Channeled into Segregated "Mexican Schools"

In the first part of the last century, as the Latino and immigrant populations swelled in the Southwestern region of the country, segregated "Mexican" and "migratory" schools for Latino children began to emerge.[5] Proponents of segregation commonly argued that separate schools were necessary to impart upon Latino schoolchildren "American culture" and values.[6] Such justifications could not conceal the pervasive judgments that Latino students were inferior to their white peers and that their presence would undermine white students' educational experience. School officials often expressed such views with bracing candor: one California superintendent, in defending segregated Mexican schools, commented that "[s]ome Mexicans are very bright, but you can't compare their brightest with the average white children. They are an inferior race."[7]

Some school districts segregated Latino students based on what they termed "language handicaps," others broadly targeted those with Mexican or "Latinized" surnames,[8] and still others implemented compulsory "entrance

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[5] Kristi L. Bowman, Note, *The New Face of School Desegregation*, 50 Duke L.J. 1751, 1769 n.117 (2001).

[6] Eduardo Luna, *How the Black/White Paradigm Renders Mexicans/Mexican Americans and Discrimination Against Them Invisible*, 14 La Raza L.J. 225, 239 (2003).

[7] Bowman, *supra* note 5, at 1770.

[8] Christopher Arriola, Comment, *Knocking on the Schoolhouse Door: Mendez v. Westminister, Equal Protection, Public Education and Mexican Americans in the 1940's*, 8 La Raza L.J. 166, 179 (1995).

exams" designed to identify Latino students.[9] Much of the Southwest's school segregation stemmed from patterns of residential segregation of Latinos into "Mexican Towns," but often such patterns resulted from intentional gerrymandering. One survey of school superintendents found that "[w]hile many claimed that there was no segregation in their schools, some admitted that the drawing-up of district boundary lines was deliberately made to enclose areas predominantly Latin."[10] By 1931, more than 80 percent of school districts with large Latino populations were officially segregated, and many of the remaining 20 percent were unofficially segregated.[11] All told, 85 percent of Mexican students living in the Southwest received instruction in either separate classrooms or entirely separate schools.[12]

The Southwest's Mexican and migratory schools struggled with significantly inferior resources, poor equipment, inadequate buildings, and lower-paid teachers who were permitted to transfer to Anglo schools as a reward or promotion.[13] In addition, the "Americanization" curricula of the resource-poor Mexican schools neglected many basic subjects of primary education, emphasizing

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[9] *Id.* at 179 n.64; James A. Ferg-Cadima, *Black, White & Brown: Latino School Desegregation Efforts in the Pre- and Post-Brown v. Board of Education Era*, at 20, Mexican American Legal Defense and Educational Fund, May 2004, *available at* http://www.maldef.org/pdf/LatinoDesegregation.pdf.

[10] Nancy Kuhr, *Segregated Public Schools in Texas, 1876-1940*, at 73, 1971, unpublished M.A. Thesis, University of Texas.

[11] Bowman, *supra* note 5, at 1770.

[12] Rubén Donato, *The Other Struggle for Equal Schools: Mexican Americans During the Civil Rights Era* 13 (State University of New York Press 1997).

[13] Bowman, *supra* note 5, at 1769 n.119.

instead "practical subjects" such as American norms and values, patriotism, sewing, housekeeping, handiwork and manual labor.[14] These lessons were designed to prepare Latino students for the roles that, in the popular view, they were destined to assume.

B. Latinos Have Continually Struggled Against Separate and Unequal Schools

Channeled into segregated schools with substandard resources, Latinos in Western communities mounted intermittent challenges to school segregation throughout the 1930s.[15] These efforts bore fruit in 1946 – eight years before the *Brown* decision – when Latino litigants obtained a federal court ruling barring some California school districts from maintaining separate Mexican and Anglo schools. *Mendez v. Westminister Sch. Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947). Sixty years later, Latino schoolchildren are at once the largest and the most segregated minority group in American schools, and the promises of *Mendez* and *Brown* remain unfulfilled. In the years leading up to the *Mendez* case and in the decades since, the Latino community has ceaselessly wrestled with the deep educational and social harms of *de jure* and *de facto* school segregation.

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[14] Lisa J. Soto, *The Treatment of the Spanish Language and Latinos in Education in the Southwest, in the Workplace, and in the Jury Selection Process*, 3 Hisp. L.J. 73, 76 (1997).

[15] For a more comprehensive discussion of this legal history, *see* Ferg-Cadima, *supra* note 9, at 14.

1. Latinos Turned to the Courts to Challenge Unlawful Discrimination.

The Latino community commenced its unfinished struggle for school desegregation with *Mendez*, the first federal lawsuit to challenge Latino segregation in K-12 schools on Fourteenth Amendment grounds.[16] Although *Mendez* was a landmark litigation for Latinos and an important precursor to *Brown*, the case developed in a way that separated Latino segregation from the issue of race discrimination. This disconnect limited *Mendez*'s reach and contributed to the exclusion of Latinos from future legal and academic discourses on school segregation.

Mendez evolved from the efforts of two Mexican American cousins, Gonzalo Mendez and Soledad Vidaurri, to enroll their respective children in the same Orange County "Anglo" school.[17] Although both sets of children had similar language abilities and were blood relatives, the district assigned the two Mendez children, whose surname and features were more evidently "Mexican," to the Mexican school, while enrolling their Vidaurri cousins in the Anglo school.[18] At the time, such segregation was routine in Orange County; 80 percent of the county's Mexican and Mexican American students were clustered into 14 Mexican schools, where they were racially isolated and received

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[16] Richard R. Valencia, *The Mexican American Struggle for Equal Educational Opportunity in Mendez v. Westminister: Helping to Pave the Way for Brown v. Board of Education*, 107 Tchrs. C. Rec. 389, 400 (2005).

[17] *Id.* at 399.

[18] *Id.*

instruction in trades – industrial labor for boys and homemaking for girls.[19]

While the school officials in *Mendez* contended that Latino students' "lack of American values, culture and proficiency in the English language" necessitated their segregation into separate schools,[20] they acknowledged having made school assignments based exclusively upon Mexican descent.[21] Yet, ultimately, the *Mendez* case did not tackle the issue of race and national origin discrimination head-on, due in large part to a critical and curious stipulation by the parties. The plaintiffs and the districts stipulated that Mexican Americans were part of the white race – an agreement that did not comport with the social reality of the time, but which each party evidently found expedient for the purposes of the litigation.[22] *See Mendez*, 64 F. Supp. at 546. The plaintiffs likely sought the stipulation to avoid then-existing caselaw that permitted segregation between races under the "separate but equal" doctrine, and to avoid a California statute that permitted districts to establish "separate schools for Indian children, excepting children of Indians who are wards of the United States Government and children of all other Indians who are descendants of the original American Indians of the United States." Cal. Educ. Code § 8003 (repealed 1947). This statute would permit

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[19] Gilbert G. Gonzalez, *Chicano Education in the Era of Segregation* 137 (1990).

[20] *Id.*

[21] Luna, *supra* note 6, at 241.

[22] For a discussion of the *Mendez* stipulation and its effect, *see* Thomas A. Saenz; Mendez *and the Legacy of* Brown: *A Latino Civil Rights Lawyer's Assessment*, in Symposium, Rekindling the Spirit of *Brown v. Board of Education*, 6 Afr.-Am. L. & Pol'y Rev. 194; 11 Asian L.J. 276; 15 Berkeley La Raza L.J. 67; 19 Berkeley Women's L.J. 395 (2004).

segregation of children descended from the Indians of Mexico; thus, plaintiffs' stipulation avoided a law directed toward segregation of Mexican Americans.[23]

The stipulation in *Mendez* rendered it a case about intra-racial, rather than inter-racial, segregation, effectively shifting the case's emphasis from racial discrimination to language. Still, the arguments in *Mendez* prefigured those of *Brown* in important ways. Like the *Brown* plaintiffs that followed them, the *Mendez* litigants introduced social science testimony that segregated learning environments stigmatized Latino schoolchildren and caused psychological harm.[24] The school districts responded by contending the schools' facilities and resources were adequate under the "separate but equal" framework of *Plessy v. Ferguson*, 163 U.S. 537 (1896).[25] Ultimately, in a decision that took steady aim at *Plessy*, Federal District Judge Paul J. McCormick concluded that "separate but equal" facilities were not sufficient to satisfy the equal protection clause:

> The 'equal protection of the laws' . . . is not provided by furnishing in separate schools the same

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[23] *Id.* The reason that the districts agreed to the stipulation might lie in their argument, redolent of Texas in the jury exclusion context, seeking to establish that intra-racial discrimination was more acceptable than inter-racial discrimination:

> "If it be fallacious argument to contend that the [African] race is stamped with a badge of inferiority by separation, how can it be contended that one group of white persons are [so] stamped . . . simply because they are separated from other groups of white people in the public schools?"

Appellant's Reply Br. to ACLU at 3, *Westminister Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (No. 11310).

[24] Valencia, *supra* note 16, at 391.

[25] *Id.* at 402.

> . . . facilities . . . that are available to the other public school children regardless of . . . ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.

Mendez, 64 F. Supp. at 549. The district court further accepted evidence that segregation harmed and stigmatized minority students:

> The evidence clearly shows that Spanish-speaking children are retarded in learning English by lack of exposure to its use because of segregation. . . . It is also established by the record that the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them where none exists.

Mendez, 64 F. Supp. at 550.

On appeal, the Ninth Circuit upheld the lower court's decision on far narrower grounds. Although it declined to rule explicitly on the issue of "separate but equal," as urged by the NAACP's *amicus curiae* brief, the Ninth Circuit's affirmance paved the path toward eradication of *de jure* school segregation in California.[26] *See Westminister Sch. Dist. v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947). In 1947, California's Governor Earl Warren, who as Chief Justice would write the Court's opinion in *Brown*, signed legislation that fully repealed California's segregation laws.[27] But despite the positive products of *Mendez*, its stipulation that Latino children were "white," though

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[26] Ferg-Cadima, *supra* note 9, at 14, 20.

[27] Charles Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975* at 132 (1976).

clearly contrary to social reality, disconnected the problem of Latino segregation from its roots in racial discrimination, thereby distinguishing Latinos from other segregated minority groups.[28] Indeed, the question of whether *Brown*'s central holding applied to Latinos did not reach this Court until 1973, nearly 20 years after it was rendered.

2. *Brown*'s Applicability to Latinos Was Not Settled Until Nearly Two Decades After the Ruling.

In the same term as *Brown* – generally acknowledged as the start of the modern civil rights era – Latinos celebrated their own victory in *Hernandez v. Texas*, 347 U.S. 475 (1954), the first Supreme Court decision that found Latinos to be a protected class under the Fourteenth Amendment. Concluding that Latinos are a protected class under the equal protection clause for jury eligibility purposes, the *Hernandez* Court cited the segregation of Latino schoolchildren as evidence that the white community considered Latinos a distinct and inferior race. *Hernandez*, 347 U.S. at 479-80. Yet the specific recognition that *Brown*'s doctrine applied to Latino school segregation would not reach the federal courts until many years later, with *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599 (S.D. Tex. 1970), and *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

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[28] In *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951), another district court anticipated *Brown*'s holding by recognizing that segregation stamped Latino students with a badge of inferiority. Like *Mendez*, *Gonzales* is rarely cited in legal and academic discussions of school segregation.

Jose Cisneros' challenge to his children's segregation into poorly-resourced, majority-Latino schools rested squarely upon the equal protection clause of the Fourteenth Amendment and this Court's reasoning in *Brown*. The trial court noted that although *Brown* and its progeny until that point specifically concerned African American segregation, "any other group which is similarly or perhaps equally, disadvantaged politically and economically, and which has been substantially segregated in public schools" deserved comparable constitutional protection. *Cisneros*, 324 F. Supp. at 606. The Fifth Circuit affirmed, noting that "[t]he decision in *Brown* is the clear embodiment of the legal framework for the resolution of these important issues." *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142, 148 (5th Cir. 1972).

Not long after *Cisneros*, *Keyes* received national attention as the first non-Southern school desegregation case to reach this Court.[29] The *Keyes* plaintiffs had challenged segregation of African Americans in Denver schools, and the matter of Latino segregation did not emerge until the Congress of Hispanic Educators intervened at the remedy phase of the trial.[30] Latinos at the time constituted 20 percent of Denver's public school enrollment. *Keyes*, 413 U.S. at 195. As in *Cisneros*, the *Keyes* ruling recognized that Latinos "constitute an identifiable class for purposes of the Fourteenth Amendment."

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[29] Tom I. Romero II, *From Brown to Grutter: Racial Integration and the Law: Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 Seattle J. For Soc. Just. 73, 74 (2004).

[30] George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 Harv. Latino L. Rev. 321, 332 (1997).

Keyes, 413 U.S. at 197. Moreover, the Court observed that "Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students," concluding that "petitioners [were] entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of 'segregated' schools." *Keyes*, 413 U.S. at 198. Following the *Keyes* decision, Denver became one of the few large metropolitan areas in the 1970s where both Latino and African American students experienced significant, albeit temporary, relief from school segregation.[31]

C. Latino Students Have Become the Largest and Most Segregated Minority Group in K-12 Public Schools

America's modern racial landscape looks vastly different than it did when this Court considered *Brown*, or even *Keyes*. According to the 2000 Census, the U.S. Latino population soared from 22.4 million to 32.4 million since the previous Census, representing a 45 percent increase.[32]

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[31] Denver schools are once again deeply segregated, driven in part by changing demographic patterns and the so-called Poundstone Amendment to the Colorado State Constitution, approved in 1974. The amendment prevented annexation of surrounding suburban, increasingly Anglo communities to the Denver school district without the consent of voters in each affected county, restricting the reach of the *Keyes* desegregation order. *See* Tom I. Romero, II, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado's Legal Past*, 73 U. Colo. L. Rev. 521, 583-84 (2002); Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace – and Denial – of Equal Opportunity in Higher Education*, 70 U. Colo. L. Rev. 703, 752 (1999).

[32] *See* U.S. Census Bureau, Statistical Abstract of the United States: 2001, at 19, *available at* http://www.census.gov/prod/2002pubs/01statab/pop.pdf.

More recent data shows that continued rapid growth has since propelled Latinos, now numbering 42.7 million, ahead of African Americans as the nation's largest minority group.[33] The rapid increase in the U.S. Latino population has been fueled in great part by immigration, but has also been driven by higher birth rates among both foreign and U.S.-born Latinos, who tend to have larger and younger families, and who have children at younger ages.[34]

These demographic trends mean that the tremendous growth in the U.S. Latino population is most pronounced and dramatic among Latino youth. In the 2003-2004 school year, Latinos comprised 19 percent of the K-12 student population.[35] Latino public school enrollment is currently concentrated in the metropolitan centers in a few large states, but it is dispersing rapidly; while only two states, California and Texas, have 26 percent of total U.S. public school enrollment and 56 percent of the nation's total Latino enrollment, growth in Latino enrollment is evident in every region of the country.[36] In Florida, for example, Latino K-12 public student enrollment increased by 614 percent from 1970 through

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[33] U.S. Census Bureau News Release, Nation's Population One-Third Minority (May 10, 2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/population/006808.html (estimating the respective populations of Latinos and African Americans as 42.7 million and 39.7 million).

[34] *Id. See also*, U.S. Census Bureau, Fertility of American Women: June 2004 (issued Dec. 2005) at 2, 4, *available at* http://www.census.gov/prod/2005pubs/p20-555.pdf.

[35] Adriana D. Kohler, *Hispanic Education in the United States* (Statistical Brief No. 8, Conference Edition) at 1, National Council of La Raza (2006).

[36] *Id.*

2000; in Illinois, by 304 percent for the same period; in New Jersey, by 240 percent; and in Arizona, by 248 percent.[37]

Latino growth is perhaps most striking when viewed as a *component* of total K-12 enrollment growth. An October 2006 study by the Pew Hispanic Center found that between 1993-94 and 2002-03, Latino children accounted for 64 percent of additions to public school enrollment.[38] During the same period, African Americans and Asian Americans accounted for 23 percent and 11 percent of the growth, respectively, while white enrollment dropped by about one percent.[39] The Pew Center also found that Latino growth was not uniform across all grades, and that the increase in Latino student enrollment in the nation's primary schools has been particularly dramatic. Indeed, Latinos have entirely driven growth in America's primary school enrollment; without the increase in Latino students, public school enrollment would have declined by about three percent.[40] During the study period, between the 1993-94 and 2002-03 school years, Latino enrollment rose 53 percent, from 3 million to 4.6 million. These trends are significant because they herald the future: public schools and a broader society that is more diverse, and more Latino, in composition.

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[37] Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, at 32, C.R. Project Harv. U., Jan. 2003, *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

[38] Richard Fry, *The Changing Landscape of American Public Education: New Students, New Schools*, Pew Hispanic Center, Oct. 5, 2006, *available at* http://pewhispanic.org/files/reports/72.pdf.

[39] *Id.*

[40] *Id.* at 9.

Due in part to the timing of this extraordinary growth in the Latino school-age population – and the relatively late recognition that *Brown* applied to Latino segregation – Latinos never reaped the benefits, however fleeting, of serious efforts at school desegregation.[41] In many regions, the rapid increases in Latino enrollment coincided with or followed the dissolution of desegregation orders, leaving Latino students without remedy. In other instances, even where Latino students were present in significant numbers, desegregation orders were extinguished without consideration of their interests.[42] The absence of significant initiatives to address Latino segregation, together with entrenched and growing residential segregation for Latinos,[43] have combined to make Latino students the most racially isolated minority group in the country.

Today, more Latinos than ever before attend segregated schools, and their racial isolation is increasing in every region of the country. Nationally and in every region, a typical Latino student attends a school that is less than one-third white.[44] Seventy-six percent of Latinos attend predominantly minority schools, more than any other group.[45] More alarming is the rise in Latino

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[41] Ferg-Cadima, *supra* note 9, at 34.

[42] Gary Orfield & Chungmei Lee, *New Faces, Old Patterns? Segregation in the Multiracial South* at 5, 7, C.R. Project Harv. U., Jan. 2003, *available at* http://www.civilrightsproject.harvard.edu/research/reseg05/resegregation05.php.

[43] For a fuller discussion of these patterns of residential segregation, *see* the *amicus curiae* brief submitted in this case by the Poverty and Race Research Action Council, *et al.*

[44] Frankenberg et al., *supra* note 37, at 44.

[45] *Id.* at 33.

enrollment at intensely segregated schools, defined as schools with 90 to 100 percent minority enrollment. The absolute number of students attending these schools grew from 462,000 in 1968 to 2.86 million in 2000, an increase of 520 percent.[46] Nationally, almost one in nine Latino students attend a school that is 99 to 100 percent minority.

National data also demonstrates that Latinos experience significant segregation by language as well as by race.[47] Latinos predominate among English Language Learners; about three-quarters of ELL students nationally are Spanish speakers.[48] Although ELLs represent a relatively small share of the total student population, more than 53 percent of these children are concentrated in schools where more than 30 percent of their peers are also ELLs. By contrast, 57 percent of English proficient students attend schools where less than one percent of students have limited English proficiency.[49]

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[46] *Id.*

[47] Richard R. Valencia et al., *Segregation, Desegregation, and Integration of Chicano Students: Old and New Realities,* in Chicano School Failure and Success – Past, Present and Future, 70-113 (Richard R. Valencia ed., Routledge Farmer 2d ed., 2002).

[48] Randy Capps et al., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act* at 16, MPI Breakfast Briefing, Sept. 30, 2005, Foundation for Child Development, *available at* www.fcd-us.org/PDFs/NewDemographypresentationfinal.pdf.

[49] *Id.*

II. IN AMERICA'S INCREASINGLY MULTIRACIAL LANDSCAPE, THE STATE HAS A COMPELLING INTEREST IN REDUCING RACIAL ISOLATION AND MAINTAINING DIVERSE CLASSROOMS

This demographic picture makes clear that the new paradigm for American education and society is increasingly multiracial in nature, and amplifies the importance of racial diversity in K-12 education. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court recognized that in the context of higher education, public universities have a compelling interest in seeking the educational benefits that spring from a diverse student body. The Court identified several benefits of diversity in *Grutter*, including promoting cross-racial understanding, combating racial stereotypes, and preparing all students to participate fully in civic life. *See Grutter*, 539 U.S. at 332. These interests apply with even greater force in the context of elementary and secondary schools, which, as *Brown* instructs, are charged with essential democratic duties.

As this Court noted in *Brown*, education "is the very foundation of good citizenship" and "is . . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown*, 347 U.S. at 493. In keeping with *Brown*'s noble and profoundly democratic goals, integrated schools can better prepare students of all races to participate in democratic life and to function in diverse communities by increasing tolerance and cross-racial understanding, by promoting participatory citizenship and by enhancing learning and access to educational opportunities. With Latinos now a sizable and swiftly rising population, their inclusion in integration efforts is of growing consequence, for the students

themselves, for their classmates, and for American economic and democratic life.

A. Integrated Schools Promote Democratic Values of Tolerance and Cross-Racial Understanding for Students of all Racial Groups

This Court's jurisprudence has long acknowledged that public schools bear responsibility not only for instructing their charges in academic subjects, but also for instilling the democratic ideals we collectively share and prioritize. As noted in *Brown* and *Plyler v. Doe*, 457 U.S. 202 (1982), public schooling "has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage." *Brown*, 347 U.S. at 493; *Plyler*, 457 U.S. at 203. Among the most cherished American values, and at the very foundations of the Fourteenth Amendment, are racial tolerance and an abiding belief in and commitment to equality. Integrated schools advance these democratic values by providing meaningful opportunities to encounter, engage with, and develop friendships with peers in other racial and ethnic groups.[50] For Latinos, whose residential segregation is both acute and on the rise, integrated learning settings may represent their *only* avenue for such contacts – contacts that promote cross-racial understanding among students, help them overcome fear and distrust of people of different races, and make

[50] For a comprehensive discussion and analysis of this research, see the Social Science Statement and *amicus* brief submitted in this case by the Harvard Civil Rights Project.

them more likely to perceive people of different races as equals.[51]

As American society becomes more racially complex and heterogeneous, reducing racial prejudice and stereotyping and increasing cross-racial understanding are significant ends in themselves; these values are tied to both the normative underpinnings of the Fourteenth Amendment and to our traditional notions of the democratic purposes of public education. Racial diversity in schools can play a critical role in fulfilling education's fundamental and democratic mission of "transmitting 'the values on which our society rests.'" *Plyler*, 457 U.S. at 221 (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)). But even beyond these benefits, research demonstrates that attending integrated schools gives minority students greater comfort to actually participate in a hetereogenous democracy.[52] Motivating participatory democracy is of particular importance for the Latino community, which still has tremendous strides to make in the realm of civic engagement and political participation. For example, although Latinos comprised fully one-half of population growth from 2000-2004, they represented just one-tenth of new voters.[53] Although this disparity is explained partially by citizenship figures and by the youthfulness of the Latino population, it is also true that only 39 percent of eligible Latinos voted in the last

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[51] Amy Stuart Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* at 6, *available at* http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf#search='How%20desegregation%20changed%20us%20wells.

[52] Frankenberg et al., *supra* note 37, at 14.

[53] Roberto Suro et al., *Hispanics and the 2004 Election: Population, Electorate and Voters*, Pew Hispanic Center Report, June 27, 2005, *available at* http://pewhispanic.org/files/reports/48.pdf.

presidential election, compared to 68 percent of whites and 60 percent of African Americans.[54] As the Latino community ascends in numbers and in prominence, their full engagement in and contributions to American civic, economic, and political life will be essential to robust democracy. Integrated school settings, by promoting democratic values, motivating civic engagement and enhancing learning and educational attainment for minority students (as discussed in greater detail below), equip Latinos to participate more effectively in democratic life.

B. Integrated Schools Enhance Learning, Educational Opportunities and Access to Higher Education

Research shows integrated settings enhance classroom learning for all students in a number of important ways. Diverse schools can help expose students to multiple perspectives, for example, which can bolster comprehension of complex issues and "critical thinking," both crucial for development and growth in intellectual and academic skills.[55] Reducing racial isolation can also yield better opportunities for learning and educational attainment for minority students in particular, setting the stage for longer-term success and advancement in American society. As this Court has stated, "by depriving the children of any disfavored group of an education, we foreclose the means

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[54] *Id.*

[55] Michal Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District* at 3-4, C.R. Project Harv. U., Jan. 2003, *available at* http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php#fullreport.

by which that group might raise the level of esteem in which it is held by the majority." *Plyler*, 457 U.S. at 222. The vast majority of intensely segregated minority schools, so often schools of concentrated disadvantage, are marked by limited educational opportunities and diminished academic achievement and attainment, as measured by indicators ranging from test scores to graduation rates.

The nation's drop-out crisis, for example, is concentrated in segregated minority schools in large metropolitan areas, and is more acute for Latinos than for any other racial group.[56] Although Latino schoolchildren have good levels of grade completion throughout primary school, those rates drop precipitously as they move up into secondary school. The school attrition rate for Latino secondary school students is now near fifty percent, and the problem is even more pronounced in large inner-city school districts, among foreign-born Latinos, and among ELLs.[57] A 2005 report on the Los Angeles Unified School District – which enrolls more than 735,000 students (over 90 percent of them minorities) – found that only 39.1 percent of Latino students complete high school.[58] College matriculation rates for Latinos are lower than for members of any other racial or ethnic group, and in 2004 less than a quarter of Latinos between the ages of 18 and 24 were enrolled in institutions of higher learning, with a majority of these students attending two-year colleges.[59]

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[56] Kohler, *supra* note 35, at 3.

[57] *Id.* at 3, 7.

[58] Dan Losen & Johanna Wald, *Confronting the Graduation Rate Crisis in California* at 6, C.R. Project Harv. U., Mar. 24, 2005, *available at* http://www.civilrightsproject.harvard.edu/research/dropouts/dropouts05.pdf.

[59] Kohler, *supra* note 35, at 9.

These figures are compelling, but unsurprising when viewed in context: segregated minority schools have disproportionately higher concentrations of poverty and limited advanced curricula, such as Advanced Placement and other college preparatory courses.[60] The impact of racial segregation on teacher quality is particularly well-documented; ample research shows that well-qualified teachers tend to leave racially segregated schools to teach in more integrated settings, irrespective of such factors as working conditions, teacher salary or student poverty.[61] Skilled and experienced teachers are not only an important factor in student achievement, but also a source of support and networking for the college admissions or job-hunting process. Latinos in racially isolated schools tend, in general, to have less access to informal integrated networks, whether teacher, peer or alumni networks, placing them at additional disadvantage relative to counterparts at integrated schools.[62]

Integrated schools help prevent these harms that are so strongly associated with minority, and specifically Latino, isolation. Minority students in integrated schools experience smaller classes and greater teacher support, and are more likely to be in college-track classes.[63] They

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[60] *Id.* at 4-5.

[61] Benjamin Scafidi et al., *Race, Poverty, and Teacher Mobility*, Working paper 06-51, Andrew Young School of Policy Studies Research Paper Series, Aug. 2005, *available at* http://aysps.gsu.edu/publications/2006/downloads/ScafidiSjoquist_RacePovertyTeacherMobility.pdf.

[62] Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, Rev. Educ. Res. 64 No. 4, Winter 1994, at 531-55.

[63] Janet Ward Schofield, *Maximizing Benefits of Student Diversity: Lessons from School Desegregation Research in Diversity Challenged*, at

(Continued on following page)

also receive exposure to the integrated alumni, peer and teacher networks that are so critical to learning about and obtaining college and occupational opportunities.[64] In addition, they benefit from the support and higher expectations of teachers, counselors, and peers – support that improves these students' aspirations, confidence, and ambition. Predictably, these increased opportunities result in better educational outcomes for non-white students in integrated schools, including improved student achievement, higher graduation rates, and better rates of college matriculation and graduation.[65]

These integration benefits advance the interests of ELLs as well, who experience segregation particularly acutely, and who experience particular challenges and harms as a result of their racial and linguistic isolation in disadvantaged schools. Despite this Court's holding in *Lau v. Nichols*, 414 U.S. 563 (1974) that ELL students have a right to a "meaningful and effective" education, a large proportion of ELLs are poorly-served in schools characterized by ethnic and linguistic isolation and concentrated poverty. Because ELLs are so likely to attend school with other ELLs and to live in racially and linguistically isolated neighborhoods, they have few contexts in which to interact with English-proficient peers. Integrated schools can create meaningful opportunities for this peer interaction.[66] Further, ELLs, who are more likely to be children of

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99-111 (Gary Orfield & Michal Kurlaender eds., Harvard Education Publishing Group, 2001).

[64] Frankenberg et al., *supra* note 37, at 12.

[65] Schofield, *supra* note 63, at 99-101.

[66] At the same time, it is important to note that these benefits do not validate using English immersion programs over instruction in the primary language for ELL students; education researchers have

(Continued on following page)

immigrants or immigrants themselves, and to have parents without high school diplomas, stand to draw particular benefits from the informal networks available in integrated schools.[67]

C. Integrated Schools Provide Their Students with Greater Life Opportunities

Integrated schools strengthen students' desire to interact with people of different backgrounds in the future, readying students to work and to live in diverse communities and to interupt patterns of occupational and residential segregation. As noted in *Plyler*, public education "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler*, 457 U.S. at 221 (quoting *Ambach*, 441 U.S. at 77). Improving Latinos' high school graduation and college matriculation rates will, of course, substantially enhance their economic and occupational aspirations and opportunities: Latinos remain highly concentrated in lower-earning labor and service sectors, due in part to the poor representation of Latinos in the "pipeline" to many

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consistently found that instruction in the primary language is particularly effective in improving ELL student achievement in the second language. *See, e.g.*, Claude Goldenberg, *Improving Achievement for English-Learners*, Education Week, July 26, 2006, at 34-36, *available at* http://www.edweek.org/ew/articles/2006/07/26/43goldenberg.h25.html?qs=bilingual_education (summarizing research regarding effective instructional practices for ELL students); *see also* Jacqueline Vialpando et al., *Educating English Language Learners: Implementing Instructional Practices*, 2005 at 17, National Council of La Raza, *available at* http://www.nclr.org/content/publications/download/36199 (describing the dangers of the English "submersion," or "sink-or-swim" instructional approach).

[67] Capps, *supra* note 48, at 4.

professional occupations – from a strong preparatory K-12 education, to four-year colleges and universities, to graduate and professional schools. Only 16 percent of Latinos worked in professional occupations in 2000, compared with 34 percent of white and 42 percent of Asian American participants in the labor force.[68]

But integrated schools yield even broader benefits; namely, they can prepare students to participate in diverse American and global workforces by instilling a sense of greater comfort with members of other racial groups. These effects can translate to greater economic opportunity and productivity for students of all racial and ethnic backgrounds. For Latino students, this comfort may lead them to seek out economic opportunities in fields or sectors in which they have been traditionally underrepresented. The severe underrepresentation of Latinos in fields such as law,[69] the health professions,[70] and teaching[71]

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[68] Rakesh Kochhar, *The Occupational Status and Mobility of Hispanics*. Dec. 15, 2005, Pew Hispanic Center, *available at* http://www.pewhispanic.org/files/reports/59.pdf.

[69] *See* Miguel A. Mendez & Leo P. Martinez, *Toward a Statistical Profile of Latina/os in the Legal Profession*, 13 La Raza L.J. 59, 65 (2002) (Latinos were 9 percent of national population in 1990, but only 2.49 percent of lawyers).

[70] *See* U.S. Department of Health and Human Services, The Office of Minorities Health, Surgeon General's TODOS Report (1993), noting underrepresentation of Latinos at all levels of the health professions, including practitioner, faculty, advanced career positions, and decision-making bodies.

[71] In 2005, Latinos occupied 6.9 percent of education, training, and library occupations in K-12 schools. They accounted for four percent of postsecondary education teachers, 10.4 percent of preschool and kindergarten teachers, six percent of elementary and middle school teachers, five percent of secondary school teachers and about six percent of special education teachers. U.S. Department of Labor, Bureau of Labor Statistics, *Table 11. Employed persons by detailed*

(Continued on following page)

has led to a deepening crisis – namely, an astonishing scarcity of educators, legal service providers, and health care providers with the linguistic resources and cultural sensitivity to serve the growing Latino community.

The experience of attending racially diverse schools also makes students in all racial and ethnic groups more comfortable living in integrated communities.[72] Studies have shown that implementation of desegregation programs can lead to more stably integrated neighborhoods.[73] Because segregated neighborhoods help drive school segregation, the positive effects of integration programs can actually serve to break self-perpetuating cycles of racial isolation.

III. IN TODAY'S NEW MULTIRACIAL PARADIGM, SCHOOL OFFICIALS MUST BE PERMITTED TO TAKE FLEXIBLE APPROACHES TO COMBAT RACIAL ISOLATION

In a growing number of school districts, officials must grapple with increasingly diverse groups of learners. Latino enrollment, including significant numbers of ELL students and students from immigrant backgrounds, is a major element of this changing picture. As school officials confront these demographic changes and consider how best to meet important educational, community, and civic goals, they require the flexibility to respond to these new, more complicated paradigms.

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occupation, sex, race, and Hispanic or Latino ethnicity, available at http://www.bls.gov/cps.

[72] *Id.*

[73] Wells & Crain, *supra* note 62, at 531.

This Court has consistently acknowledged this need for flexibility, and recognized local governments' broad discretionary powers to ensure their students attend schools reflecting the racial and ethnic composition of their districts as a whole. *See North Carolina State Bd. of Ed. v. Swann*, 402 U.S. 43, 45 (1971) ("[S]chool authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements"); *see also, Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 242 (1973) (Powell, J., concurring) (noting that local school boards may exceed the minimal constitutional standards to promote racial and ethnic integration). Voluntary integration programs are fully in keeping with these principles, and emerge from the considered judgments of local educators, teachers, and parents – those who are in the best position to evaluate and respond to the challenges of a changing racial landscape.

CONCLUSION

The Latino past and present educational experience is defined by separation and exclusion, invariably paired with poor resources and limited educational opportunities. Yet the challenges and struggles of Latino schoolchildren have seldom been the focus of either historical attention or corrective action, even as Latinos comprise an ever-growing and ever-more isolated share of our public schools and communities as a whole. For Latinos, the promise of *Brown* has not only gone unfulfilled; it becomes more distant and dim with each year that Latino school segregation grows.

Voluntary integration programs represent meaningful opportunities to bring the dream of equal and integrated education within closer reach of Latinos, a rising population in every sense. Such programs are designed to meet compelling, and noble, ends, and for the sake of Latino students and of America's robust civic and democratic life, they should be permitted. The Court should affirm the judgments of the Sixth and Ninth Circuits.

Respectfully submitted,

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STATEMENT OF INTEREST

ASPIRA Association, Inc.

The ASPIRA Association, Inc. is the only national non-profit organization devoted solely to the education and leadership development of Puerto Rican and other Latino youth. ASPIRA takes its name from the Spanish verb *aspirar*, "aspire."

Since 1961, ASPIRA has pursued its mission of empowering the Latino community through the development of its youth. With community-based offices in large cities in seven states and Puerto Rico, ASPIRA's 1,600 staff members work with over 55,000 youth and their families each year to develop their potential. ASPIRA programs include academic enrichment, mentoring, guidance counseling, charter schools, and parental engagement initiatives. Whereas over 40% of Latino youth drop out of school, over 95% of Aspirantes (ASPIRA youth) complete high school and over 90% go on to college. Almost every Latino leader in the states served by ASPIRA – in government and in the private sector – have been Aspirantes. ASPIRA is proud of the over 300,000 young Latinos that have been through ASPIRA.

Dominican American National Roundtable (DANR)

The Dominican American National Roundtable (DANR) is a non-partisan, non-profit corporation seeking to bring together the different voices of all people of Dominican origin in the United States. DANR is a national forum for analysis, planning, and action to advance the educational, economic, legal, social, cultural, and political interests of Dominican Americans. DANR aims to ensure for U.S. Dominicans the full exercise of the rights and freedoms

guaranteed in the Constitution of the United States of America.

With those objectives in mind, DANR is committed to enriching the quality of life in the United States by highlighting the contributions of Dominicans to the larger American society.

Hispanic Association of Colleges & Universities (HACU)

The Hispanic Association of Colleges and Universities (HACU) has championed the higher education success of the nation's youngest and largest ethnic population. The formal mission of HACU is to promote the development of member colleges and universities; improve access to and the quality of ~~postsecondary~~ educational opportunities for Hispanic students; and, to meet the needs of business, industry and government through the development and sharing of resources, information and expertise.

HACU's member colleges and universities enroll two-thirds of the two million U.S. Hispanics in higher education today. But inadequate K-12 preparation, economic disparities, and high drop out rates continue to keep Hispanic participation in higher education at rates far below their representation in the U.S. population, especially in the traditional 18-24 year old college age cohort. HACU and the institutions it represents have a vital interest in assuring more adequate K-12 education for the Hispanic population.

Hispanic National Bar Association (HNBA)

The Hispanic National Bar Association (HNBA) is a non-profit, non partisan, national legal association representing the interests of 37,000 U.S. Hispanic attorneys, judges, law professors, law graduates, law students, legal administrators, and paralegals in the United States and Puerto Rico. The HNBA's continuing mission is to improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession. The primary objectives of the HNBA are to increase professional opportunities for Hispanics in the legal profession and to address legal issues that affect the Hispanic community. As such, the HNBA has a vested interest in the positive development of the U.S. educational system, in particular with respect to equal opportunity, and access to the best educational processes and programs for Latino youth.

Intercultural Development Research Association (IDRA)

The Intercultural Development Research Association's (IDRA) mission is to create schools that work for all children, and particularly those students that are minority, low-income or in the process of learning English. Since its inception in 1973, the organization has worked with thousands of schools to ensure that all students are provided equitable, high quality educational opportunities. IDRA'S school desegregation assistance activities date back to its inception, and it is one of a small number of organizations that has continuously worked with schools to ensure non-segregation of any students on the basis of race, gender or national origin. Our research on the issue has long validated the belief that students most benefit

from an education that includes diverse students, using instructional approaches that are inclusive and valuing of community and individual differences. IDRA supports the adoption, continuation and strengthening of racial diversity programs.

League of United Latin American Citizens (LULAC)

The League of United Latin American Citizens (LULAC) is the largest and oldest Hispanic membership organization in the United States. With over 115,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans. For more than 75 years, LULAC's members have sought increased opportunities in education for Hispanic students through the desegregation of public schools, reaching parity in school funding, the provision of scholarships, educational counseling and strong affirmative action programs.

Mexican American Legal Defense and Educational Fund (MALDEF)

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has represented Latino interests in school desegregation and other educational rights cases in Texas, California, Colorado, New Mexico, Arizona and many other states, and has been counsel on such landmark education cases as *Plyler v. Doe*. MALDEF's mission includes a commitment to

pursuing educational equity and opportunity through advocacy, community education, and the courts, and therefore it has a strong interest in the outcome of these proceedings.

Multicultural Education, Training, and Advocacy, Inc. (META)

Multicultural Education, Training and Advocacy, Inc. (META) is a national public interest legal organization which for more than two decades has advocated for the educational civil rights of Latino and other linguistic minority students. META has represented classes of Latino students in California, Florida, Texas, Massachusetts, Colorado, New York and New Mexico. Through its litigation and community advocacy, META has seen the harmful effects of racial and linguistic isolation on its clients. META supports creative solutions to such isolation and therefore joins with fellow *amici* in this brief.

National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund

The NALEO Educational Fund, established in 1981, is the leading nonprofit organization that facilitates full Latino participation in the American political process, from citizenship to public service. The NALEO Educational Fund carries out this mission through programs that integrate Latinos fully into American society, provide professional development opportunities and technical assistance to the nation's more than 6,000 Latino elected and appointed officials, and monitor and conduct advocacy on issues important to the Latino community and its political participation.

National Conference of Puerto Rican Women (NACOPRW)

The National Conference of Puerto Rican Women (NACOPRW), as a non-profit and non-partisan organization that promotes the full participation of Puerto Rican women and other Hispanics in the social, economic, and political life in the U.S., supports the educational interests set out in this *amicus* brief.

The National Council of La Raza (NCLR)

The National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy.

NCLR recognizes that if K-12 voluntary integration programs, which provide for diversity in K-12 public schools by using race as a factor in making school assignments, are found unconstitutional, the state's and the nation's minority students will be denied equal opportunities to attend academically challenging public schools and consequently, lifelong opportunities. NCLR stands in support of admissions policies intended to increase diversity in public schools not only for the sake of minority communities, but also for the sake of a better United States.

National Hispanic Medical Association (NHMA)

The National Hispanic Medical Association's (NHMA) mission includes improving the health of Hispanics and other underserved groups. NHMA supports increased diversity in education to enhance opportunities for Hispanics to join the medical profession, which eventually leads to expanded access to health care in the U.S. and to improved health of the nation.

National Puerto Rican Coalition, Inc. (NPRC)

The National Puerto Rican Coaltion, Inc. (NPRC) is a national non-profit organization representing the interests of close to 8 million Puerto Rican U.S. citizens on the mainland and in Puerto Rico. NPRC's mission is to systematically strengthen and enhance the social, political and economic well being of Puerto Ricans throughout the United States and in Puerto Rico, with a special focus on the most vulnerable.

Puerto Rican Bar Association (PRBA)

The Puerto Rican Bar Association (PRBA) is a professional organization composed of members of the bar and law students of Latino ancestry as well as other interested persons. The PRBA was founded to provide a forum for Latino and other lawyers who are interested in promoting the social, economic, professional, and educational advancement of Latino attorneys, the Latino Community and the administration of justice.

Puerto Rican Legal Defense and Education Fund (PRLDEF)

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) is a New York-based private not-for-profit, non-partisan civil rights, pan-Latino litigation and advocacy organization that has defended the civil rights and equal protection under law of Latinos for the past 34 years, with particular interest in protecting voting rights, equal employment opportunity, fair housing, language access rights, educational access, and immigrants' rights.

We are interested in this lawsuit because Latino students are disproportionately impacted by public education policies that have historically served to promote persistent school segregation. Equitable education opportunities are the critical path to civic engagement and creating a stake in a modern inclusive pluralistic society for Latinos and minorities. Decreasing racial isolation and promoting diversity at all levels of the educational system are important to the advancement and success of the Latino community.

William C. Velásquez Institute (WCVI)

The William C. Velásquez Institute (WCVI) is a non-profit, non-partisan public policy analysis organization chartered in 1985. The purpose of WCVI is to conduct research aimed at improving the level of political and economic participation in Latino and other underrepresented communities; to provide information to Latino leaders relevant to the needs of their constituents; to inform the Latino leadership and public about the impact of public policies on Latinos; and to inform the Latino leadership

and public about political opinions and behavior of Latinos.

(68) (63) File date: OCT 10 2006

Nos. 05-908 and 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioners,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN McDONALD,
Petitioners,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeal for the Sixth and Ninth Circuits

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area submits this brief *amicus curiae* in support of the respondents in the above-captioned cases and urges affirmance in each of those cases.[1]

[1] Pursuant to Supreme Court Rules 37.3 and 37.6, the undersigned represent that (1) letters by all parties granting blanket consent to the

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area is a civil-rights and legal-services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, and other underrepresented persons. The Lawyers' Committee was established in 1968 by leading members of San Francisco's private bar.[2]

The Lawyers' Committee has dedicated itself to ensuring equal access to education for all schoolchildren. It served as counsel to the National Association for the Advancement of Colored People in the NAACP's desegregation suit against the San Francisco Unified School District. Throughout the more than 25 years of that litigation, the Lawyers' Committee, relying upon race-conscious remedies that improved the overall quality of the city's schools, worked to advance the right of all San Francisco schoolchildren to an equal education.

Accordingly, the Lawyers' Committee has a unique interest in seeing that the Court is accurately informed about the use and impact of race-conscious remedies in California, and in San Francisco specifically. This brief strives to correct some incorrect impressions left by the dissenting opinion in the Seattle case, and by other *amici*, regarding these subjects.

SUMMARY OF ARGUMENT

Integrated schools are essential to create good citizens in our increasingly diverse society. Teaching children how to

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filing of briefs *amicus curiae* are on file with the Clerk; (2) no counsel for any party authored this brief either in whole or in part; and (3) no person or entity other than the above-named *amicus curiae* and its counsel made any monetary contribution to its preparation or submission.

[2] The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C., which was created at the behest of President Kennedy in 1963.

live with, befriend, and appreciate each other is a compelling state interest in and of itself. Nowhere is this more self-evident than in California, where approximately an eighth of America's schoolchildren (and over a fifth of its minority schoolchildren) are taught. The California experience proves that states and localities need the autonomy to adopt voluntary integration plans to combat segregation.

But some have given the California experience a different interpretation. *Amicus* briefs filed in support of the petitioners theorize that minority academic achievement improved in California because California school districts abandoned race-conscious student-assignment plans wholesale after the enactment of Proposition 209, which prohibits racial discrimination in public education. In a similar vein, the dissenting Ninth Circuit judges in the Seattle case cited San Francisco as an example of successful race-neutral desegregation. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1215 n.24 (9th Cir. 2005) (en banc) (Bea, J., dissenting), *cert. granted*, 126 S. Ct. 2351 (2006).

The Court should reject such claims, for three reasons.

First, there is a compelling interest in promoting diversity in education—a value recognized by this Court in *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). We simply cannot afford to become strangers to each other, as will surely happen if our children are raised and educated on starkly isolated racial and socio-economic "islands." Accordingly, states and localities need to retain the autonomy to adopt narrowly tailored student-assignment plans that affirmatively seek to achieve integration and diversity. See Part I, *infra*.

Second, the claim that ignoring race benefited California's minority students rests on the false assumption that Proposition 209 prompted a statewide change in student-assignment policy. In fact, there is no evidence for any such policy

change, and thus no basis for arguing that the alleged policy change improved minority academic achievement. See Part II, *infra*.

Third, if anything, the California experience actually refutes the claim that minority students benefit when school districts abandon race-conscious student-assignment plans. Indeed, the one California district that could serve as a laboratory for testing such a theory—San Francisco—experienced severe resegregation and diminished minority achievement after eliminating racial criteria from the consent decree that governed its student-assignment plan. In fact, the race-neutral plan that San Francisco adopted in 2001 proved so harmful to minority interests that the district court charged with administering the consent decree allowed the decree to expire in 2005, concluding that it had become a vehicle for "court-ordered resegregation." See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 413 F. Supp. 2d 1051, 1063 (N.D. Cal. 2005). See Part III, *infra*.

Accordingly, this Court should reject the contention that California's experience proves that race-neutral student assignments result in improved academic achievement or equal education for minority and non-minority schoolchildren. Taking race into account is both a helpful and a legal means of combating segregation and producing healthy school environments in which quality education can take place.

ARGUMENT

The Lawyers' Committee submits this brief to affirm that voluntary integration plans remain necessary to fulfill *Brown*'s promise, and more specifically, to refute the argument that "California has proven that the goal [of improved minority academic achievement] can be achieved through race-neutral means."[3] This view is articulated in *amicus*

[3] Pacific Legal Foundation ("PLF") Seattle Br. at 25.

briefs filed by the Pacific Legal Foundation, which make the following unfounded assertions:

> (1) "For the last ten years, California school districts have been providing equal educational opportunities to all its [sic] K-12 public school students without using race-based assignment plans."[4]
>
> (2) The (supposed) wholesale elimination of racial criteria has improved minority academic achievement in California.[5]
>
> (3) "[T]he answer is to implement race-neutral programs that have a proven track record,"[6] like those supposedly in force in California.[7]

The Court should treat these references to the California experience with skepticism. In the first place, PLF's analysis gives short shrift to the state's compelling interest in promoting diversity in K-12 education. See Part I, *infra*.

Moreover, PLF's analysis rests on the flawed assumption that California experienced a statewide policy change in 1996, with a large number of school districts abandoning race-conscious student-assignment plans *en masse*. But that assumption is simply wrong. In fact, there is no evidence

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[4] PLF Louisville Br. at 26; see also *id.* at 27 ("Since the passage of Proposition 209, California has used race-neutral methods to pursue the goal of providing opportunity for all California's children.").

[5] PLF Seattle Br. at 25, 28-29.

[6] PLF Seattle Br. at 29.

[7] The dissenting Ninth Circuit judges in the *Seattle* case cited San Francisco's student-assignment plan as an example of "race-neutral alternatives" that are "common throughout the United States." *Seattle*, 426 F.3d at 1215 n.24 (Bea, J., dissenting). "Notably," the dissenters observed, "the San Francisco system does not use race as an express criterion for school assignments and thus avoids the sharp focus of strict scrutiny." *Ibid.* (citation and internal quotation marks omitted).

that a statewide policy change occurred, much less that it benefited minority students. See Part II, *infra*.

Finally, the California experience actually refutes the claim that minority academic achievement improves when districts abandon race-conscious student-assignment plans. Indeed, a federal district court found that San Francisco's adoption of a race-neutral student-assignment plan in 2001 resulted in diminished minority achievement and a swift return to severely segregated schools. See Part III, *infra*. Thus, at a time when (according to some) minority academic achievement made some modest *gains* in California as a whole, it *deteriorated* in the one school district known to have adopted a race-neutral student-assignment policy.

I. STATES AND LOCAL GOVERNMENTS MUST RETAIN THE AUTONOMY TO ADOPT MEASURES NARROWLY TAILORED TO ACHIEVE DIVERSITY IN K-12 EDUCATION.

This Court observed over 30 years ago that "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition' for educational excellence.'" *Milliken v. Bradley*, 418 U.S. 717, 742 (1974) (citation omitted). "'[L]ocal autonomy of school districts is a vital national tradition.'" *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (citation omitted). Federal courts therefore "'must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.'" *Id.* at 489 (citation omitted).

These teachings apply with equal force when state and local authorities—based on their intimate knowledge of complex local conditions—voluntarily adopt race-conscious means to integrate their schools. Preparing our children to live happily and peacefully with each other in an increasingly

diverse society is, in and of itself, a compelling governmental interest. Indeed, this Court has recognized and reaffirmed that education is "'the very foundation of good citizenship.'" *Grutter*, 539 U.S. at 331 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). The *Grutter* decision recognized the importance of exposure to "widely diverse people, cultures, ideas, and viewpoints" and noted that studies have shown that diversity promotes learning and prepares students for a diverse society. 539 U.S. at 330. Although *Grutter* concerned graduate education, its teachings apply even more forcefully to K-12 education, where our children learn the fundamentals of citizenship, responsibility, and social interaction. As the First Circuit recently observed, "under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes and the disarming of stereotypes." *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 14 (1st Cir. 2005) (internal quotation marks and citations omitted), *cert. denied*, 126 S. Ct. 798 (2005).

If achieving integration is a compelling state interest, then states and localities should remain free to use race-conscious student-assignment plans when narrowly tailored to further that interest. As other *amici* demonstrate, student-assignment plans that employ race as one of several factors for consideration can be tailored narrowly enough to withstand strict scrutiny. Moreover—and contrary to the assertions of some *amici*—narrow tailoring can be achieved through race-conscious means and without the prior "exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. In contrast, banning race-conscious policies as a tool for achieving integration would, in some instances, foreclose integration altogether—as evidenced by the experience of the San Francisco Unified School District. See Part III, *infra*.

Accordingly, this Court has before it an opportunity to uphold *Brown*'s tenets by reaffirming that separate is not

equal and that local school districts must be granted the latitude to adopt race-conscious means to achieve integration and maintain quality schools.

II. CALIFORNIA HAS NOT ADOPTED RACE-NEUTRAL STUDENT-ASSIGNMENT POLICIES STATEWIDE.

California has not experienced a wholesale abandonment of race-conscious student-assignment plans in the wake of Proposition 209. Nor has there been a related statewide change in minority academic achievement.

The Pacific Legal Foundation hypothesizes that a statewide *change* in California's student-assignment policy—namely, the removal of all racial criteria—caused a related statewide *change* in minority academic achievement. But this theory founders because the supposed statewide policy change never happened. In fact, the only evidence of any policy change consists of two reported decisions concerning, respectively, Huntington Beach[8] and San Francisco.[9] But other prominent California school districts, including Los Angeles and Berkeley, still maintain race-conscious student-assignment plans aimed at achieving integration.

This lack of any uniform shift away from race-conscious student-assignment plans is not surprising. To begin with, Proposition 209, by its terms, does not apply to any race-conscious student-assignment plan that existed when Proposition 209 became effective, if the plan was mandated by a

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[8] See *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002). The policy change in Huntington Beach occurred only after extensive litigation and affected just one high school where a one-for-one transfer policy had been implemented. *Id.* at 1277-78.

[9] See *San Francisco NAACP*, 413 F. Supp. 2d 1051. The policy change in San Francisco likewise occurred only after extensive litigation. *Id.* at 1055-59.

court order or consent decree. See Neil S. Hyytinen, *Proposition 209 and School Desegregation Programs in California*, 38 San Diego L. Rev. 661, 677-81 (2001).[10]

The legal effect of Proposition 209 on *voluntary* school-desegregation plans remains an open question. At present, there is only one published California appellate decision—from an intermediate court—applying Proposition 209 to a voluntary school-desegregation plan; and that decision turned upon the specific characteristics of the challenged plan. See *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275, 1278 (2002). But more recently, a trial court upheld a race-conscious Berkeley plan on the ground that it "does not discriminate against, or provide preferential treatment to, any student based on race. It merely considers race and ethnicity as one of multiple factors in seeking to achieve desegregated schools for all students." *Avila v. Berkeley Unified Sch. Dist.*, No. RG03-110397 at 10 (Cal. Super. Ct. Alameda County Apr. 6, 2004) (order granting demurrer of defendants Berkeley Unified School District and Michele Lawrence) [hereinafter *Avila* order].[11]

In sum, PLF's unsupported assumptions undermine the attempt to cite the California experience as evidence that

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[10] One provision of Proposition 209 states: "Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section." Cal. Const. art. I, § 31(d).

[11] The Berkeley trial court noted that the *Crawford* court had not been asked to apply caselaw that would have required it to "harmonize new and existing constitutional provisions." *Avila* order at 10. Accordingly, the *Crawford* decision made no attempt to harmonize Proposition 209 with preexisting state-constitutional provisions and caselaw that require school boards to attempt to alleviate segregation. The trial court in the Berkeley case thus distinguished the *Crawford* decision on its facts while casting doubt on the thoroughness of *Crawford's* legal analysis. No party appealed from the Berkeley decision (which, concededly, is non-precedential under California law).

race-neutral student-assignment plans improve minority academic achievement. Tellingly, PLF makes no mention of what happened in San Francisco—the only California school district for which there is actual data on the educational impact of dropping racial factors from a student-assignment plan. As discussed below, the San Francisco experience not only refutes PLF's claim, but confirms the pernicious impact of removing race-conscious remedies.

III. RACIAL INTEGRATION AND MINORITY ACADEMIC ACHIEVEMENT DETERIORATED IN SAN FRANCISCO AFTER IT ELIMINATED RACIAL CRITERIA FROM ITS STUDENT-ASSIGNMENT PLAN.

As we have seen, unsupported assumptions undermine the theory that minority academic achievement improves when school districts terminate policies that seek to integrate public schools. There is, for example, no evidence that *any* statewide change in student-assignment policy occurred after California adopted Proposition 209; and there is therefore no basis for arguing that such a change caused a statewide change in minority academic achievement.

But there *is* one California school district that furnishes an opportunity to test that theory. That district is San Francisco, where racial factors were eliminated from the student-assignment plan in 2001—not as the result of Proposition 209, but as part of the district's settlement with a class of Chinese-American parents.[12] Due to the conscientious efforts of San Francisco's consent-decree monitor, this policy change has generated some useful data[13] as well as some pointed

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[12] *Ho v. San Francisco Unified Sch. Dist.*, No. C-94-2418-WHO (N.D. Cal.).

[13] The reports of the consent-decree monitor are available at http://www.gseis.ucla.edu/courses/edlaw/sfrepts.htm.

judicial findings based on that data.[14] Those data and findings tend to refute the theory, not support it.

A. Between 1983 and 1999, San Francisco's race-conscious student-assignment plan largely desegregated its schools and promoted academic excellence throughout the district.

From 1983 to 1999, the San Francisco schools operated under a consent decree whose goal was "'to eliminate racial/ethnic segregation or identifiability in any District school program or class and to achieve throughout the system the broadest practicable distribution of students from nine racial and ethnic groups.'" *San Francisco NAACP*, 413 F. Supp. 2d at 1054 (citation omitted).[15]

Under the 1983 consent decree, the district adopted guidelines to prevent any racial/ethnic group from exceeding 45% of the student body at any regular school or 40% at any "alternative" school. *Ibid.* The decree also designated 19 historically segregated schools for special desegregation treatment and identified certain schools in the predominantly African-American Bayview-Hunter's Point neighborhood for reconstitution and conversion into magnet schools. *Ibid.*

The district court that administered the consent decree found that, before San Francisco removed racial factors from the decree, its student-assignment plan had "succeeded in promoting integration and academic excellence throughout the district." *Id.* at 1055. At "the apex of integration," during

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[14] See *San Francisco NAACP*, 413 F. Supp. 2d at 1052-59.

[15] The full history of the San Francisco schools litigation has been detailed elsewhere. See, *e.g.*, *San Francisco NAACP*, 413 F. Supp. 2d at 1052-59; Leslie Fulbright & Heather Knight, *With More Choice Has Come Resegregation*, S.F. Chron., May 29, 2006, at A-1. Here, we present only those facts bearing on PLF's theory that eliminating race-conscious remedies improves minority educational achievement.

the 1997-98 school year, only 30 regular district schools and six alternative schools (out of 122 schools total) failed to comply with the 45% / 40% requirement, and only one school enrolled more than 50% of a single race/ethnicity. *Ibid.* Standardized test scores increased seven years in a row between 1992 and 1999. Reading scores increased for students of every race and ethnicity, with the exception of a slight drop for Korean American students; and math scores also increased for students of every race and ethnicity, with the exception of a slight drop for Native American students. *Ibid.*

B. After San Francisco eliminated race from its student-assignment plan in 2001, its schools resegregated and minority academic achievement suffered.

In 1999 and again in 2001, the consent decree was modified as part of the district's settlement with a class of Chinese-American parents ("the *Ho* settlement"). *See San Francisco NAACP*, 413 F. Supp. 2d at 1057-58. Beginning in 2001, the decree featured a new student-assignment plan in which race no longer played any role. *Id.* at 1058.

The current, race-neutral plan works as follows. Students are eligible to attend any school in the district. First, applicants with a sibling already attending the desired school are admitted automatically. Second, students with specialized learning needs—*e.g.*, for English proficiency or special education—are assigned automatically to their desired schools with the program meeting those needs.[16]

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[16] See "Excellence for All: A Five-Year Comprehensive Plan to Achieve Educational Equity in the San Francisco Unified School District for School Years 2001-02 to 2005-06" (Apr. 4, 2001) at 98-99, available at http://www.sfusd.edu/news/pdf/X4Allrev021302.pdf#search=%22sfusd%20excellence%20for%20all%20plan%22 [hereinafter 2001 Plan].

All students who are not assigned in either of these steps are assigned according to a six-factor "Diversity Index." In this process, each student obtains a numerical profile based on his or her socioeconomic status, academic achievement status, mother's educational background, language status, academic performance index, and home language.[17]

If more seats are available at a grade level in a school than the number of applicants for that school, then the student is tentatively admitted.[18] If the school is also the student's first choice, then the student is assigned to that school without resorting to the index.[19] But if there are fewer seats available at a school than the number of applicants, then for each oversubscribed class at that school, a complicated computerized formula uses Diversity Index scores as the basis for assigning students to that school.[20]

Although the "diversity index" represented a sincere effort to maintain diversity in San Francisco's public schools, it failed to achieve that objective. Instead, the new race-neutral system resulted in resegregated schools and a relative decline in minority academic achievement. As a result, in November of 2005, the district court that administered the consent decree refused to extend the decree on the ground that "[t]he perpetuation of resegregation allowed, if not caused, by the decree itself would be contrary to the public interest. In effect, due to the *Ho* settlement * * *, the decree has transformed itself into court-ordered resegregation." *San Francisco NAACP*, 413 F. Supp. 2d at 1063.

The district court concluded that, "[u]ndoubtedly, the San Francisco Unified School District is resegregated today. This

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[17] 2001 Plan at 100-03.

[18] 2001 Plan at 100-01.

[19] 2001 Plan at 100-01.

[20] 2001 Plan at 100-03.

segregation can be measured both across schools and within individual school programs." *Id.* at 1067. And the district court expressed its firm conviction that segregation across schools could be traced directly to San Francisco's adoption of a race-neutral student-assignment system: "[T]he current segregation across schools is * * * a result of the evolution of the consent decree itself. If anything, the revised student-assignment plan imposed by the consent decree (with its so-called diversity index) has been the main culprit." *Id.* at 1068.

In support of these conclusions, the district court cited statistics from the consent-decree monitor's reports showing that the race-neutral student-assignment plan had resulted in a sharp and immediate trend toward resegregation that only worsened over time. During the 2001-02 school year, 30 schools were severely resegregated at one or more grade levels—meaning that 60% or more of the students in those grades were of one race/ethnicity. *Id.* at 1059 & n.9. By the 2004-05 school year, this number had risen to 43, with 27 schools resegregated at all grade levels. *Id.* at 1059. Thus, the district court concluded that, "[t]oday, over one in three San Francisco public schools is resegregated, largely as a result of the student-assignment system adopted by the [*Ho*] parties and written into the consent decree." *Ibid.* By the time the consent-decree monitor filed his final report in late December 2005, these figures had become even more dire, with completely resegregated schools reaching approximately 50 in number "for the first time in this era."[21]

The district court's November 2005 decision also concluded that "[a]cademic achievement data indicate a close relationship between resegregation and the disparity in

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[21] Final Supplemental Report of Consent Decree Monitor (Dec. 28, 2005) at pp. 3-4, available at http://www.gseis.ucla.edu/courses/edlaw/Final%20SF%20Supp%20Rept.pdf#search=%22sfusd%20consent%20decree%20biegel%22.

academic achievement between black and Latino students in comparison with white and Chinese-American students." *San Francisco NAACP*, 413 F. Supp. 2d at 1059. The court observed that "[t]he overwhelming majority" of schools that had succeeded in closing the achievement gap—measured by the large percentages of students of all ethnic backgrounds who scored "proficient" or above on state standardized tests—were ones that had maintained "ethnically and racially-diverse student bodies." *Ibid.* (citation omitted).

For example, the consent-decree monitor's report showed that, at the integrated Claire Lilienthal elementary school, the percentage of students scoring "proficient" or above in English on the California Standards Test was 65.5% for all students and 61.5% for Latino students—an "achievement gap" of just 4%.[22] The figures were 67% and 61.5% for math, respectively—an achievement gap of just 5.5%.[23] And Lilienthal was a portrait of integration: 17.5% African American, 13.3% Korean American, 28.4% White, and 11.5% Latino.[24]

Similarly, at the Gateway High School, the percentage of students scoring "proficient" or above in English was 62.8% for all students and 63.6% for African American students.[25] So, on average, African American students outperformed

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[22] Supplemental Report of Consent Decree Monitor Regarding the Achievement Gap and Related Issues (Mar. 2004), at p. 10, available at http://www.gseis.ucla.edu/courses/edlaw/304supp-rpt.pdf [hereinafter March 2004 Report].

[23] *Ibid.*

[24] *Id.* at 11. These figures sum to 70.7%. The remaining 29.3% was comprised of Chinese Americans (9.4%), Japanese Americans (1.0%), American Indians (1.3%), Filipino Americans (1.3%), other non-Whites (10.5%), and students who declined to state their race (5.7%). See SFUSD School Profile for Claire Lilienthal Elementary School (Fall 2003), available at http://orb.sfusd.edu/profile/pf03/pf03-479.htm.

[25] *Id.* at 10.

their classmates in English proficiency. Gateway, too, was integrated, with a student body that was 13.5% African American, 32.8% White, 23.5% Latino, and 13% "other non-White."[26] In all, the consent-decree monitor identified 13 schools that had "done a notable job of closing the achievement gap at their sites";[27] and "[a]ll but one" of those schools were ones that had "maintained substantially racially and ethnically diverse student populations."[28]

In contrast, the schools that had become resegregated were marked by declining standardized-test scores, as measured by the Academic Proficiency Index, or "API."[29] *See San Francisco NAACP*, 413 F. Supp. 2d at 1059. For example, all of the elementary schools in the Bayview-Hunter's Point neighborhood that had a predominantly black enrollment had an API score of 1, "the lowest possible ranking." *Ibid.* The district court observed that the "[r]esegregated schools also have the most significant achievement gaps." *Ibid.*

Perhaps the strongest evidence of the academic impact of San Francisco's public-school resegregation comes from the annual "Adequate Yearly Progress" reports compiled by the California Department of Education. Among other things, these district-by-district reports track the percentage of students, by racial group, who score "proficient" or above on California's standardized tests.

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[26] *Id.* at 11. These figures sum to 82.8%. The remaining 17.2% was comprised of Chinese Americans (9.5%), Japanese Americans (0.7%), Korean Americans (0.5%), American Indians (0.5%), Filipinos (2.1%), and students who declined to state their race (4.0%). See SFUSD School Profile for Gateway High School (Fall 2003), available at http://orb.sfusd.edu/profile/pf03/pf03-565.htm.

[27] *Id.* at 9.

[28] *Id.* at 11.

[29] The API is a school-ranking system based on standardized test scores. See http://www.monet.k12.ca.us/mcsnew/departments/assessment/API/API Overview.htm.

These figures chronicle a shocking increase in the "achievement gap" between African American students and other students between 2002 and 2006, when San Francisco schools were resegregating. In those years, the "gap" between the percentage of African American students and the percentage of White students scoring "proficient" or above in English Language Arts climbed from 19.3% to 49.1%. In part, this widening gap reflects the fact that African American English proficiency actually declined on an absolute basis, from 33% to 22.7%. In math, although African American proficiency improved from 9.7% to 21.2%, the "gap" between African American students and Asian American students climbed from 48.8% to 57.7%.[30]

As the San Francisco experience illustrates, when local authorities are denied the autonomy to adopt race-conscious student-assignment plans, integration may become nearly impossible to achieve. If integration is a compelling state interest, then states and localities must retain the autonomy to adopt narrowly tailored plans, which include racial factors, to further that interest.

CONCLUSION

For all the reasons stated above, this Court should reaffirm a state's compelling interest in achieving school integration and should reject the unsupported claim that minority students benefit when race-conscious student-assignment policies are eliminated. Indeed, in San Francisco—the one

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[30] The 2002 Adequate Yearly Progress Report for San Francisco is available at http://dq.cde.ca.gov/dataquest/AYP/2003AYP_Dst.asp?cSelect=3868478%A0--%A0SAN+FRANCISCO+UNIFIED&cChoice=AYP02_dst&cYear=&cLevel=District&ctopic=AYP&myTimeFrame=S&submit1=Submit.

The 2006 report is available at http://dq.cde.ca.gov/dataquest/APIBase2006/2006APR_Dst_AYP_Report.aspx?allcds=3868478.

place in California where race-conscious remedies were eliminated and data is available—the story is a troubling one of severe resegregation and deteriorating minority achievement.

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Nos. 05-908 & 05-915

In the Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,

Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF FOR THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Constitution bars a local school board from determining voluntarily that its educational purposes will be accomplished best by educating schoolchildren in a racially diverse environment and that to achieve that goal it is necessary to use race as a factor in assigning children among the school district's elementary and secondary schools – even though the school district demonstrates that its approach is narrowly tailored to accomplish its purpose.

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INTEREST OF THE AMICI CURIAE[1]

The Leadership Conference on Civil Rights ("LCCR") is a coalition of more than 180 national organizations committed to the protection of civil and human rights in the United States. It is the Nation's oldest, largest, and most diverse civil and human rights coalition. LCCR was founded in 1950 by three legendary leaders of the civil rights movement – A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races and ethnicities. Member organizations of the Leadership Conference and officers of the LCCR have played a major role in school desegregation litigation and the implementation of court orders since this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).[2]

The Leadership Conference on Civil Rights Education Fund ("LCCREF") is the research, education, and communications arm of LCCR. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation and fostering better public understanding of issues of prejudice.

LCCR and LCCREF strongly support the ability of local school boards to choose to educate children in a diverse environment by voluntarily using race as one factor in the assignment of children to primary and secondary schools. Based on their decades of experience in civil rights issues,

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[1] The parties have consented to the filing of this brief; their written consents have been filed with the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the amici curiae, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

[2] The full list of LCCR member organizations is set forth in the appendix to this brief.

LCCR and LCCREF believe that experiencing diversity in these early years is the best way to equip a child to participate fully in the civic life of our diverse communities and of our diverse Nation, as well as in our country's diverse workplaces. Local school boards are well situated to determine when the use of race-conscious measures is necessary to achieve these goals. When their voluntary decisions to use such measures are narrowly tailored to those important ends, they should be upheld by the courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions in *Brown* and its progeny blazed the path that led our Nation away from segregation and racism and toward integration and tolerance, often in the face of fierce resistance by local school boards.

Here, local school boards – with the support of the courts of appeals – seek voluntarily to advance the values that animated this Court's landmark decisions. Petitioners urge this Court to turn its back on well-settled constitutional principles as well as on the Court's own statements in prior opinions in order to block these school boards' efforts to maximize their students' educational experience by providing a racially diverse school environment. Because the school boards' actions are narrowly tailored to achieve a compelling government interest, and therefore satisfy strict scrutiny review, this Court should uphold their educational decisions.

To begin with, the interest advanced by the school boards in these cases – their conclusion as a matter of educational policy that the learning process is benefited significantly when students are taught in a racially diverse environment – is a compelling governmental interest. This Court recognized as much in its unanimous decision in *Swann* v. *Board of Education*, 402 U.S. 1, 16 (1971), stating that a local school board's determination "that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students re-

flecting the proportion for the district as a whole" falls "within the broad discretionary powers of school authorities." The courts of appeals have uniformly held that this interest is compelling.

The federal government has reached the same conclusion. In a long line of statutes culminating in the No Child Left Behind Act, Congress has found that "[i]t is in the best interests of the United States" to support local school boards "that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." 20 U.S.C. § 7231(a)(4)(A). It has also established grant programs focused on assisting local school boards in that effort.

Finally, this Court endorsed the school districts' reasons for concluding that their interest is compelling, recognizing that "[a]ttending an ethnically diverse school may help accomplish th[e] goal [of enabling minority children to achieve their full measure of success] by preparing minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-473 (1982) (citations omitted). A wealth of empirical data supports this Court's conclusion. For all of these reasons, the interest advanced by the school districts here is a compelling one.

This Court's prior decisions assessing whether race-based criteria are narrowly tailored all arose in a context in which the government was making individualized decisions based on a variety of criteria. Where, as here, the government program does *not* involve this sort of individualized decisionmaking, the narrow tailoring test does not require the government to reconfigure its program and utilize individualized assessments based on multiple considerations in order to pursue a compelling interest. Rather, the narrow tailoring in-

quiry must be reframed to provide equivalent protection in this different context.

The appropriate narrow tailoring standard requires a showing that race is not used unnecessarily to accomplish the compelling governmental interest. This inquiry encompasses assessment of serious, good-faith consideration of race-neutral alternatives, and the absence of quotas and undue harm to any racial group, as well as consideration of the extent to which the school board's approach uses factors other than race in the pupil allocation process.

In applying this standard, the Court should follow its long-established practice, applied in a wide variety of constitutional contexts, of configuring the requirements of the Constitution to reflect the deference accorded to educators' decisions in the K-12 context. This deference should apply to both of the decisions that underlie a school board's implementation of its educational goal of teaching schoolchildren in a diverse environment: first, that the local board has a compelling interest in providing a diverse education environment; and, second, that the means employed by the local school board are narrowly tailored toward achieving that end. Measured against that standard, the voluntary plans at issue here should be upheld by this Court.

ARGUMENT

THE CONSTITUTION PERMITS LOCAL SCHOOL BOARDS VOLUNTARILY TO ADOPT NARROWLY TAILORED MEASURES TO DESEGREGATE OR PREVENT RESEGREGATION OF PUBLIC SCHOOLS.

A. Educating Children In A Racially Diverse Environment Is A Compelling Governmental Interest.

Petitioners and their amici seek to collapse the two separate inquiries under strict scrutiny analysis. Their argument that respondents have failed to demonstrate a compelling in-

terest is based upon their assertion that the only legitimate method of promoting the interest in providing education in a racially diverse environment is by individualized determinations based on a range of factors. Because respondents did not make individualized determinations, they assertedly cannot be seeking to promote diversity.

That contention confuses goals and means. The goal of educating schoolchildren in a racially diverse environment may be achieved through a variety of means. Individualized determinations may be one way, but – as these cases demonstrate – it is not the only way. The compelling-interest test asks whether the goal is sufficiently important; the narrow tailoring inquiry asks whether the means are permissible.

The desire of petitioners and their amici to lump the two inquiries together is understandable: they have no grounds for disputing the conclusion of the courts below that a local school district has a compelling interest in educating its schoolchildren in a racially diverse environment. This Court, the courts of appeals, and Congress all have endorsed that conclusion.[3]

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[3] The dissenters below in the *Seattle* case advanced a similar argument, contending (05-908 Pet. App. 84a-86a) that promoting diversity between white and nonwhite students can never be a compelling interest: a school district must choose between promoting diversity on the full range of racial and ethnic bases or not promoting diversity at all. See also 05-908 U.S. Am Br. 13-14. There is no basis in this Court's precedents for such an assertion. To the contrary, this Court's decisions in the desegregation context focused on the very same criteria. Moreover, as we discuss in detail below, this Court and Congress have focused specifically on the importance of racial diversity in the K-12 context and the empirical data support that conclusion. Given our Nation's three-hundred year history of specific, targeted discrimination against African-Americans, and the documented residual effects of that conduct, it would be extraordinary for this Court to hold it impermissible for a school board to conclude that there is a compelling

1. This Court Has Recognized A Compelling State Interest In Providing Schoolchildren With A Diverse Educational Environment, And The Courts Of Appeals Unanimously Agree.

In *Swann* v. *Board of Education*, 402 U.S. 1 (1971), a unanimous Court, speaking through Chief Justice Burger, clearly distinguished between the power of a local school board to implement race-conscious pupil assignment policies and the more limited authority of a court to order adoption of such rules:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Id. at 16; *see also McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (upholding school board's voluntary adoption of race-conscious pupil assignment standards without finding of de jure segregation); *Bustop, Inc.* v. *Bd. of Educ.*, 439 U.S. 1380, 1383 (1978) (Rehnquist, J., in chambers) (petitioner sought stay of implementation of desegregation plan on ground that the federal Constitution barred race-conscious student busing unless required to remedy violations of the Fourteenth Amendment; stay denied on ground that there was "very little doubt" that the Constitution permitted the plan's

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educational interest in providing a racially diverse school environment. Accord *Comfort* v. *Lynn Sch. Comm.*, 418 F.3d 1, 17-18 (1st Cir.), cert. denied, 126 S. Ct. 798 (2005).

implementation notwithstanding the absence of a constitutional violation).[4]

For nearly three decades, the courts of appeals have consistently adhered to the distinction drawn by the *Swann* Court, holding in a variety of contexts that fostering a racially diverse educational environment is a compelling governmental interest that may justify use of race-conscious measures as one element of a pupil assignment plan. Thus, in *Johnson* v. *Board of Education*, 604 F.2d 504 (7th Cir. 1979), the court upheld a desegregation plan adopted voluntarily by the Chicago School Board. It found that "the state interest in promoting integration in these two high schools and communities, while at the same time affording all students residing in these attendance areas a viable opportunity to attend high school in an integrated setting, to be compelling." *Id.* at 516; accord *Parent Ass'n of Andrew Jackson High Sch.* v. *Ambach*, 598 F.2d 705, 718-719 (2d Cir. 1979) (upholding race-conscious plan designed to prevent resegregation).

The court in *Spangler* v. *Pasadena City Board of Education*, 611 F.2d 1239 (9th Cir. 1979), specifically relied upon

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[4] Justice Powell reached the same conclusion in his separate opinion in *Keyes* v. *School District No. 1*, 413 U.S. 189, 242 (1973), stating that "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation. In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience." Accord *Seattle Sch. Dist. No. 1*, 458 U.S. at 501 n.17 (Powell, J., dissenting) (indicating that "[a]s a former school board member for many years" he would "[a]s a policy matter" leave in place a school board's decision to experiment with a voluntary student busing program).

the school board's "representations that it would continue to engage in affirmative action in the future in support of integration" in directing the district court to terminate the injunction in effect in that case. *Id.* at 1241; see also *id.* at 1245 (Kennedy, J., concurring) (citing school board's "official resolution promising * * * to adopt and maintain 'affirmative action programs designed to improve racial integration among students, faculty and administrative staff of the District'").

Most recently, in addition to the decisions below (see 05-908 Pet. App. 22a-33a & 05-915 Pet. App. C43-C54), the First Circuit in *Lynn*, 418 F.3d at 16, held that "there are significant educational benefits to be derived from a racially diverse student body in the K-12 context. [The school district] has a compelling interest in obtaining those benefits." Accord *Brewer* v. *West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000).

Petitioners and their amici have not identified a single decision of this Court or the courts of appeals that reaches a contrary conclusion. The Court should reject petitioners' invitation to effect a radical change in the law by overturning the distinction drawn by the Court in *Swann* and relied upon repeatedly by the lower federal courts. Moreover, as we next discuss, petitioners' approach would lead to absurd results.

2. Petitioners' Argument Leads To The Absurd Result That A School Board That Wishes To Retain Some Or All Of The Race-Based Measures Used To Achieve Unitary Status May Do So Only If It Remains Under Federal Court Supervision.

When a school board is found to have engaged in de jure segregation, this Court's decisions direct the district court to require the board "to 'take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" *Freeman* v. *Pitts*, 503

U.S. 467, 486 (1992) (quoting *Green* v. *School Bd.*, 391 U.S. 430, 437-438 (1968)). "The concept of unitariness has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn." *Id.* at 486.

In *Board of Education* v. *Dowell*, 498 U.S. 237 (1991), the Court held that motions to lift or modify school desegregation injunctions should not be assessed against the stringent "grievous wrong" standard set forth in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). The Court emphasized that "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." 498 U.S. at 248. "Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'" *Ibid.* (citation omitted).

One year later, in *Freeman*, *supra*, the Court made clear that "in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages." 503 U.S. at 490. That holding rested in large part upon the Court's long-established view that "'local autonomy of school districts is a vital national tradition'" and its conclusion that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." *Ibid.* (citation omitted).

Petitioners' contention that voluntary race-conscious measures are *never* permissible is flatly inconsistent with this Court's recognition of the extraordinarily strong interest in local control of education. Under petitioners' view of the law, a school district that adopted race-conscious measures in order to achieve unitary status must immediately eliminate all such measures the instant that the district is granted unitary status.

As the Louisville case demonstrates, however, a school district may wish to retain some or all of the measures that it originally implemented in order to eliminate the vestiges of desegregation. See 05-915 Pet. App. C14-C17. The district may find a valuable pedagogical effect in educating children in schools with diverse populations and determine that elimination of the measures will lead to resegregation; and it may believe that abrupt elimination of some or all of the measures would disrupt a well-functioning school system – because of the sudden cessation of accepted practices, because of the controversy that might be generated by elimination of those practices, or both.

Under petitioners' view, the only way such a school district may avoid the adverse effects on its students' education that would flow from elimination of the race-conscious measures would be to choose to remain under court supervision, with all of the attendant lack of control, expense, and lack of flexibility. That result is wholly inconsistent with this Court's long-established emphasis on local control. It also makes no sense: there is no basis for interpreting the Constitution to impose such a straitjacket on local school boards.

The situation is even more absurd for districts never found to have engaged in de jure segregation. Rather than allowing these school districts to act voluntarily to eliminate segregation without the need for an expensive and time-consuming judicial inquiry into whether the segregation is de jure or de facto, petitioners would require a court determina-

tion in every single case. (As the court of appeals observed in the Seattle case (05-908 Pet. App. 5a-6a), the Seattle plan was adopted initially at least in part because the local school board's voluntary action avoided a Department of Education investigation and threatened desegregation lawsuit.) A school district could not implement *any* race-based measure voluntarily – no matter how limited the use of racial criteria – in the absence of a court decree. That is true whether the school district sought to implement the measure for the pedagogical benefits that flow from educating children in schools with diverse populations, to avoid time-consuming, divisive, and expensive litigation and retain control over educational policy in its schools, or both.

Nothing in this Court's cases requires these results. Indeed, the Court can prevent them simply by reaffirming *Swann*'s recognition that educating children in a racially diverse environment constitutes a compelling state interest.

3. Congress Has Long Recognized The Compelling Interest In Educating Children In Desegregated Schools.

The compelling interest in educating children in racially diverse schools also has long been recognized by Congress. The relevant statutory provisions were enacted most recently in the portion of the recently enacted No Child Left Behind Act providing for federal assistance to magnet schools. The statute states:

> It is in the best interests of the United States—
>
> (A) to continue the Federal Government's support of * * * local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education;
>
> (B) to ensure that all students have equitable access to a high quality education that will prepare all

> students to function well in a * * * highly competitive economy comprised of people from many different racial and ethnic backgrounds; and
>
> (C) to continue to desegregate and diversify schools by supporting magnet schools, recognizing that segregation exists between minority and nonminority students as well as among students of different minority groups.

20 U.S.C. § 7231(a)(4); see also *id.* § 7231(b) (stating that the "purpose" of federal aid to magnet schools is "to assist in the desegregation of schools served by local educational agencies" by providing financial assistance for, among other goals, "the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students").

Moreover, the statute makes clear that federal grants may be awarded to local educational agencies either that are under judicial or administrative order to desegregate elementary or secondary schools *or* that have adopted a voluntary plan found adequate by the Secretary of Education "for the desegregation of minority-group-segregated children or faculty in such schools." *Id.* § 7231c(2). An application for federal funds must describe how the requested grant "will be used to promote desegregation, including how the proposed magnet school programs will increase interaction among students of different social, economic, ethnic, and racial backgrounds." *Id.* § 7231d(b)(1)(A). Finally, the Secretary of Education's evaluations of local school districts' magnet school programs must address "the extent to which magnet school programs lead to the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students." *Id.* § 7231i(b)(3).

These provisions of the No Child Left Behind Act, which have their roots in the Emergency School Aid Act of

1972[5] and subsequent measures,[6] clearly reflect Congress's determination that there is a compelling governmental interest in educating schoolchildren in a racially diverse environment. It provides very substantial support for reaffirming this Court's statement in *Swann*.[7]

The government does not even attempt to explain how its position that there is no compelling interest in a racially diverse educational environment is consistent with the very clear provisions of this federal statute. Indeed, it expressly recognizes that the Department of Education has by regulation "identified the goal of 'reducing, eliminating or preventing minority group isolation' through magnet schools as a

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[5] Pub. L. No. 92-318, Title VII, §§ 701-720, 86 Stat. 354.

[6] The bipartisan congressional support for federal financial assistance to foster voluntary desegregation has remained consistent over the more than thirty years since the program was created. Concerned about insufficient support for voluntary desegregation after the program had been merged into a block grant program, Congress in 1984 enacted the Magnet Schools Assistance Program, Pub. L. No. 98-377, 98 Stat. 1299, again stressing its goal of promoting voluntary desegregation to improve student achievement through the reduction of racial isolation in elementary and secondary schools.

[7] The Executive Branch first recognized the compelling nature of this interest in 1970 when President Nixon proposed what became the Emergency School Aid Act. He stated that "[i]t is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education—not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broadbased human understanding that increasingly is essential in today's world." H.R. Rep. No. 92-576 (1971), at 3. President Nixon concluded that "doing a better job of overcoming the adverse educational effects of racial isolation, wherever it exists, benefits not only the community but the nation." *Id.* at 6.

'compelling interest.'" 05-908 U.S. Br. 26. The statement that the Department of Education "expressly favor[s] race-neutral" alternatives to achieving this goal relates to means, and does not in any way undercut its recognition that the goal is a compelling one. Rather, by incorporating the statutory purpose of eliminating minority group isolation, the regulation further demonstrates the compelling interest in achieving that goal.

4. Desegregation Of Elementary And Secondary Schools Serves The Compelling National Interest In Fostering National Unity And Effective Participation Of All Citizens In The Civic Life Of The Nation As Well As Preparing Schoolchildren To Participate In Today's Diverse Business Environment.

This Court has already explained why local school boards have a compelling interest in providing a racially diverse educational environment:

> Education has come to be 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.' When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in – and are fully accepted by – the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage.

Seattle Sch. Dist. No. 1, 458 U.S. at 472-473 (citations omitted); accord *Grutter* v. *Bollinger*, 539 U.S. 306, 330-332

(2003); *id.* at 387-388 (Kennedy, J., dissenting) ("[o]ur precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence").

Expert educators agree. Charles Silberman has observed:

> The way we do things * * * shapes values more directly and more effectively than the way we talk about them. Certainly administrative procedures like * * * racial segregation * * * affect "citizenship" education more profoundly than does the social studies curriculum. And children are taught a host of lessons about values, ethics, morality, character and conduct every day of the week, less by the content of the curriculum that by the way schools are organized, the way teachers behave, they way they talk to children and to each other.

CHARLES E. SILBERMAN, CRISIS IN THE CLASSROOM 9 (1971).

This Court's conclusion in *Seattle School District No. 1* about the important effects of a diverse educational environment is also supported by a wealth of research focused specifically on the positive effects of racially diverse K-12 schools on the educational experience of students attending those schools.

To begin with, a significant body of empirical research confirms this Court's conclusion that education in a racially diverse environment best prepares all students to participate fully in our diverse Nation. One recent study concluded that "the vast majority of graduates * * * found [the daily cross-racial interaction in high school] to be one of the most meaningful experiences of their lives, the best—and sometimes the only—opportunity to meet and interact regularly with people of different backgrounds." Amy Stuart Wells *et al.*, *How Desegregation Changed Us: The Effects of Racially Mixed*

Schools on Students and Society 6 (Apr. 2004), available at http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf.

Numerous studies establish the positive results of desegregation in fostering the participation and inclusion of African Americans in American society:

> The evidence from extensive survey data supports a conclusion that desegregated schooling has important long-term benefits for minority students, especially in terms of its ability to open up economic opportunities for them. * * * Parents who have attended desegregated schools are more likely to have attended college, have better jobs, and live in desegregated neighborhoods. They are also more likely to provide their children with the skills they need to begin school.

William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255 (1997).[8]

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[8] Other studies similarly document the impact of school desegregation in several areas including desegregation of the work force, attendance at desegregated colleges, choices to live in desegregated neighborhoods and the development of cross-racial friendships. See Jomills Henry Braddock II & Marvin P. Dawkins, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994); Jomills Henry Braddock II & James M. McPartland, *The Social and Academic Consequences of School Desegregation,* in EQUITY & CHOICES (1988); Jomills Henry Braddock II, Marvin P. Dawkins & William T. Trent, *The Effects of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT'L J. CONTEMP. SOC. 273 (1994); Maureen T. Hallinan & Stevens S. Smith, *The Effects of Classroom Racial Composition on Students' Interracial Friendliness*, 48 SOC. PSYCHOL. Q. 3 (1985); Michal Kurlaender & John Yun, *Is Diversity a Compelling Educational Interest? Evidence from Metropolitan Louisville*, in DIVERSITY CHALLENGED:

Finally, a very substantial body of research establishes a link between desegregation at the K-12 level and improvements in the academic achievement of minority children. See, *e.g*, EFFECTIVE SCHOOL DESEGREGATION: EQUALITY, QUALITY AND FEASIBILITY (W.D. Hawley ed. 1981) (including a meta-analysis of 93 studies conducted by Robert L. Crain and Rita E. Mahard on the effect of desegregation); Eric A. Hanushek, John F. Kain, & Steven G. Rivkin, *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement*, Nat'l Bureau on Econ. Res., Working Paper No. 8741 (2002).[9]

The gap between white and black students in reading was narrowed significantly in the 1970s and early 1980s as measured by the widely respected National Assessment of Educational Progress. The greatest gains were recorded by black elementary students in the Southeast during the 1970s, when school desegregation was occurring across the region

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EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Orfield & Kurlaender eds. 2001); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994); Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99 (Orfield & Kurlaender eds. 2001).

[9] Numerous studies also show that school desegregation has little or no measurable negative impact on white students. Gary Orfield & Chung Mei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project (2006), available at http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf. Nor do whites gain if schools become resegregated after the end of a desegregation plan. Catherine Horn & Michal Kurlaender, *The End of* Keyes*—Resegregation Trends and Public Schools*, Harvard Civil Rights Project (2006), available at http://www.piton.org/Admin/Article/Full%20Harvard%20study-%20part%202.pdf.

after *Swann*. See Marshall S. Smith & Jennifer O'Day, *Educational Equality: 1966 and Now*, in SPHERES OF JUSTICE IN EDUCATION: THE 1990 AMERICAN EDUCATION FINANCE YEARBOOK 53, 80 (Verstegen & Ward eds. 1991); NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, THREE NATIONAL ASSESSMENTS OF READING CHANGES IN PERFORMANCE, 1970-1980, at 42-44 (1981).

While many of these changes were prompted by court-ordered desegregation, studies have shown that the *positive impact of desegregation on achievement is stronger when desegregation is voluntary*. See THOMAS COOK ET AL., SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT (1984); WALTER G. STEPHAN, BLACKS AND BROWNS: THE EFFECTS OF SCHOOL DESEGREGATION ON BLACK STUDENTS (1984).

Positive changes have taken place in educational attainment as well as in achievement scores. In St. Louis, African American students enrolled in voluntary desegregation programs in the suburbs graduate from high schools at more than twice the rate of their city peers. This is so even though a high proportion of these transferring students come from poor families. AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 182 (1997). See also Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 796-97 (2005).

In sum, overwhelming empirical evidence supports this Court's recognition that there is a compelling governmental interest in educating schoolchildren in a racially diverse environment.

B. The Challenged Voluntary Measures Are Narrowly Tailored To Achieve This Compelling Interest.

The legal issue before the Court in this case is fundamentally different from those considered in this Court's prior

cases addressing race-conscious government action. As Judge Kozinski explained in his concurring opinion below:

> The Seattle plan * * * is not meant to oppress minorities, nor does it have that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. The program does use race as a criterion, but only to ensure that the population of each public school roughly reflects the city's racial composition.

05-908 Pet. App. 65a. Chief Judge Boudin reached precisely the same conclusion in his concurring opinion upholding a similar plan adopted voluntarily by a local school board to promote a diverse educational environment. *Lynn*, 418 F.3d at 27.

Judge Kozinski concluded that these distinctions warrant application of the rational-basis standard of review. 05-908 Pet. App. 65a-66a. This Court need not reach that conclusion to uphold the local school board decisions at issue in these cases. Even under strict scrutiny, the narrow-tailoring standard must be applied in a manner that takes account of the very different nature of the government action challenged here and of the Court's long-standing deference to the decisions of local school boards. The arguments to the contrary by petitioners and their amici resound with "the thud of square pegs being pounded into round holes." *Id.* at 63a (Kozinski, J., concurring). Assessed against the proper stan-

dard, it is clear that the actions of the local school boards should be upheld.

1. Individual Holistic Assessments Are Not Required Or Even Appropriate To Satisfy Narrow Tailoring In The K-12 Context; A Local School Board Must Prove That Race Is Not Used Unnecessarily In The Government Decisionmaking.

Petitioners and their amici reflexively invoke the narrow-tailoring standard applied by the Court in *Grutter*, seizing in particular on the absence here of individualized holistic consideration of the qualifications of each student. But *Grutter* itself recognized that the narrow-tailoring standard must be "calibrated to fit the distinct issues raised" and take "'relevant differences into account.'" 539 U.S. at 334 (citation omitted). The particulars of the standard applied there are not appropriate for this very different context.

The government action challenged in *Grutter* involved allocation of places in an elite educational institution on the basis of individualized assessment of a student's qualifications based on a variety of considerations. When the government's decisionmaking process turns upon individualized assessment, the compelling interest must be "achieved by a system where individual assessment is safeguarded through the entire process. * * * [A]n educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking." 539 U.S. at 392-93 (Kennedy, J., dissenting).

Where, as here, the government program does *not* involve this sort of individualized decisionmaking, the narrow-tailoring test does not require the government to reconfigure its program and utilize individualized assessments based on multiple considerations in order to pursue a compelling inter-

est. Rather, the narrow-tailoring inquiry must be reframed to provide equivalent protection in this different context.

Any other approach would be nonsensical. After all, the process for allocating students among a school district's primary and secondary schools is totally different from the process for selecting students for an elite undergraduate or graduate institution (or a selective-admission secondary school). A school board must find a place for every student living within its district: "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend." *Bazemore* v. *Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring). The assignment process involves allocation of students among substantially similar schools; denying admission is not an option. Cf. *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 301 n.39 (1978) (Powell, J.) (observing that the University "did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education").

School boards consequently do not assess every kindergarten or fifth or ninth grade student individually based on a number of different parameters. Such a process would be impossibly burdensome as well as unnecessary. Rather, local school boards establish broad standards to allocate students among their schools. There simply is no basis for requiring a school board to jettison its normal approach to pupil assignment simply because it voluntarily seeks to achieve a racially diverse environment.

The question, therefore, is how the narrow-tailoring standard should apply to government decisions that are not made on an individualized basis. The essential goal of the narrow-tailoring test is to "ensure[] that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial

prejudice or stereotype." *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

We submit that the appropriate standard in this context is one that requires a showing that race is not used unnecessarily to accomplish the compelling governmental interest. This inquiry, which parallels the standard identified by Justice Kennedy in his opinion in *Grutter*, encompasses *Grutter*'s assessment of serious, good-faith consideration of race-neutral alternatives, and the absence of quotas and undue harm to any racial group, as well as consideration of the extent to which the school board's approach uses factors other than race in the pupil allocation process. Cf. *United States* v. *Paradise*, 480 U.S. 149, 187 (1987) (Powell, J., concurring). As we next discuss, when applied in the K-12 context this standard also must reflect the deference this Court traditionally accords to local school boards' educational decisions.[10]

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[10] Adoption of this approach by the Court is especially important because local school boards make a number of other non-individualized educational determinations that might be the target of lawsuits similar to those now before the Court. For example, the district court in the Louisville case observed that in that district "[r]acial demographics have influenced the boundaries for contiguous and non-contiguous resides areas and the composition of some elementary school clusters. Elementary schools are clustered so that combined attendance zones, assuming normal voluntary choices, will produce at each school student populations somewhere within the racial guidelines." 05-915 Pet. App. C19.

Under petitioners' theory, any such zoning decision would be unconstitutional automatically because it involved consideration of race. So would decisions regarding the location of magnet programs – which often turn on the racial make-up of the area surrounding a school (and the interest in attracting students from other neighborhoods in order to promote diversity) – as well as school siting decisions that took account of the race of students residing nearby. Judicial second-guessing of school board decisions would skyrocket under the legal regime advocated by petitioner.

2. *The Narrow-Tailoring Test Must Be Applied In A Manner That Preserves The Discretion This Court Affords To Local School Authorities In Implementing Educational Goals.*

This Court has long recognized that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. * * * By and large, public education in our Nation is committed to the control of state and local authorities." *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975); accord *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988); *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42-43, 49 (1973).

The Court has applied this well-settled principle in a wide variety of constitutional contexts, configuring the requirements of the Constitution to reflect the deference accorded to educators' decisions in the K-12 context. See, *e.g.*, *Vernonia Sch. Dist. No. 47J* v. *Acton*, 515 U.S. 646, 665 (1995) (upholding random drug testing in K-12 schools); *Kuhlmeier*, 484 U.S. at 267-268 & 270-274 (deferring to educators' judgments in First Amendment context); *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 683 (1986) ("[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board"); *N.J.* v. *T.L.O.*, 469 U.S. 325 (1985) (Fourth Amendment); *Lopez*, *supra* (due process).

In applying the compelling-interest test in the K-12 context, it is similarly appropriate to accord deference to the determinations by a local school board that underlie implementation of its educational goal of teaching schoolchildren in a diverse environment: first, that the local board has a compelling interest in providing a diverse education environment; and, second, that the means employed by the

local school board are narrowly tailored toward achieving that end.

With respect to the first determination, there is – as we have discussed (see pages 4-18, *supra*) – substantial authority recognizing the very significant benefits to all students, majority and minority, that flow from a racially diverse K-12 education. Indeed, both Congress and this Court have specifically endorsed that goal.

Just as there is no doubt about the broad authority of local officials, along with the state, to establish the curriculum for their students, it is well within the province of state and local educators to determine the optimal educational environment for their schools and classrooms and the educational values they wish to promote. As the Court – speaking through Justice Powell – observed in *Rodriguez*,

> [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

411 U.S. at 42-43.

For similar reasons, deference also is appropriate as to a local school board's voluntary decision that race-conscious measures are necessary to achieve its goal. Allocating students among a district's schools – like drawing the lines for legislative districts – is a complicated process involving a number of variables. These include taking into account time and distance from home to school, according a measure of choice to students with special interests, accommodating desires to have siblings attend the same schools, and providing accessible education for students with special needs. The narrow-tailoring standard should take account of the special expertise of local school boards in determining the most

appropriate method for allocating their schoolchildren among the particular district's schools.

Indeed, the Court has done just that in the context of desegregation decrees, making clear that "[r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." *Swann*, 402 U.S. at 16. Rather, the local school board must exercise its discretion to come forward with a plan that satisfies the compelling interest in eradicating de jure segregation and its vestiges. So too here, the standard should be whether the school district has devised a pupil allocation plan that is tailored to achieving its compelling interest without using race unnecessarily to accomplish its goal of providing a diverse educational environment. See also 05-915 Pet. App. C42 ("[i]t would seem rather odd [if] the concepts of equal protection, local control, and limited deference [were] now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law") (footnote omitted).

3. The Seattle Provisions.

The Seattle Board's statement makes clear that the plan challenged here was adopted in order to further the compelling interest in obtaining for the district's students the educational benefits of learning in a racially diverse environment. 05-908 Pet. App. 20a-21a. For the reasons we have discussed, that interest is sufficient to satisfy strict scrutiny.[11]

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[11] Petitioners and their amici rather disingenuously challenge the legitimacy of Seattle's interest on the ground that the particulars of Seattle's plan supposedly are inconsistent with the District's educational goals. They argue that the plan is underinclusive (because it leaves in place substantially nondiverse schools in the absence of oversubscription by ninth graders) and overinclusive (because it applies to schools at which there would be some diversity in any event). They also contend that Seattle should have identified the particular level of diversity necessary to satisfy its educational ob-

The particulars of Seattle's plan are narrowly tailored to this interest. The plan applies to the allocation of ninth graders among the District's high schools. A student may select any of the ten high schools in the District as his or her first choice. Unless that school is oversubscribed, the student will be admitted to it. If a particular school is oversubscribed, then the District will allocate students based on a series of tiebreakers:

- First, students who have a sibling attending the school will be admitted.
- Second, if "the racial make up of [a high school's] student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole" even after the sibling preference is applied, then the race of the student is considered. 05-908 Pet. App. 10a. This tiebreaker "is applied to the entering ninth grade population only until it comes within the 15 percent plus or minus variance. Once that point is reached, the District 'turns off' the race-based tiebreaker and there is no further consideration of a student's race in the assignment process." *Id.* at 12a.
- Third, students are admitted according to the distance between their home and the high school.
- Fourth, a lottery is used to allocate the remaining seats.

Assessed in light of the deference that this Court accords to educational decisions by local school authorities, Seattle's

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jectives. Of course, if the plan contained these more intrusive and more specific racial criteria, petitioners then would cite each of those details in arguing that the plan's specificity constituted an impermissible quota. The school board legitimately exercised its discretion to craft a plan that satisfies its educational goals as well as this Court's narrow-tailoring criteria.

limited use of a race-conscious measure plainly is not unnecessary to achieving the compelling interest.

Consideration of race-neutral alternatives. The court below thoroughly discussed the District's evaluation of alternative approaches and correctly concluded that "the District made a good faith effort to consider feasible race-neutral alternatives and permissibly rejected them in favor of a system involving a sibling preference, a race-based tiebreaker, and a proximity preference." 05-908 Pet. App. 57a-58a. Given the deference accorded to a local school board's educational judgments, Seattle was not required to do more.

Absence of quotas. Seattle's plan does not set aside a fixed number of places in any school for white students or for nonwhite students. If no school is oversubscribed, then the tiebreakers do not operate: a school could be composed of all white students or all nonwhite students.[12] And even if the tiebreaker does come into play, it "is used only so long as there are members of the underrepresented race in the applicant pool for a particular oversubscribed school. If the number of students of that race who have applied to that school is exhausted, no further action is taken, even if the 15 percent has not been satisfied." *Id.* at 44a.

The actual operation of the plan confirms the absence of any fixed quota. For the 2001-02 school year, the race-based tiebreaker was not used for assignments to seven of the District's ten high schools because those schools were not oversubscribed. In the prior year, when the race-based provisions of the plan were more substantial, it affected the assignment of only ten percent of the District's ninth graders. *Id.* at 11a, 12a.

Certainly the fact that the plan is triggered by a more-than-fifteen-percent variance from the District's racial

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[12] Indeed, two of Seattle's high schools are more than ninety percent nonwhite. 05-908 Pet. App. 197a.

makeup does not mean that it constitutes a quota. The tiebreaker may not be triggered for any school; and even if it is triggered, it allows a thirty percentage point variation in a school's racial makeup. Compare *Grutter*, 539 U.S. at 389-90 (Kennedy, J., dissenting) (criticizing extremely low variation in percentage of minorities enrolled in the law school). And because the tiebreaker only operates as long as there are members of the underrepresented race in the applicant pool, the actual variance can be even greater. There simply is no basis for condemning this flexible plan as a rigid quota.

Absence of undue harm. Seattle's plan does not single out any particular racial group. The record demonstrates that substantial numbers of both white and nonwhite students were assigned to their first choice schools as a result of the operation of the tiebreaker. 05-908 Pet. App. 60a. The benefits and burdens of the plan are thus shared by students of all races.[13]

Relative prominence of race-based criteria in pupil assignment plan. Seattle has carefully designed its plan so that the use of the race-based criterion is a subsidiary part of the pupil assignment process. The criterion only comes into play if a school is oversubscribed, and even then it is limited by the broad (thirty percentage point) range that is permissible under the plan as well as by the number of applicants from the underrepresented category. The use of race is focused and

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[13] Petitioners and their amici argue that the plan imposes undue harm because some students necessarily are denied the school of their choice solely because of their race. If that were a legitimate objection, then the use of race-based criteria would never be constitutionally permissible: the only reason a constitutional question arises in the first place is because some students are adversely affected because of their race. Without that adverse impact, no one would have standing to challenge Seattle's plan. The undue-burden inquiry focuses on whether there is a disproportionate burden, not whether there is any burden.

moderate. Indeed, under the more stringent version of the plan in effect in 2000-01 only ten percent of the District's ninth graders were assigned on the basis of this criterion. *Id.* at 12a. The percentage necessarily would be lower based upon the current version of Seattle's plan. The District's plan satisfies the narrow-tailoring test.

4. The Louisville Provisions.

The Louisville plan was adopted following the dissolution of the 1975 desegregation decree, which had included a number of race-based student assignment criteria. The plan "requires each school to seek a Black student enrollment of at least 15% and no more than 50%. This reflects a broad range equally above and below Black student enrollment systemwide," which is approximately 34%. 05-915 Pet. App. C17-C18, C11. Normally, elementary school students are assigned to their local school ("resides school" in the plan's terminology) "unless that school exceeds its capacity or hovers at the extreme ends of the racial guidelines" or the student has applied to and been accepted by another school, such as a magnet school. *Id.* at C24. Middle school and high school students may attend their resides school, to which they are entitled to be admitted, or apply to a magnet school, magnet program, or optional program. Admission to magnet schools and similar programs generally is based upon objective criteria, available space, and the racial guidelines (one school also uses the student's residence to obtain a student body representative of the county). *Id.* at C25-C27.

This plan, like Seattle's, is based upon the school board's determination that students gain substantial educational benefits from learning in a racially diverse environment. *Id.* at C46-C47 & C49-C51. The district court, which had overseen the school board's compliance with the 1975 decree, concluded that the policy "is sincerely held and not intended to disadvantage any race" and correctly determined that the

board had met its burden of establishing a compelling interest. *Id.* at C53 (footnote omitted).

The discussion of narrow tailoring with respect to the Seattle plan also demonstrates why the Louisville plan should be upheld. Here too, the school board considered a variety of race-neutral options (*id.* at C68-C69); there are no quotas – the plan does not reserve a pre-set number of places for students of a particular race, and the wide variance among the percentages of African-American students in the district's schools (ranging from 20.1% to 50.4%) confirms that fact (*id.* at C57-C58); and there is no undue burden because to the extent the plan confers benefits or imposes burdens they are distributed to students of all races (*id.* at C66-C67). In addition, as with the Seattle plan, race is not the principle criterion for assignment of students – student choice and, for the magnet schools, other individualized criteria are far more important. *Id.* at C62-C63. Especially given the deference accorded to a school board's educational determinations, the courts below properly upheld this plan.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

The following organizations are members of the Leadership Conference on Civil Rights:

A. Philip Randolph Institute
AARP
ADA Watch
Advancement Project
African Methodist Episcopal Church
African Methodist Episcopal Zion Church
Alaska Federation of Natives
Alaska Inter-Tribal Council
Alliance for Retired Americans
Alpha Kappa Alpha Sorority, Inc.
Alpha Phi Alpha Fraternity, Inc.
American Association for Affirmative Action
American Association of People with Disabilities
American Association of University Women
American Baptist Churches, U.S.A.-National Ministries
American Civil Liberties Union
American Council of the Blind
American Ethical Union
American Federation of Government Employees
American Federation of Labor- Congress of Industrial Organizations
American Federation of State, County & Municipal Employees, AFL-CIO
American Federation of Teachers, AFL-CIO
American Friends Service Committee
American Jewish Committee
American Jewish Congress
American Nurses Association
American Postal Workers Union, AFL-CIO
American Society for Public Administration
American Speech-Language-Hearing Association
American-Arab Anti-Discrimination Committee
Americans for Democratic Action

Anti-Defamation League
Appleseed
Asian American Justice Center
Asian Pacific American Labor Alliance
Associated Actors and Artistes of America, AFL-CIO
Association for Education and Rehabilitation of the Blind and Visually Impaired
B'nai B'rith International
Brennan Center for Justice at New York University School of Law
Building & Construction Trades Department, AFL-CIO
Catholic Charities, USA
Center for Community Change
Center for Voting and Democracy
Center for Women Policy Studies
Children's Defense Fund
Church of the Brethren-World Ministries Commission
Church Women United
Coalition of Black Trade Unionists
Common Cause
Communications Workers of America
Community Transportation Association of America
Congress of National Black Churches
Delta Sigma Theta Sorority
Disability Rights Education and Defense Fund
Division of Homeland Ministries-Christian Church (Disciples of Christ)
Epilepsy Foundation of America
Episcopal Church-Public Affairs Office
Evangelical Lutheran Church in America
Families USA
Federally Employed Women
Feminist Majority
Friends Committee on National Legislation
Global Rights: Partners for Justice
GMP International Union

Hadassah, The Women's Zionist Organization of America
Hotel and Restaurant Employees and Bartenders International Union
Human Rights Campaign
Human Rights First
Improved Benevolent & Protective Order of Elks of the World
Industrial Union Department, AFL-CIO
International Association of Machinists and Aerospace Workers
International Association of Official Human Rights Agencies
International Brotherhood of Teamsters
International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO
International Union, United Automobile Workers of America
Iota Phi Lambda Sorority, Inc.
Japanese American Citizens League
Jewish Community Centers Association
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Women International
Judge David L. Bazelon Center for Mental Health Law
Kappa Alpha Psi Fraternity
Labor Council for Latin American Advancement
Lambda Legal
Lawyers' Committee for Civil Rights Under Law
League of Women Voters of the United States
Legal Momentum
Mashantucket Pequot Tribal Nation
Mexican American Legal Defense and Education Fund
Na'Amat USA
NAACP Legal Defense and Educational Fund, Inc.
National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education
National Association for the Advancement of Colored People
National Association of Colored Women's Clubs, Inc.
National Association of Community Action Agencies
National Association of Community Health Centers
National Association of Human Rights Workers
National Association of Negro Business & Professional
National Association of Neighborhoods
National Association of Protection and Advocacy Systems
National Association of Social Workers
National Bar Association
National Black Caucus of State Legislators
National Catholic Conference for Interracial Justice
National Coalition for the Homeless
National Coalition on Black Civic Participation
National Coalition to Abolish the Death Penalty
National Committee on Pay Equity
National Community Reinvestment Coalition
National Conference of Black Mayors, Inc.
National Congress of Black Women, Inc.
National Congress for Community Economic Development
National Congress for Puerto Rican Rights
National Congress of American Indians
National Council of Catholic Women
National Council of Churches of Christ in the U.S.
National Council of Jewish Women
National Council of La Raza
National Council of Negro Women
National Council on Independent Living
National Education Association
National Employment Lawyers Association
National Fair Housing Alliance

National Farmers Union
National Federation of Business and Professional Women's Clubs, Inc.
National Federation of Filipino American Associations
National Gay & Lesbian Task Force
National Health Law Program
National Institute For Employment Equity
National Korean American Service and Education Consortium, Inc. (NAKASEC)
National Lawyers Guild
National Legal Aid & Defender Association
National Low Income Housing Coalition
National Neighbors
National Office for Black Catholics
National Organization for Women
National Partnership for Women & Families
National Post Office Mail Handlers, Watchmen, Messengers & Group Leaders
National Puerto Rican Coalition
National Sorority of Phi Delta Kappa, Inc.
National Urban League
National Women's Law Center
National Women's Political Caucus
Native American Rights Fund
Newspaper Guild
Office of Communications of the United Church of Christ, Inc.
Omega Psi Phi Fraternity, Inc.
Open Society Policy Center
Organization of Chinese Americans, Inc.
PACE International Union
Parents, Families, Friends of Lesbians and Gays
People for the American Way
Phi Beta Sigma Fraternity, Inc.
Planned Parenthood Federation of America, Inc.
Poverty and Research Action Council

Presbyterian Church (USA)
Pride at Work
Progressive National Baptist Convention
Project Equality, Inc.
Puerto Rican Legal Defense and Education Fund, Inc.
Religious Action Center of Reform Judaism
Retail Wholesale & Department Store Union, AFL-CIO
Service Employees International Union
Servicemembers Legal Defense Network
Sigma Gamma Rho Sorority, Inc.
Sikh American Legal Defense and Education Fund
Southeast Asia Resource Action Center (SEARAC)
Southern Christian Leadership Conference
Southern Poverty Law Center
The Association of Junior Leagues International, Inc.
The Association of University Centers on Disabilities
The Center for Voting and Democracy
The Justice Project
The National Conference for Community and Justice
The National PTA
Union for Reform Judaism
Unitarian Universalist Association
UNITE HERE!
United Association of Journeymen & Apprentices of the Plumbing& Pipe Fitting Industry of the U.S. & Canada-AFL-CIO
United Brotherhood of Carpenters and Joiners of America
United Church of Christ-Commission for Racial Justice Now
United Farm Workers of America, AFL-CIO
United Food and Commercial Workers International Union
United Methodist Church-Board of Global Ministries Women's Division
United Mine Workers of America

United Rubber, Cork, Linoleum & Plastic Workers of America
United States Conference of Catholic Bishops
United States Students Association
United Steelworkers of America
United Synagogue of Conservative Judaism
Women of Reform Judaism
Women's American ORT
Women's International League for Peace and Freedom
Workers Defense League
Workmen's Circle
YMCA of the USA, National Board
YWCA of the USA, National Board
Zeta Phi Beta Sorority, Inc.

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Petitioner,

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Respondents.

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BRIEF *AMICI CURIAE* OF THE LOUISVILLE AREA CHAMBER OF COMMERCE, INC. (D/B/A GREATER LOUISVILLE INC.) AND LOUISVILLE METRO MAYOR JERRY E. ABRAMSON IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici curiae will address the following questions:

1. Does the student assignment plan, adopted by the Jefferson County Board of Education after considering extensive local community and educator input, and as affirmed by the courts below, satisfy the Equal Protection Clause of the Constitution, given, among other things, the Board's conclusion that its plan for maintaining racial diversity in secondary education furthers compelling goals, such as preparing students to succeed in the racially diverse workforce of the Louisville, Kentucky – Southern Indiana metropolitan area?

2. Do concerns of federalism and institutional competence counsel for a federal court to defer to this decision of a locally elected and accountable school board?

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No. 05-915

IN THE

Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT
AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

V.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF *AMICI CURIAE* OF THE LOUISVILLE AREA CHAMBER OF COMMERCE, INC. (D/B/A GREATER LOUISVILLE INC.) AND LOUISVILLE METRO MAYOR JERRY E. ABRAMSON IN SUPPORT OF RESPONDENTS

The Louisville Area Chamber of Commerce, Inc. d/b/a Greater Louisville Inc. ("GLI") and Mayor Jerry E. Abramson file this brief *amici curiae* in support of respondents.[1] The purpose of this brief is twofold: first, to

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[1] Pursuant to Supreme Court Rule 37.6, *amici* disclose that no counsel for any party authored any portion of this brief and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. *Amici* have the consent of

explain the importance of racial diversity to Jefferson County Public Schools ("JCPS" or the "Board") for preparing students to succeed in the greater Louisville workforce and thereby strengthen the local business community; and second, to emphasize the need, based on principles of federalism and institutional competence, for the federal judiciary to defer to local public school officials in their fashioning of practical solutions, based on extensive community and educator input, for promoting racial diversity in their public elementary and secondary schools.

INTEREST OF AMICI CURIAE

GLI, a not-for-profit organization established in September, 1997, functions as the chamber of commerce and economic development agency for the Louisville, Kentucky – Southern Indiana metropolitan area. GLI has a membership of approximately 2,900 businesses and other employers, ranging from small local businesses to large multinational companies. GLI has a deep interest in public education because GLI understands that well-educated workers are an essential component for a community's prosperity.[2] An educated workforce will help attract and maintain good-paying jobs in the greater Louisville region. Based on this understanding, GLI is engaging in various

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the parties to file this brief. The parties' letters of consent were filed with the Court on June 26 and 28, 2006.

[2] *See* Brookings Institution Center on Urban & Metropolitan Policy, *Beyond Merger: A Competitive Vision for the Regional City of Louisville* (2002) (noting the importance of increasing educational achievement of students at levels in Louisville, particularly those who are lowest-achieving). GLI has formed a task force to establish "a community that values education [and] where no priority outranks education." *See Greater Louisville Inc. Partnership for Education* (2006), available at *http://www.greaterlouisville.com/ed/pforedu.asp.*

activities to promote education in Jefferson County, Kentucky, where Louisville is located. For example, GLI developed and is implementing the "Every 1 Reads" project – a special initiative to enhance children's overall reading level by 2008. This Court's ruling on the constitutionality of JCPS's student assignment plan will affect GLI's substantial interest in education because of the impact of local public school policies on GLI's efforts to promote healthy and robust economic development in greater Louisville.

Since January of 2003, Mr. Jerry E. Abramson has been the Metro Mayor of the recently merged City-County government known as Louisville Metro. He also served three terms as Mayor of the City of Louisville – the longest serving mayor in the City's history – prior to its merger with the government of Jefferson County. In addition, Mayor Abramson has served as president of the United States Conference of Mayors. As Metro Mayor, Mr. Abramson's responsibilities include promoting quality education for all children in Louisville Metro and securing healthy economic development for the community. The Mayor has a substantial interest in this Court's ruling because it will affect Louisville Metro's efforts to foster quality public education and thereby help attract new business and promote the growth of existing companies in the metropolitan area.

STATEMENT

The student assignment plan at issue here should be considered within the context of the history of Louisville. This history underscores the importance of racial diversity and healthy racial relations for fostering economic growth of the City.

"Louisville has always been called the gateway from the North to the South," Isabel M. McMeekin, *Louisville: The*

Gateway City 256 (1946), and is referred to by many as the "northernmost Southern city and southernmost Northern city in the United States." Indeed, "Louisville's personality has been shaped" in large part by "its border-city status" – "its neither southern-fish nor northern-fowl location on the Kentucky-Indiana border." Bob Hill & Dan Dry, *Louisville: A River Serenade* 13 (1995).

Louisville has historically been and remains the largest city in Kentucky, the state that was the birthplace of Abraham Lincoln and one of the "border States" that never joined the Confederacy during the Civil War. *See* John E. Kleber, ed., *The Kentucky Encyclopedia* 555-56, 576 (1992). Louisville always remained a Union stronghold throughout that conflict. *See id.* at 576. However, during the late nineteenth and much of the twentieth century, Louisville, like many other cities, suffered from racial segregation. *See, e.g., Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down a Louisville ordinance requiring residential segregation). Indeed, it is said that the name "Jim Crow" had its origin from a minstral show character "inspired by an elderly Negro in Louisville." *The Origin of "Jim Crow"*, in *Afro-American Almanac*, available at *http://www.toptags.com/aama/docs/jcrow.htm*. Racial relations deteriorated, and "[l]ike other cities, Louisville saw unrest in the 1960s over civil rights and in the 1970s over busing." Ellen R. Stapleton, "Police Shooting Aggravates Racial Tensions in Ky.," *The Boston Globe* (Jan. 16, 2004), available at *http://www.boston.com/ news/nation/articles/2004/01/16*. This same period of societal unrest saw Louisville and Jefferson County's population shrink and its economy suffer.

Since the 1980s, however, Louisville has transformed itself. It is now home to the corporate headquarters or substantial manufacturing facilities for many Fortune 500 companies, as well as the Worldport air hub for UPS. The

City also has major health care and medical sciences industries, and its medical facilities have produced important breakthroughs in heart and hand surgery as well as cancer treatment. This industry development has led to significant population and economic growth.

Along with economic development has come greater diversity among the citizenry. The city that has always been an amalgam of North and South has become home to an even greater mix of different peoples. Although racial minorities other than African-Americans are still a small percentage of JCPS students, the City has become more racially diverse and home to an increasing number of immigrants from around the world.[3] It is also more culturally and religiously diverse than many other cities situated south of the Mason-Dixon line. The City has strong Catholic, Jewish and Protestant communities and is the hometown of one of the most famous Americans of the Islamic faith, former heavyweight boxing champion Muhammad Ali. *See The Kentucky Encyclopedia, supra,* at 12, 460, 576, 766.

With the recent merger of its City and County governments, the new Louisville Metro is, by one estimate, "now the 16th largest city in the nation." Pet. App. C-11. Its public school district, the Jefferson County Public Schools ("JCPS"), is "the 28th largest public school system in the United States." *Id.*

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[3] In 1990, approximately 665,000 of Jefferson County's population was comprised of 81% non-Hispanic origin whites and 19% of non-whites. U.S. Census Bureau, *Census 2000*, available at *http://factfinder.census.gov.*. By 2004, non-whites accounted for 25% of the population. U.S. Census Bureau, *State & County Quick Facts*, available at *http://quickfacts.census.gov/qfd /states/21/21111.html.*

Louisville's public schools were subject to a federal court-ordered student assignment plan from 1975 until 2000, when the same federal district judge who heard the present case below (Chief Judge John G. Heyburn II) dissolved the original desegregation decree. In his 2000 decision, Chief Judge Heyburn "ordered JCPS to cease using racial quotas at Central High School, and ordered JCPS to complete any reevaluation and redesign of the admissions procedures in other magnet schools before the beginning of the 2002-2003 school year." *Id.* C-15, C-16. In compliance with this order, "the Board ended its use of racial quotas" at certain schools as directed by the federal court, but "determined that the Court's order did not address the use of race at magnet traditional schools." *Id.* C-16, C-17. The Board then embarked on an in-depth process to investigate the local community's view and needs and received considerable "public feedback from opinion surveys and community meetings." *Id; see also* Stipulation of Facts ¶ 135, reprinted at J.A. 58. Based upon extensive study and constituent input, the Board adopted in 2001 the student assignment plan at issue here – what is commonly referred to as the "2001 Plan."

Chief Judge Heyburn held that the 2001 Plan comported with the Equal Protection Clause, with the exception of the admissions process for those magnet schools offering "traditional" programs. See Pet. App. C-75, C-76. The Board did not appeal the district court's judgment and revised the 2001 Plan to comport with the district court's ruling. Petitioner appealed portions of the 2001 Plan upheld by the district court. Petitioner's appeal was rejected by the United States Court of Appeals for the Sixth Circuit, which adopted Chief Judge Heyburn's opinion *in toto*. The student assignment plan at issue before this Court, therefore, is the 2001 Plan as modified by Chief Judge Heyburn's ruling. As explained below, GLI and Mayor Abramson support the

portions of the 2001 Plan upheld in the courts below and request that this Court affirm the Sixth Circuit's decision.

ARGUMENT

I. JCPS HAS A COMPELLING INTEREST IN MAINTAINING RACIALLY INTEGRATED SCHOOLS BECAUSE, AMONG OTHER THINGS, THEY PREPARE STUDENTS FOR DIVERSITY IN THE WORKPLACE AND THEREBY CONTRIBUTE TO THE COMMUNITY'S ECONOMIC DEVELOPMENT

GLI and Mayor Abramson support JCPS's student assignment plan as modified by the courts below because it effectively achieves a racially balanced public school system, which in turn benefits the local community by preparing students for a racially diverse workforce.

This Court has recognized that public educational institutions have a compelling interest in preparing students for an increasingly diverse workplace. *See Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003) (noting that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints" and citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982) and *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), as evidence that the Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship"). By referring to these landmark K-12 education decisions, this Court tacitly recognized that a compelling interest in racial diversity could be advanced for elementary and secondary schools as well as institutions of higher learning. *See* Lisa J. Holmes, *After Grutter: Ensuring Diversity in K-12 Schools*, 52 UCLA L. Rev. 563, 591-92 (2004).

JCPS students receive significant benefits from the school district's racially integrated classes. Many experts agree that racially diverse environments in K-12 schools will contribute to students' "enhanced learning, higher educational and occupational aspirations, and social interaction among members of different racial and ethnic backgrounds . . . ." (Def. Ex. 72 at 115-16) (citing research). Indeed, as Dr. Gary Orfield, Professor of Education and Social Policy at Harvard University and Co-Director of the Harvard Civil Rights Project, testified, desegregated schools have "strongly positive effects for [both minority and white] students . . . in terms of what kind of life you have after school, whether you go to college, whether you finish college, what kind of employment you have [and] how you live and work in communities." J.A. 140.

The record reflects research supporting these experts' views:

- More than 80 percent of both white and black high school juniors in Jefferson County surveyed answered that their racially diverse public school experience "had helped them learn how to work and relate to students from other groups." J.A. 146.

- Ninety-seven percent of the 1997 JCPS graduates surveyed by the University of Kentucky agreed that "it is important for [their] long-term success in life that schools have students from different races and backgrounds in the same school." J.A. 134.

- Eighty-nine percent of the 1997 JCPS graduates surveyed by the University of Kentucky felt that JCPS prepared them to work in the workplace with racially different people. J.A. 135.

These data confirm that students are receiving significant benefits from JCPS's racial diversity. For example, they are better prepared for their future racially diverse work environment. As Patricia Todd, JCPS's Executive Director for Student Assignment, testified, "We believe that in order to prepare our kids for work in our community or any other community, they are largely going to be encountering diverse work places, and so we feel like there is a social benefit as well as an academic benefit." J.A. 122. Furthermore, JCPS's integrated school system benefits the whole business community by educating students who will eventually become part of the highly diverse work force upon which the City's economic growth depends.

Given today's world economy, a company's ability to address racial and cultural diversity issues is increasingly important. Success in business often depends on how well a company can deal with diverse customers and business partners. *See* Deborah Ramirez & Jana Rumminger, *Symposium – Civil Right in the New Decade: Race, Culture, and the New Diversity in the New Millennium*, 31 Cumb. L. Rev. 481, 520 (2000-2001). Human resource management is critical in business administration, and a company's mishandling of issues of race and alleged discrimination in the workplace can result in significant reputation damage, low employee morale, and exposure to legal liability. *See* Vivek Wadhwa, *The True Cost of Discrimination*, Bus. Wk. Online, June 6, 2006. Given these concerns, companies are actively searching for ways to adapt to a racially and culturally diverse world, *see* Derald Wing Sue, *A Model for Cultural Diversity Training*, 70 Journal of Counseling & Development Sept.-Oct. 1991, at 99 (presenting a model for systematically incorporating cultural diversity in organizations), and the public school system can be an important partner in this regard.

This is particularly true given that "[t]he ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999). For this reason, schools can be a crucial venue in which to inculcate values of racial diversity and tolerance "early on, [when] students are still learning how to interact appropriately with their peers." *Id.* at 651. By the time students enter the workforce, it may be too late to eliminate prejudicial attitudes and unfair racial stereotypes. As Dr. Orfield testified, racially integrated schools can make students "very confident about their ability to live and work and participate in a society that's multiracial," and such confidence can only contribute to professional success. J.A. 144.

This point is well understood by Jefferson County's business leaders. For example, Sam Corbett, a businessman and a former school board member, testified that JCPS's racially diverse environment brings substantial benefit to the business community. J.A. 129-30. Mr. Corbett spoke to "the importance of racial integration in education as it prepares students for working in a diverse workplace." Pet. App. C-9.

Speaking as a "consumer of the product" of public education whose more than 200 employees also "consume the product either with their children or their grandchildren," Mr. Corbett testified from personal experience about the importance of elementary and secondary education in preparing students for a racially diverse workplace:

> [I]n my own business . . . today a third of our work force is white, a third of our work force is African-American, a third of our work force is Hispanic. Five years ago we had a significant Vietnamese population. I know

> we all talk this and it sounds good, but from a practical standpoint if we want our children to live and work in a world where they are going to be dealing with people who don't necessarily look and/or sound like they do, then what better way to prepare them for that than to be in that setting in the school building because they are going to get it in the workplace, and my company is a perfect example of how that's going to happen.

J.A. 129.

As Chief Judge Heyburn found, the lessons of racial tolerance, friendships with those of other races and elimination of racial stereotypes are "values [that] transcend [students'] experiences in public school and carry over into their relationships in college and the workplace." Pet. App. C-46. "As a result," the district court found, "these students are better prepared for jobs in a diverse workplace and exhibit greater social and intellectual maturity with their peers in the classroom and at their job." *Id.*

Petitioner baldly asserts that "for the most part, Louisville, Kentucky and/or the United States of America are indeed color-blind communities." Pet. 21. Indeed, *amici* wish that were true, but as this Court correctly observed only three years ago, racial discrimination still exists in our society, *Grutter*, 539 U.S. at 333, and greater Louisville is no exception. Our community continues to strive to achieve this worthy goal of a color-blind society, and the local school board has determined that racially integrated schools remain an important means to this end. Therefore, *amici* respectfully submit that the Board properly determined that JCPS's student assignment plan serves compelling purposes, including teaching students to thrive in the racially diverse

workplace, thereby contributing to the economic development of the entire community.

II. THE SCHOOL BOARD SHOULD BE ALLOWED TO FORMULATE A STUDENT ASSIGNMENT PLAN SUITABLE TO THE LOCAL COMMUNITY TO PROMOTE RACIAL INTEGRATION WITHOUT INTERFERENCE FROM A FEDERAL COURT

The Court, as a matter of both federalism and institutional competence, should accord deference to the decision made – based upon extensive community and educator input and involvement – by the locally elected and accountable school board in this case.

This Court has recognized that public school boards should be given discretion in fashioning secondary education policies that in other contexts might be deemed constitutionally suspect. To be sure, "school children do not shed their constitutional rights when they enter the schoolhouse." *Board of Educ. Of Ind. School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 829 (2002) ("*Pottawatomie County*"). However, for example, "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia School Dist. 475 v. Acton*, 515 U.S. 646, 656 (1995). "In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing." *Pottawatomie County*, 536 U.S. at 830.

In addition to the Fourth Amendment cases, several decisions of this Court "recognize[] that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other

settings,'" *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)), but "must be 'applied in light of the special characteristics of the school environment,'" *Hazelwood*, 484 U.S. at 266 (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)). To that end, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' . . . even though the government could not censor similar speech outside the school." *Hazelwood*, 484 U.S. at 266 (quoting *Bethel School Dist. No. 403*, 478 U.S. at 685). Thus, the Court has concluded that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Bethel School Dist. No. 403*, 478 U.S. at 683.

This Court has deferred to school board decisions in these other constitutional contexts for at least two principal reasons. First, the Court recognizes, as a matter of federalism, that locally elected school boards under the authority of state governments are vested constitutionally with the responsibility to make policy decisions related to the education of secondary students in public schools.[4] *See Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) ("When district courts seize complete control over the schools, they strip state and local governments of one of their most important governmental responsibilities, and thus deny their existence

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[4] For example, in Kentucky, a school board is empowered by state law to "do all things necessary to accomplish the purposes for which it is created." Ky. Rev. Stat. Ann. § 160.160(1). The members of the school board are locally elected. Id. § 160.210(5). The election is by secret vote in a non-partisan manner. Id. §§ 160.220, 160.230, 160.250 (1999). The board members meet regularly at least once a month. Id. § 160.270. The board members receive no salaries. Id. § 160.280.

as independent governmental entities."); *cf. Owasso Indep. School Dist. v. Falvo*, 534 U.S. 426, 435 (2002) (declining to adopt an interpretation of the Family Educational Rights and Privacy Act that would have allowed "federal power" to "exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country").

Accordingly, the concept of local control over the operation of public schools is deeply rooted in our national tradition. *See Milliken v. Bradley*, 418 U.S. 717, 742 (1974) "(stating that [l]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence") (quotation marks and citation omitted); s*ee also Board of Educ. of Okl. City Pub. Sch., Indep. Sch. Dist. No. 89 v. Dowell*, 498 U.S. 237, 248 (1991) (*"Dowell"*). Because of these benefits, local autonomy is "essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken*, 418 U.S. at 741-42. As Justice Kennedy has explained, local control of secondary educational policy is part of the essence of federalism:

> Preserving our federal system is a legitimate end in itself. It is, too, the means to other ends. It ensures that essential choices can be made by a government more proximate to the people than the vast apparatus of federal power.

Davis, 526 U.S. at 684-85 (1999) (Kennedy, J., dissenting).[5]

Second, the Court has deferred to public school boards with respect to many aspects of elementary and secondary education policy because, practically speaking, the local school board is better situated than a federal court to make such decisions. Simply put, "[f]ederal courts do not possess the capabilities of state and local governments in addressing difficult education problems." *Missouri v. Jenkins*, 515 U.S. at 132. "State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricula, and funding choices necessary to bring a school district into compliance with the Constitution." *Id.*

In part, local school boards are better equipped to make policy decisions because they are directly accountable to the people. As the Court has emphasized, "[w]hen the school district and all state entities participate in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in ordinary course." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).

In this case, Board members were elected to office, as are the majority of school board members nationwide. *Wood v.*

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[5] *See also Hazelwood*, 484 U.S. at 273 (stating that "education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (recognizing courts' "reluctance to trench on the prerogatives of state and local educational institutions"); *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (stating that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint" and that "[b]y and large, public education in our Nation is committed to the control of state and local authorities").

Strickland, 420 U.S. 308, 320 n. 11 (1975). Thus, the Board can be held accountable to the citizenry in the political process. *See e.g., San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 413 F. Supp. 2d 1051, 1069 (N.D. Cal. 2005). To maintain a school board's political accountability, courts have, in recent years, often exercised self-restraint against interfering with a board's decision making process to promote desegregation. *See, e.g., Dowell*, 498 U.S. at 248 (stating that courts' intervention in local educational affairs to secure desegregation is temporary); *Hampton v. Jefferson County Bd. Of Educ.*, 102 F. Supp. 2d 358, 376 (W.D. Ky. 2000) (stating that "[i]t would be wrong for a federal court to impose [the federal court's preference between integrated school and neighborhood schools] upon an elected local school board as a matter of educational policy").

Furthermore, school boards generally have greater access to teachers, administrators and others with expertise about student assignment issues. *See generally Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley v. Rowley*, 458 U.S. 176, 208 (1982) (noting "courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy") (citation and quotation marks omitted). Judicial restraint by a court is particularly appropriate in the context of elementary and secondary education given the sensitive and complicated task of guiding children through their formative years. *See Johnston-Loehner v. O'Brien*, 837 F. Supp. 388, 392 (M.D. Fla.), *aff'd*, 7 F. 3d 241 (11th Cir. 1993).

Thus, numerous cases recognize situations in which a school board's discretion should be "limited only by the requirement that any actions taken be in good faith, upon a sound, just and reasonable basis, [with] due regard for the public interest and consequences of its actions upon the children affected." *Swift v. Breckinridge County Bd. of*

Educ., 878 S.W.2d 810, 811 (Ky. Ct. App. 1994) (quotation marks and citation omitted). The adoption of a race-conscious student assignment plan to promote school desegregation should be afforded such deference by courts. *See generally Charlotte-Mecklenburg Bd. of Educ. v. Swann*, 402 U.S. 1, 16 (1971) (recognizing the school authority's broad power to formulate and implement educational policy to racially integrate public schools); *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 61 (6th Cir. 1966) (recognizing that the local school authority may take steps, based on its sound judgment, to relieve racial imbalance in the school); *Clark v. Board of Educ. of Little Rock*, 705 F.2d 265, 271 (8th Cir. 1983) (stating that a school board may take into account the possibility of white students' flight and consequent resegregation to promote integration).

There is no evidence to suggest that the Board exceeded its authority, acted in bad faith, or violated any law or ordinance when it adopted the latest revision to the student assignment plan in 2001. Rather, after carefully considering its options and taking account of public opinion, the Board acted within its constitutionally sanctioned authority to implement an assignment plan that it believed would alleviate the vestiges of racial segregation in the best interests of the entire community. *See* Stipulation of Facts ¶ 134, reprinted at J.A. 58.

Given this reality, there is no justification for the Court to intervene in JCPS's decision-making process. When the district court dissolved the desegregation decree in 2000, that court found no evidence of racial discrimination within the school system, but it recognized the legitimacy of the Board's continuing good faith efforts to maintain racially integrated schools. *See Hampton*, 102 F. Supp. 2d at 365. The Board's decision to maintain the race-conscious student assignment plan was based on substantial community and

educator input. These circumstances should counsel in favor of deference to the Board's expertise in the information gathering, deliberation, and decision making process, and therefore, this Court should not disturb the Board's decision to maintain modified race-conscious student assignment plan.

Indeed, "[h]istory shows that, no matter what a school official chooses to do, someone will be unhappy," *Davis*, 526 U.S. at 682 (Kennedy, J., dissenting), but that is no reason for a federal court to interfere with a student assignment plan arrived at by a locally accountable school board after diligent study, solicitation of views from the community and the informed advice of school administrators and teachers. It is "essential" to "[r]eturn[] schools to the control of local authorities," *Freeman*, 503 U.S. at 490, and upholding this assignment plan is a step in that direction. As this Court has stated, "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood*, 484 U.S. at 273.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

October 10, 2006

Respectfully submitted,

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PARENTS INVOLVED IN COMMUNITY SCHOOLS,
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v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
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CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

I. Whether the Sixth and Ninth Circuits correctly applied settled law, including the Court's decision in Grutter v. Bollinger, 539 U.S. 306 (2003), in determining that: (a) the Jefferson County, Kentucky and Seattle, Washington K-12 school systems have a compelling interest in maintaining voluntary, race-conscious student assignment plans, and (b) the Jefferson County, Kentucky and Seattle, Washington plans are narrowly tailored to achieve their compelling interest in producing the significant educational benefits of integration and protecting students from the harms of racial isolation and segregation?

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae The Commonwealth of Massachusetts submits this brief in support of respondents. Petitioners' challenges to Jefferson County, Kentucky and Seattle, Washington's voluntary, race conscious desegregation plans threaten state and local authority to implement voluntary measures to integrate public elementary and secondary schools and fail to acknowledge the deference that courts must accord the pedagogic expertise of state and local educational officials. A similar challenge to a voluntary, race conscious integration program was brought in Massachusetts in the case of Comfort v. Lynn School Committee, 418 F.3d 1 (1st Cir. 2005), cert. denied, 126 S.Ct. 798 (2005).[1]

Massachusetts has a strong interest in retaining the ability to implement policies and programs designed to achieve the compelling goal of integration and reducing racial isolation in K-12 public schools, and in according appropriate discretion to the Commonwealth and its localities to determine when those plans are educationally necessary. Massachusetts state law, Mass. G.L. c. 71, §§ 37C and 37D, and c. 15, § 1I, encourages public school systems to devise plans to integrate their schools, eliminate segregation, and reduce racial isolation voluntarily to achieve the significant benefits of an integrated education and to protect students from the harms of racial isolation.

Massachusetts recognizes the connection between safe schools and an integrated learning environment. Massachusetts, through its Attorney General, the chief law enforcement officer of the Commonwealth, has launched a *Safe Schools Initiative*. It is a new strategy that brings together experts in education, law

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[1] Massachusetts, through its Attorney General, intervened in Comfort and defended the state defendants in the litigation. Comfort v. Lynn School Committee, 283 F.Supp.2d 328, 330, 336-37, 336 n.10 (D. Mass. 2003); Comfort, 418 F.3d at 4.

enforcement, health, civil rights, victim assistance, and prevention to provide schools statewide with practical help in making them safe from harassment, bullying, and hate crimes. The *Initiative* includes a pilot project that develops and field tests new tools, practical policies, training programs, and strategies to help schools promote safety and cultivate climates conducive to academic learning. Through its *Initiative*, Massachusetts has seen firsthand how racial, ethnic, and other forms of student-on-student harassment directly affect learning. Consequently, Massachusetts recognizes the importance that educators have available all effective tools, including race conscious integration programs, to promote racial harmony and ensure safe schools.

SUMMARY OF ARGUMENT

The Sixth and Ninth Circuits correctly relied on Grutter v. Bollinger, 539 U.S. 306 (2003), in holding that the Jefferson County, Kentucky and Seattle, Washington school districts have compelling educational interests in using race conscious means to integrate their schools. The Jefferson County and Seattle school districts fulfill their core educational mission by providing a racially integrated education. Racial integration in K-12 schools not only promotes many of the same educational interests as racial diversity in higher education, as this Court recognized in Grutter, it advances distinct and even more important interests. Through racially integrated schools, educators provide students vital educational, citizenship, and race relations benefits.

Examining the case record in Comfort v. Lynn School Committee, and the history of the Lynn, Massachusetts school system and its voluntary integration plan, provides powerful support for the compelling interest and narrow tailoring determinations of the Sixth and Ninth Circuits, while presenting

additional compelling interests not raised in the Jefferson County and Seattle cases. Because of segregated housing patterns and other local conditions, some K-12 school districts are unable to rely on race neutral means to integrate their schools. Race conscious means are at times necessary for school districts to succeed in providing an integrated education and in preventing racial isolation.

A school district's use of a broad percentage range in a race conscious integration plan does not constitute a quota or unconstitutional racial balancing where the district satisfies Grutter's constitutional requirement that it take into account students' race only as necessary to achieve the educational benefits its plan is designed to produce.

This Court's narrow tailoring requirements for competitive, race-preferential higher education admissions programs do not prohibit a K-12 school system from using race as a decisive factor in school assignment decisions. When effectively implemented, race conscious integration plans do not reinforce stereotypes or unnecessarily draw attention to racial differences.

ARGUMENT

I. The Voluntary Efforts of the Jefferson County, Kentucky and Seattle, Washington School Systems to Integrate Their Schools through Race Conscious Means Meet Fourteenth Amendment Requirements Where their Use of Race Is Narrowly Tailored to Further Compelling Governmental Interests.

The race conscious student assignment plans in the Jefferson County, Kentucky and Seattle, Washington school systems satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment where

their use of race is "narrowly tailored to further compelling governmental interests." Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting City of Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989)). "Not every decision influenced by race is equally objectionable." Grutter, 539 U.S. at 327. A fact-intensive analysis of the specific policy and context in which the government action operates is required to make this legal determination. Id. at 326-27.

Three circuit courts since Grutter v. Bollinger, the First, Sixth, and Ninth Circuits, engaged in the required fact-intensive analysis of voluntary, race-conscious integration policies involving similar K-12 contexts and interests and have decided the constitutional questions consistently. Relying on Grutter v. Bollinger, these circuits have recognized the compelling interest in integration and have identified similar considerations that must be taken into account in a narrow tailoring inquiry in the K-12 context.

The Sixth Circuit affirmed the constitutionality of Jefferson County, Kentucky's race-conscious K-12 school assignment policy for educationally comparable schools in McFarland v. Jefferson County Public Schools, 330 F.Supp.2d 834 (W.D. Ky. 2004), Pet. App. C1-C79, aff'd, 416 F.3d 513 (6th Cir. 2005) (*per curiam*), Pet. App. B1-B3, reh'g and reh'g *en banc* denied (Oct. 21, 2005), cert. granted, Meredith v. Jefferson County Public Schools, 126 S.Ct. 2351 (No. 05-915) (2006). In Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1168 (9th Cir. 2005), cert. granted, 126 S.Ct. 2351 (No. 05-908) (2006), Pet. App. 1a-128a, the *en banc* Ninth Circuit upheld the constitutionality of Seattle, Washington's voluntary integration plan for high school assignments. Similarly, the *en banc* First Circuit in Comfort v. Lynn School Committee, 418 F.3d 1 (1st Cir. 2005), cert. denied, 126 S.Ct. 798 (2005), relied on Grutter in holding that the Lynn, Massachusetts school

district satisfies constitutional requirements under strict scrutiny when implementing its race conscious school transfer plan that racially integrates its elementary and secondary schools.

II. The Sixth and Ninth Circuit Correctly Applied Grutter v. Bollinger in Concluding that the Jefferson County, Kentucky and Seattle, Washington School Systems Have Compelling Educational Interests in Integration.

A. The Grutter Court Recognized Racial Diversity in Public Education as a Compelling Interest.

The Sixth and Ninth Circuits correctly relied on Grutter v. Bollinger in holding that the Jefferson County and Seattle school districts have compelling educational interests in using race conscious means to integrate their schools.[2] Parents Involved, Pet. App. 20a-30a, 33a; Meredith, Pet. App. B3, C36-C51. The Grutter Court not only recognized viewpoint diversity or "true educational diversity" as a compelling interest, it also identified racial diversity in public education as a compelling interest. Although the Grutter Court relied in substantial part on the First Amendment's right to "academic freedom" and the "educational autonomy" of institutions of higher learning, it also rooted its decision in government's constitutional interest in promoting racial diversity in

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[2] The First Circuit in Comfort, 418 F.3d at 13-16, also properly relied on Grutter in concluding that Lynn's educators have compelling educational, race relations, and student safety interests in racially integrating their elementary and secondary schools. The Second Circuit, in Brewer v. West Irondequoit Central School District, 212 F.3d 738, 749, 752 (2nd Cir. 2000), which preceded Grutter, similarly concluded that educators have a compelling educational interest in reducing racial isolation in K-12 schools through race-conscious means.

public education. 539 U.S. at 328-33. Grutter relied heavily on landmark decisions involving elementary and secondary school education, noting that this Court has long recognized, since Brown v. Board of Education, 347 U.S. 483, 493 (1954), the government's powerful interest in promoting racial diversity in the K-12 setting. Grutter, 539 U.S. at 331, citing Plyler v. Doe, 457 U.S. 202, 221 (1982).

As the First Circuit correctly concluded, Grutter is not "limited to the benefits that flow from *viewpoint* diversity in the higher education context" but "extend[s] to the benefits that flow from racial diversity in the K-12 context." Comfort, 418 F.3d at 15 (emphasis in original). The differences in compelling interests between higher education in Grutter and K-12 schools "are the logical result of context." Id. at 16.

The interests the government advances in the Jefferson County and Seattle educational contexts "bear a strong familial resemblance" to many of the educational interests the Grutter Court found compelling for higher education. Comfort, 418 F.3d at 15-16. For example, the Court in Grutter cited findings that "the Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" 539 U.S. at 330. The Grutter Court further relied on the "numerous studies show[ing] that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Id. (citations and internal quotations omitted). Similarly, the First, Sixth, and Ninth Circuits concluded that students in Lynn, Massachusetts, Jefferson County, Kentucky, and Seattle, Washington receive these benefits when educated in integrated K-12 schools. Comfort, 418 F.3d at 15-16, 16 n.8; Parents Involved, Pet. App. 20a-27a, Meredith, Pet. App. B3, C37, C45-C47.

B. Achieving The Benefits of Racially Integrated Schools Is Critical to Jefferson County and Seattle Schools Realizing their Core Educational Mission.

The Grutter Court concluded that attaining a racially diverse student body is essential for the University of Michigan Law School to achieve its proper institutional mission, 539 U.S. at 328; similarly, racial integration benefits are central to the Jefferson County and Seattle school systems achieving their proper educational mission. Parents Involved, Pet. App. 20a-30a, 33a, Meredith, Pet. App. B3, C37, C45-C51; see also Comfort, 418 F.3d at 14-16, 19, 19 n.11.

The Jefferson County and Seattle school cases concern public education, "perhaps the most important function of state and local government." Brown v. Board of Education, 347 U.S. at 493. As the Court recognized in Grutter, 539 U.S. at 334, education is "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society. . . . [E]ducation is the very foundation of good citizenship" (citation omitted). Jefferson County and Seattle schools fulfill their core educational mission by promoting racially integrated education. Learning in integrated classrooms and schools helps children disarm racial stereotypes, develop positive racial attitudes, and build cross-race relationships. It improves learning outcomes and helps prepare children for citizenship. Integration ensures that students develop the skills to learn and play well with children of all races, and to live and work successfully in an increasingly diverse community, state, country and world. Comfort, 418 F.3d at 14, 16; Comfort, 283 F.Supp.2d at 333-34, 375-76, 386.

> [T]he purpose of the public school system is as much to teach citizenship to its

> students as it is to teach academic subjects. Indeed, . . . teaching citizenship -- the proverbial effort to ensure that students "work and play well with others"-- is one of a school's highest educational priorities. And this is especially the case in a multiracial, urban community like Lynn.

Comfort, 283 F.Supp.2d at 375-76 (D. Mass. 2003).[3]

C. The Benefits That Flow from Racial Diversity Are Even More Compelling in the K-12 Educational Context than in the Higher Education Context.

As the Sixth and Ninth Circuits correctly concluded, many benefits that flow from learning in racially integrated K-12 schools are distinct from those in higher education and are even more compelling. Meredith, Pet. App. B3, C47-C50; Parents Involved, Pet. App. 20a-30a. Similarly, expert testimony and other significant record evidence in Comfort established that the benefits of racial diversity in education are more compelling at younger ages. Comfort, 418 F.3d at 15-16. "It is more difficult to teach racial tolerance to college-aged students; the time to do it is when the students are still young, before they are locked into racialized thinking." Comfort, 418 F.3d at 16, citing Comfort, 283 F.Supp 2d at 356. Through an extensive record, Lynn established the positive impact racial integration has had on student safety and attendance in Lynn schools, important educational interests distinctly different from

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[3] See also Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (instilling civic values "is truly the 'work of the schools'") (citation omitted); Ambach v. Norwich, 441 U.S. 68, 76-77 (1977) (public schools provide "the values on which our society rests," including the "fundamental values necessary to the maintenance of a democratic political system").

those that institutions of higher education advance for promoting racial diversity. Id. at 14, 16. Lynn's integration plan generated "higher attendance rates, declining suspension rates, a safer environment, and improved standardized test scores -- since the Plan's inception." Id. at 14. It also eliminated racial isolation, which produces psychological burdens on minority students that "can lead to poor attendance and academic woes. . . ." Id. at 14.

D. The Record in Comfort v. Lynn School Committee Powerfully Supports the Sixth and Ninth Circuits' Conclusion that the Jefferson County and Seattle School Systems Have a Compelling Interest in Voluntarily Integrating their Schools.

Examining the history of the Lynn, Massachusetts school system and its voluntary integration plan provides powerful support for the compelling interest determinations of the Sixth and Ninth Circuits. The Comfort record demonstrates the important educational, citizenship, and race relations benefits that accrue from implementing race conscious plans that meet constitutional requirements, while presenting additional compelling interests not raised in the Jefferson County and Seattle cases.

1. Legal background of the Comfort litigation.

Following an eleven-day bench trial, the District Court of Massachusetts concluded that the Lynn and state defendants provided overwhelming evidentiary and social science support establishing Lynn's compelling educational, school safety, and race relations needs for its school integration plan. The District Court also held

that the Plan was narrowly tailored to achieve Lynn's compelling goals. Comfort v. Lynn School Committee, 283 F.Supp.2d 328, 375-91 (D. Mass. 2003).

In June 2005, the First Circuit issued an *en banc* opinion, holding that Lynn's Plan met constitutional requirements.[4] Comfort v. Lynn School Committee, 418 F.3d 1, 14-23 (1st Cir. 2005).[5] The *en banc* First Circuit Court, relying on Grutter, unanimously held that Lynn had a compelling interest in obtaining the substantial educational benefits that flow from its school integration plan. Id. at 14-16. Except for one ground, the five members of the *en banc* court also unanimously agreed that Lynn's integration plan was narrowly tailored.[6] Id. at 16-23, 27-32.

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[4] A three-judge panel of the First Circuit Court of Appeals initially concluded that although "defendants have made a persuasive case that a public school system has a compelling interest in obtaining the educational benefits that flow from a racially diverse student body," Slip Op. at 34, Lynn's Plan was not narrowly tailored. Id. at 40, 47-48; see Comfort, 418 F.3d at 10. The First Circuit withdrew the panel decision. 2004 WL 2348405 (1st Cir. Oct. 20, 2004), withdrawn (Nov. 24, 2004).

[5] On December 5, 2005, this Court rejected plaintiffs' request to review the constitutionality of Lynn's Plan. Comfort v. Lynn School Committee, 126 S.Ct. 798 (U.S. Dec. 5, 2005) (No. 05-348). On June 9, 2006, the Lynn plaintiffs asked the Court to reopen the case after granting requests to review the lower court decisions in the Jefferson County, Kentucky and Seattle, Washington school cases. On July 31, 2006, the Court denied plaintiffs' request to reconsider its refusal to hear the Lynn case.

[6] The two dissenting judges stated that Lynn erred by using race as a decisive factor in some school transfer decisions, rather than as "a strong but non-determinative 'plus' factor for integrative transfers." Comfort, 418 F.3d at 31. The two dissenting judges were members of the original three-judge panel. The *en banc* court, however, relying on Grutter, concluded that individualized consideration of each student is unnecessary in this educational context, taking into account the compelling interests Lynn advanced. Id. at 17-19.

2. The City of Lynn, its school system and its students

Lynn is an urban school system in Massachusetts with over 15,000 students attending its 25 schools. It has 18 elementary schools, four middle schools, and three high schools. It is a racially and ethnically diverse city of approximately 89,000 people, located on the coast of Massachusetts nine miles north of Boston. According to the 2000 Census,[7] the City's overall racial composition is 63% white and 37% non-white. Hispanics comprise 18%, African Americans 12%, and Asian Americans 8% of Lynn's population. Non-whites, however, comprise a majority of the students in its public schools. At the time of the Comfort trial in June 2002, 42% of Lynn's students were white and 58% nonwhite--29% Hispanic, 15% African-American, and 14% Asian-American. The racial composition of Lynn's schools reflects population trends similar to many urban communities, with minority birth rates higher, family sizes larger, and ages younger than whites living in the community. Comfort, 418 F.3d at 6-7; Comfort, 283 F.Supp.2d at 345-46, 351, 358.

3. Lynn's voluntary, race conscious integration plan

In 1987, Lynn adopted a voluntary, race conscious school transfer plan to integrate its schools. Lynn's Plan gives every parent of a regular education student the ability to send his or her child, regardless of race, to that child's neighborhood school. Approximately two-thirds of students' parents make that choice. Lynn considers and uses a student's race as a decisive factor only when

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[7] United States Census Bureau, 2001, Census 2000 Redistricting Data (P.L. 94-171): Summary files for states, Washington, D.C.: Government Printing Office

approving parents' voluntary requests for school transfers, and only then in certain circumstances. Lynn applies the same school assignment rules to all its students, whether white or nonwhite. Lynn's race-conscious plan regulates only requests for non-competitive, elective school transfers to non-neighborhood schools that have a segregative effect on Lynn's schools and students, i.e., when the transfer would exacerbate "racial isolation" or "racial imbalance," as defined by the Plan, in a particular school.[8] Parents can and do successfully appeal transfer denials. All Lynn's schools provide comparable educational quality, resources, and curriculum and are equally successful in providing an education to Lynn's students. Comfort, 418 F.3d at 7-8, 20; Comfort, 283 F.Supp.2d at 347-49, 352, 377-78.

4. The Comfort record conclusively established that children receive fundamentally important educational, citizenship, and race relations benefits from learning in racially integrated schools.

In unanimously concluding that Lynn had compelling interests in voluntarily integrating its schools, the *en banc* First Circuit relied on the trial testimony of Lynn's educators and four experts who established through persuasive education and social science evidence the importance of Lynn's race-conscious transfer policy

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[8] The Lynn Plan defines a "racially isolated" elementary school, for example, as one where the percentage of minority students in the school falls more than 15% below the school district's overall minority composition and a "racially imbalanced" elementary school as one where the percentage of minority students is more than 15% above the school district's overall minority composition in that school year. Comfort, 418 F.3d at 7-8; Comfort, 283 F.Supp.2d at 348.

in achieving the district's educational objectives.[9] Comfort, 418 F.3d at 14-16, 19; Comfort, 283 F.Supp.2d at 339-41, 353-58, 376-77, 379-81. Lynn's experts were nationally-renowned in their respective fields.[10] Comfort, 283 F.Supp.2d at 340-41; see also Comfort, 418 F.3d at 16 n.8. Lynn's experts applied the scientific rigor and accepted methodologies employed in authoritative social science research and study in systematically studying Lynn's local conditions and the extensive data about Lynn's schools, its students, and the history of school conditions before and since the Plan's implementation. Comfort, 418 F.3d at 6, 16; Comfort, 283 F.Supp.2d at 339-41, 344-58, 376-77, 379-81, 400.[11] The experts also

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[9] As the parties stipulated in Comfort:

> The government interests identified by Lynn in its Plan include fostering integrated public schools and what Lynn believes are [their] positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity; ensuring equal educational and life opportunities and increasing the quality of education for all students.

Comfort, 418 F.3d at 14.

[10] Lynn's experts were Dr. John Dovidio, a social psychologist, with a specialty in intergroup and interracial relations; Dr. Melanie Killen, a developmental and education psychologist with expertise "on how racial segregation and racial diversity impact the social and moral development of children and adolescents;" Dr. Gary Orfield, a political scientist and "one of the leading national experts in the field of education and equal educational opportunity;" and Nancy McArdle, an expert on demographic and housing trends. Comfort, 283 F.Supp.2d at 340-41, 353-58.

[11] The evidence included the results of a survey of the racial attitudes and interracial experiences of Lynn's eleventh graders. Comfort, 283 F.Supp.2d at 354-55. The survey instrument was designed by national experts. Id. at 354 n.50

consistently cited authoritative studies and publications in peer-reviewed journals in their fields of expertise to support their expert opinions. Comfort, 283 F.Supp.2d at 354-57, 360, 379-81, 383.[12]

The Comfort record established that when Lynn first adopted its Plan in 1987, its school system was in educational crisis, directly attributable to its segregated and racially-identifiable schools and racially-isolated students. In 1987 when the school district was 26% nonwhite, most of its schools were overwhelmingly white, with many over 90% white. Nonwhite students were concentrated in four of its 18 elementary schools and one middle school. Lynn's schools were also beset with (a) racial strife and interracial violence between its white and nonwhite students, (b) poor academic performance, (c) low attendance rates, (d) high rates of discipline, and (e) low community confidence in the school system. Lynn also experienced significant white flight, with white enrollment declining by an average of 5% each year for the ten years preceding the Plan. Compared to Lynn's predominantly white schools, schools with high minority student concentrations had significantly inferior educational conditions. As expert testimony established, racial isolation, segregation, and racially identifiable schools (with racial compositions significantly different from the overall racial composition of a school district) were the essential factors in generating Lynn's myriad education, school safety, and race relations problems.[13] To counteract these dire conditions and provide the

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[12] See Wessmann v. Gittens, 160 F.3d 790, 805 (1st Cir. 1998) (evidence expert relies on must be "of the quality necessary to satisfy the methodological rigor required by [the relevant] discipline.")

[13] When adopting its Plan, Lynn identified eliminating racial isolation as a primary goal to reduce the conflicts and violence between its white and nonwhite students and to enable it to achieve all the hoped-for educational improvements. Ex. A-J, Lynn's Plans; Stipulations, ¶ 124.

benefits of an integrated education, Lynn adopted its voluntary, race conscious integration plan. Comfort, 418 F.3d at 6, 14; Comfort, 283 F.Supp.2d at 335, 344-49.

"All parties agree that Lynn's public schools have improved markedly since the Plan's inception . . . ." Comfort, 418 F.3d at 9. Today, by all measures, Lynn's school system is thriving. In a district with a high percentage of minority and low-income students,[14] Lynn has achieved significant educational and academic achievement gains throughout its school system, most particularly for students attending schools in Lynn's urban center. It has improved students' motivation to learn and learning outcomes. Schools have uniformly high attendance rates and declining suspension rates, with extraordinarily low levels of student conflict, crime, and violence. Race relations among students are very positive. Students are much more prepared to succeed in racially diverse colleges and workplaces and live in racially diverse communities. Lynn schools no longer have a problem with white flight. Comfort, 418 F.3d at 9, 14-16; Comfort, 283 F.Supp.2d at 335, 350-53, 375-76, 400.

The testimony of Lynn's educators and their social science experts established that Lynn's integration plan was essential to generating these significant improvements in education, school safety, and race relations. Comfort, 418 F.3d at 6, 15-16; Comfort, 283 F.Supp.2d at 335, 353-54; 375-76.

> [T]he Lynn Plan played an important part in creating a thriving, diverse, and integrated urban school system, successful

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[14] Minorities constituted 58% of the overall student population in the 2001-02 school year, compared with only 26% in the 1987-88 school year; 65% of students' families lived at or near the poverty level in the 2001-2002 school year. Comfort, 418 F.3d at 6-7; Comfort, 283 F.Supp.2d at 346, 351-52.

> on all fronts and by all measures –where race relations are positive and racial and ethnic tensions are absent; where students from diverse backgrounds maintain friendships and are well represented in student government and extracurricular activities; where student attendance rates are uniformly high and test results reflect substantial gains, particularly in schools located in Lynn's urban center; and where there are extraordinary low levels of student conflict, crime, and violence.

Comfort, 283 F.Supp.2d at 335.

5. The Lynn, Massachusetts school district advanced compelling education-related interests in Comfort not proffered in the Jefferson County and Seattle cases.

a. School districts have compelling school safety and intergroup relations interests in voluntarily integrating their racially diverse school districts.

Although not directly raised as a compelling interest in the Jefferson County and Seattle cases, racially diverse school systems have a compelling interest in insuring the safety of students by promoting a positive racial climate and a safe and healthy school environment through race conscious means. Comfort, 418 F.3d at 16; Comfort, 283 F.Supp.2d at 375-76. In Comfort, the Lynn school district identified these governmental interests in its Plan, 418 F.3d at 14, interests inextricably tied to the

mission of K-12 education. Comfort, 283 F.Supp.2d at 375-76; Comfort, 418 F.3d at 16; see also Doe v. Superintendent of Schools of Worcester, 421 Mass. 117, 131, 653 N.E.2d 1088, 1096 (1995) ("[A]n adequate public education includes the duty to provide a safe and secure environment in which all children can learn."); see also id. at 143, 653 N.E.2d at 1102-03 (Liacos, C.J., dissenting) ("preserving the safety [and] security . . . of students is a compelling State interest"); Prince v. Massachusetts, 321 U.S. 158, 165 (1944).[15]

Before implementing its race conscious plan, Lynn's racially isolating school conditions bred racial hostilities between its white and nonwhite students. Comfort, 418 F.3d at 6; Comfort, 283 F.Supp.2d at 335, 344-47, 375-76, 379, 384-86. Because of integration, Lynn has been able to provide the safe learning environment necessary for Lynn students to achieve their positive academic gains. Comfort, 418 F.3d at 9, 14,16; Comfort, 283 F.Supp.2d at 335, 355-58, 376, 379-80, 381 n.91. Lynn schools are now safe. Race relations among students are highly positive, with extraordinarily low levels of student conflict, crime, and violence. Comfort, 418 F.3d at 9, 14, 16; Comfort, 283 F.Supp.2d at 335, 353-54, 379-81.[16] Even the plaintiffs "agree[d] that Lynn schools are considerably . . . safer that they were before the Plan was instituted." Comfort, 283 F.Supp.2d at 376.

As the Comfort record established, because of segregated housing patterns and other local conditions,

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[15] Indeed, a "student attending a persistently dangerous public elementary school or secondary school . . . or who becomes a victim of a violent criminal offense . . . while in or on the grounds of a public elementary school or secondary school that the student attends" has the right "to attend a safe public elementary school or secondary school within the [local school district]." No Child Left Behind Act of 2001 § 9532, 20 U.S.C. § 7912 (2002).

[16] Comfort Stipulations, ¶¶ 112-14, 116, 118-20.

many of Lynn's nonwhite and white students would again learn in racially isolated or segregated schools and classrooms at the elementary and middle school level without the Plan. 283 F.Supp.2d at 358, 387-89. As Lynn's experts explained, students begin to form rigid social cliques in about the sixth or seventh grades, and without significant preexisting interracial relationships and experiences, "race can be a dominant factor that governs who joins what clique. Once students have found their cliques, the opportunity to defeat racial stereotypes with cross-racial interaction is lost." Id. at 356. Consequently, without its race conscious school transfer policy, a large number of Lynn's elementary and middle school children would have few interracial experiences or social relationships at younger ages, leading to racial distrust and conflict permeating race relations in the schools. Id. at 335, 344, 355-58, 380-81, 381 n.90-91, 384-86. As Lynn's experts explained, racially-motivated school disruptions and violence would again become prevalent in Lynn schools, with the most significant safety-related effects on the middle and high schools. Id. Without safe schools, academic gains for both whites and minority students would be lost, as racial stereotypes and conflicts reemerge as significant barriers to learning. Id. Moreover, these adverse effects would likely have cumulative, cascading effects over time. Id. at 334, 355-56, 358.

6. Race-conscious assignment plans are necessary for some school districts to achieve their educational mission.

In Comfort, the evidence overwhelmingly established that the transformation of Lynn's schools was directly attributable to the combination of both the race-conscious and the race-neutral components of Lynn's school transfer plan. Comfort, 418 F.3d at 8-9, 15-16;

Comfort, 283 F.Supp.2d at 352-53 n.47; see also 283 F.Supp.2d at 335, 349, 352-58, 376-77, 380-82. Linking their systematic study of the concrete workings of Lynn's Plan to authoritative developmental, social-psychological, and social science research, Lynn's experts described how Lynn's transformation occurred. They explained that social science has established the "intergroup" or "social contact model" as the only social science explanation for the transformed educational and race relations conditions which began with the Plan's implementation. Comfort, 418 F.3d at 14-15; Comfort, 283 F.Supp.2d at 356-58, 376-77, 377 n.86, 380-81. The intergroup contact model has established that "under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes and the disarming of stereotypes." Comfort, 418 F.3d at 14 (quoting Comfort, 283 F.Supp.2d at 356).

Under the "intergroup contact model," desegregation (through Lynn's race-conscious transfer Plan) was a necessary precondition for Lynn students to receive the important benefits that accrue from racially integrated learning. Lynn's educators then transformed their desegregated (racially diverse) schools into racially integrated learning environments by satisfying the intergroup contact model's four conditions, including providing students frequent opportunities for personal contact with a "critical mass" of children from different racial groups to catalyze the benefits from positive intergroup contact. Comfort, 418 F.3d at 14-15; Comfort, 283 F.Supp.2d at 335, 352-53 n.47, 356-58. It is the "critical mass" that is the essential ingredient in generating "the quality and quantity of interactions, the frequency of interactions that allow all these [intergroup contact] processes to operate." Dovidio, Tran., Day 10, p. 82.

The transformation of Lynn's schools developed from extensive interracial contact, and could not have

occurred without the Plan's race-conscious transfer policy that provided the essential ingredient for achieving these benefits, i.e., sufficient levels of racial diversity in all Lynn's schools. Comfort, 418 F.3d at 14-16; Comfort, 283 F.Supp.2d at 352-53 n.47, 355-57, 376-77, 377 n.86, 380-81.

Lynn satisfied the other essential conditions of the intergroup contact theory with supportive (race-neutral) components, such as curriculum innovations, special school themes, integrated student leadership training, and equity training for teachers. These components, combined with race-conscious transfers, transformed Lynn's schools into integrated learning environments. Comfort, 418 F.3d at 8-9, 14-16; Comfort, 283 F.Supp.2d at 335, 349, 352, 380-81.[17]

II. NARROW TAILORING REQUIREMENTS

A. Because of Segregated Housing Patterns and Other Local Conditions, Some K-12 School Districts Require Race Conscious Means to Provide An Integrated Education and Achieve their Core Educational Mission.

Petitioners in the Jefferson County and Seattle school cases and their amici appear to argue that in all circumstances, in all racially diverse school districts, regardless of local conditions, race neutral alternatives will effectively achieve integration and prevent racial isolation and school segregation, and will do it about as well as any race conscious plan. See Grutter, 539 U.S. at

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[17] Since the Plan has been implemented, the integration of Lynn schools has produced increasingly positive effects. The younger the child and the longer the period a child experiences intergroup contact in integrated schools, the more the educational and race relations benefits grow. Comfort, 283 F.Supp.2d at 356, 376; Dovidio Tran., Day 10 p. 87, see also pp. 39-40.

339 (a race neutral alternative must serve the compelling interest "about as well") (quoting City of Richmond v. J.A. Croson, 488 U.S. 469, 509-10 (1989) (plurality opinion). For some school districts, however, voluntary, race conscious integration efforts remain the only option to prevent the pernicious consequences of school segregation and racial isolation and provide the significant benefits students realize from an integrated education. As the District Court in Comfort declared, "it may always be *possible* in theory to craft" race-neutral alternatives, 283 F.Supp.2d at 387 (emphasis in original), but it is meaningless to identify potential alternatives without determining their feasibility for the school district in question. Id. at 387-89.

For example, as established in Comfort, because of Lynn's local conditions, "the city's schools would immediately assume a high level of *de facto* racial segregation" without its race conscious plan. Id. at 358. Consistent with Grutter, 539 U.S. at 339-40, Lynn's administrators made serious, good faith efforts in determining that no feasible alternative existed for their school district to achieve the Plan's compelling goals without the race-conscious means it employs, and without sacrificing its neighborhood-based school system and other important educational and practical objectives. Grutter, 539 U.S. at 340 (in adopting alternatives, law school need not "effectively sacrifice all other educational values" or "a vital component of its educational mission"). The Comfort record established that race neutral alternatives would not effectively achieve integration and prevent racial isolation and school segregation in Lynn. Lynn seriously considered, and reasonably rejected, a number of race-neutral alternatives, including: (1) a strict neighborhood-based assignment plan without transfers; (2) a freedom of choice assignment plan; (3) a lottery-based assignment system; (4) a district assignment plan with magnets; (5) a socioeconomic-based assignment system; (6) a controlled choice plan (which would require

involuntary transfers and forced busing); and (7) a redrawing of school attendance zones. As the District Court and First Circuit determined, none of these alternatives is feasible for Lynn because of the segregative housing patterns in Lynn, the wide geographic separation between the predominantly white and minority sections of Lynn, and the persistent pattern of segregative school transfer requests by Lynn parents. Comfort, 418 F.3d at 22-23; Comfort, 283 F.Supp.2d at 334, 350, 350 n.41, 358, 387-89, 390 n.101.

B. When Voluntary, Race Conscious Integration Plans Use Percentage Ranges, Such as Fifteen Percent of the Racial Composition of a District's Aggregate Student Population, it Does Not Constitute Unconstitutional Racial Balancing.

Petitioners and their amici mistakenly claim that Jefferson County and Seattle's efforts to attain a racial mix in each school that is within a broad percentage range of the racial composition of the district's aggregate student population constitute a quota or unconstitutional racial balancing. Jefferson County and Seattle satisfy Grutter's constitutional requirements, however, when they take into account students' race only as necessary to achieve the educational benefits their plans are designed to produce and, to the extent possible, to prevent the educational harms of racial isolation and racially identifiable schools. See Grutter, 539 U.S. at 333-34, 335-36.

In Comfort, for example, Lynn's experts demonstrated that Lynn's 10% and 15% ranges were necessary for it to maintain integrated learning environments and prevent racial isolation and racially identifiable schools. Comfort, 418 F.3d at 20-21; Comfort, 283 F.Supp.2d at 355, 357, 377, 381, 386-87.

Expert testimony and authoritative developmental and social psychological research and study presented in Comfort demonstrate the educational benefits that accrue from maximizing racial integration. While maintaining a critical mass of whites and nonwhites in a school begins to catalyze the significant benefits of integration, achieving critical mass is only the beginning. Intergroup contact benefits accrue along a continuum. As racial diversity in a school increases (as a school moves closer to racial balance), students experience a linear increase in benefits. More racial diversity leads to increased racial harmony and understanding, and reduced racial stereotypes and tension. In schools with more equal representation of whites and nonwhites, children have many more opportunities for interracial interactions and for developing cross-race friendships with numerous children from other racial backgrounds. The increased number of cross-race opportunities better enables students to disarm nascent racial stereotypes, and develop positive racial attitudes. Comfort, 418 F.3d at 20-21; Comfort, 283 F.Supp.2d at 356-57, 380-81.

School districts also maximize racial integration to avoid the damaging educational and race relations effects of racially identifiable schools.[18] Lynn's strong interest in preventing racially identifiable schools arose from its experiences in the 1980s.[19] In 1987, when the Plan was first adopted, four of its 18 elementary schools were minority identifiable, with minorities constituting 50% to 55% of the student population, while four other

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[18] A racially identifiable school is a school in a racially diverse school district that is either predominantly white or with a concentration of nonwhites that is highly unrepresentative of a district's overall racial composition. Comfort, 283 F.Supp.2d at 344-47, 355, 380, 387. See also Morgan v. Nucci, 831 F.2d 313, 319-20 (1st Cir. 1987).

[19] The concern about racially identifiable schools has been raised in *de jure* desegregation cases. See, for e.g., Morgan v. Nucci, 831 F.2d at 319-20.

elementary schools had at least a 95% white student population, and three more were about 90% white.[20] Because these four schools were minority identifiable, the minority students felt isolated, ignored, and excluded and these schools experienced high levels of racial tension and conflict. Comfort, 418 F.3d at 6-7, 14; Comfort, 283 F.Supp.2d at 334-35, 344-47, 355-56.

By using percentage ranges, a school district seeks to minimize the number of schools that widely deviate from the district's overall racial composition (to avoid racial isolation and the racial identifiability of its schools), and maximize the number of schools with a racial composition that falls more closely in line with the district's racial composition (to maximize the benefits of integration). Comfort, 418 F.3d at 20-21; Comfort, 283 F.Supp.2d at 355-57, 375-77, 384, 380-81, 386-87.

Artificially limiting integration efforts by automatically characterizing the use of percentage ranges as a quota or racial balancing would prevent school districts such as Jefferson County and Seattle from achieving their compelling interests in racial integration and preventing students from receiving its maximum benefits.[21] Id. The ability to prevent schools deviating too much from a school district's overall racial

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[20] In 1994, Lynn considered expanding its elementary school range to plus or minus 20%, but "ultimately concluded . . . that schools would lapse into greater racial identifiability." Comfort, 283 F.Supp.2d at 348 n.38.

[21] If a district's intent was just to balance racially its schools, it would eliminate its percentage ranges altogether, and employ involuntary transfers to ensure that as many of its schools had student populations as close as possible to 50% white and nonwhite, or to guarantee that each school's racial composition mirrored the racial composition of its aggregate school population. Comfort, 283 F.Supp.2d at 377, 383-84.

composition, however, are constrained by a plan's voluntary nature.[22]

Finally, petitioners' attack on Jefferson County and Seattle's use of percentage ranges would also prevent those educators from using percentage ranges that school districts regularly use,[23] and that federal courts have adopted in remedial desegregation cases to minimize racial isolation, prevent racially identifiable schools, and promote effective desegregation. See Comfort, 283 F.Supp.2d at 386-87 (citing Belk v Charlotte-Mechlenburg Bd. of Educ., 269 F.3d 305, 319 (4th Cir. 2001)).

C. Grutter's Individualized Assessment Requirement For Competitive, Race-Preferential Higher Education Admissions Should Not Apply to Non-Selective Race-Conscious Assignments or Transfers in K-12 Schools.

Grutter's individualized assessment requirement should not be applied in the non-selective K-12 public school context. The government interest at issue here, i.e., achieving the educational benefits flowing from racially-integrated schools, is not the same interest at stake in Grutter and Gratz v. Bollinger[24] (viewpoint diversity). In Grutter, this Court admonished that the very purpose of strict scrutiny is to take relevant

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[22] For example, Lynn's percentage ranges are in effect aspirational. Lynn does not use "coercive assignments or forced busing" when its schools, as they inevitably have, fall outside its plus or minus 10% and 15% ranges. Comfort, 283 F.Supp.2d at 334-35; see also Comfort, 418 F.3d at 19-20, 19-20 n.12; Comfort, 283 F.Supp.2d at 377, 381-82, 384.

[23] Comfort, 283 F.Supp.2d at 355, 386.

[24] Gratz v. Bollinger, 539 U.S. 244 (2003).

differences in the context and interests advanced into account, 539 U.S. at 334. In short, context matters.

Applying this Court's pragmatic standard, the First Circuit in Comfort correctly applied Grutter's teachings in holding that this Court's narrow tailoring requirements for competitive, race-preferential higher education admissions programs should not prohibit a K-12 school system from using race as a decisive factor in school-transfer decisions. Comfort, 418 F.3d at 17-19. As the First Circuit held, "[i]f a non-competitive voluntary student transfer plan is otherwise narrowly tailored, individualized consideration of each student is unnecessary." Id. at 19. "The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (e.g., the Gratz and Grutter policies) are simply not present in a noncompetitive K-12 transfer policy aimed at racial diversity." Id. at 18.

Where viewpoint diversity is the educational institution's goal, as in Grutter, 539 U.S. at 314-16, 337-38 (competitive, race-preferential law school admissions), it makes sense to require an individualized holistic assessment of candidates to determine how each may contribute to the overall educational or viewpoint diversity on campus. The interest of K-12 school districts like Lynn, Jefferson County, and Seattle, however, is not to achieve the benefits of viewpoint diversity, relevant to institutions of higher education or select exam schools, where educators seek to admit students with broadly diverse backgrounds, qualifications, and experiences to exchange perspectives and ideas and enrich the overall educational experience. Comfort, 418 F.3d at 17-19, 18 n.9; Comfort, 283 F.Supp.2d at 334, 379, 381 n.90. Rather, the relevant interest is achieving the educational benefits of racially integrated schools.

Given that critical distinction in context, the First Circuit correctly concluded that a student's background and qualifications apart from race are irrelevant to a K-12 school system achieving the compelling educational benefits of integration and preventing racial isolation and segregation. Comfort, 418 F.3d at 18 (quoting Brewer v. West Irondequoit Central Sch. Dist., 212 F.3d 738, 752 (2nd Cir. 2000) ("If reducing racial isolation is -- standing alone-- a constitutionally permissible goal, . . . then there is no more effective means for achieving that goal than to base decisions on race.")). Id. at 18. This Court should adopt the sensible and pragmatic approach of the First Circuit.

1. When implemented effectively, race conscious integration plans do not reinforce racial stereotypes or cause stigmatic harm.

There is no merit to the repeated assertion by petitioners and their amici that the use of a race conscious school assignment plan to integrate schools will, as a matter of course, reinforce racial stereotypes or cause students to experience stigmatic harm.[25]

The Jefferson County and Seattle cases are distinguishable from affirmative action cases involving competitive admissions or distribution of a limited benefit where some form of preferential treatment of nonwhites may reinforce a stereotype that nonwhites cannot compete with whites on the basis of merit or that they need special governmental assistance to succeed. Grutter, 539 U.S. at 326; Adarand Constructors, Inc. v.

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[25] Amicus is not aware of any federal court making such a finding of harm during the implementation phase of desegregation plans in the *de jure* context.

Pena, 515 U.S. 200, 228-29 (1995); Croson, 488 U.S. at 493-94.

When effectively implemented, non-competitive, race conscious integration plans do not reinforce stereotypes or cause stigmatic harm.[26] For example, in Comfort, petitioners and their amici's assertion conflicts with the District Court's findings of fact and is wholly unsupported by the record. To the contrary, the record established that Lynn's race conscious integration plan, "by reducing racial isolation and increasing intergroup contact has . . . ameliorated racial and ethnic tension and bred interracial tolerance."[27] Comfort, 418 F.3d at 19; see also Comfort, 283 F.Supp.2d at 334-35, 352-53, 376; Comfort Stipulations, ¶¶ 112-14, 116.[28]

As the Comfort record established, students' racial differences must be recognized and confronted to increase racial understanding and overcome racial

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[26] Even where a plaintiff is able to prove harm, the Court should weigh the harm established with the benefits provided through the race conscious policy. See Grutter, 539 U.S. at 341; United States v. Paradise, 480 U.S. 149, 171 (1987).

[27] Amici identified as "Various School Children from Lynn, Massachusetts, Who are Parties in Comfort v. Lynn School Committee," make certain allegations about plaintiffs in the Comfort case or their children, although amici fail to address the fact that their stories do not appear in the record in the Comfort case. Amici Br. 6-8. See Comfort, 283 F.Supp.2d at 338; Comfort Stipulations, ¶¶ 39, 186, 190, 193, 196, 200, 203. (Amici also suggest that Lynn designates students' race under its Plan, but this is incorrect. Parents, not Lynn, are responsible for identifying a child's race upon admission to the school system. Id.)

[28] Reliance on Johnson v. California, 125 S.Ct.1141 (2005), is misplaced. As the First Circuit recognized, Johnson involved a state prison policy that imposed racial segregation, a practice long rejected in our country's jurisprudence. These cases, on the other hand, involve racial integration in K-12 schools, long recognized since Brown as providing fundamentally important educational and citizenship benefits. See Comfort, 418 F.3d at 18-19.

divisions. Id.; see also Comfort, 418 F.3d at 14, 16, 18-19; Comfort, 283 F.Supp.2d at 356-57, 375-76, 375-76 n.84, 378, 379-81. As the District Court found, "Lynn uses race in school admissions not because an individual's race matters, but because the district recognizes that race relations matter." Comfort, 283 F.Supp.2d at 378.

> In order to teach that the "content of [one's] character" does not depend on color, a child must interact with children of other races, an interaction that necessarily challenges nascent stereotypes.

Id. at 333-34. "Race is the elephant in the room that does not go away until it is confronted." Id. at 378. The use of race in integration plans in Lynn, Jefferson County, and Seattle "is not a form of stereotyping, but a method to prevent the formation of stereotypes." Id. at 379 (quoting Comfort v. Lynn School Committee, 100 F. Supp.2d 57, 65 n.12 (D. Mass. 2000)).

CONCLUSION

For the reasons stated, the judgments of the Sixth and Ninth Circuit Courts of Appeals should be affirmed.

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In The
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
PETITIONER,
vs.
SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
RESPONDENTS.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
PETITIONER,
vs.
JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
RESPONDENTS.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE MASSACHUSETTS ASSOCIATION OF SCHOOL SUPERINTENDENTS, THE MASSACHUSETTS ASSOCIATION OF SCHOOL COMMITTEES, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF AUTHORITY AND CONSENT TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37(3)(a) of the Rules of the Supreme Court of the United States, consent of the parties was obtained for the filing of this amici curiae brief in support of Respondents. Copies of the written consents on behalf of the Respondents and Petitioners have been filed with the Clerk of this Court.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Massachusetts Association of School Superintendents ("MASS"), incorporated in 1973, is a statewide organization dedicated to enhancing the educational interests and opportunities of Massachusetts' school children. MASS articulates the unique perspective of school superintendents on behalf of students and also advocates for the professional concerns of almost 400 superintendents and assistant superintendents in Massachusetts. MASS believes that a diverse educational community enhances educational opportunities for children. As a result, MASS strongly supports the historic legal principle that the public education system has a responsibility to provide high quality education to each and every one of its students. MASS supports the use of voluntary school desegregation programs that further racial and ethnic diversity and believes these plans as used in Massachusetts' schools provide valuable educational benefits.

The mission of the Massachusetts Association of School Committees, Inc. ("MASC") is to support the Commonwealth's school leaders in their governance roles. School committees are legally responsible for developing and approving all policies related to district governance, including policies related to student assignment, transfer and desegregation where applicable. Representing a diverse group of almost 300 urban, suburban, rural, regional, and vocational-technical school committees, MASC provides guidance on

[1] Pursuant to Supreme Court Rule 376, Counsel for Amici Curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person other than Amici Curiae, its members, and its counsel make a monetary contribution to the preparation and submission of this brief.

local policy development and communicates members' perspectives to government leaders, administrative agencies and other education-related organizations. MASC believes it is important for school committees to have the ability to utilize voluntary school desegregation plans that promote racial integration and further the educational interests of students and the community. Massachusetts' schools have benefited from the ability to enact voluntary desegregation plans that foster integrated educational opportunities.

INTRODUCTION

In the mid 19th century, Horace Mann, a Massachusetts native, articulated a vision for public education that would profoundly shape our country's thinking. Mann championed a system of "common schools" where children "of all classes and elements of society would be educated together and thus acquire the mutual respect essential to a democracy." THE COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF EDUCATION, ANNUAL DESEGREGATION AND EQUITY REPORT (1987). Roughly a century later this Court echoed Mann's ideals in its seminal decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954):

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a

> principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Id.* at 493.

The notion that racial segregation is damaging to the development of young minds and the social fabric of our nation is inextricably linked to Mann's vision. This fundamental premise and the ills of racially segregated public education have been expressly recognized by the Court for over half a century. In *Brown*, the Court observed that, "Segregation of white and colored children in public schools has a detrimental effect upon colored children." *Id.* at 494. What was true in the context of a "separate-but-equal" environment remains equally true today regardless of whether the segregation is *de jure* or *de facto* and regardless of the demographic makeup of the marginalized group. "A great deal of learning occurs informally ... through interactions among students of both sexes; of different races, religions, and backgrounds." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 n. 48 (1978). "[T]he skills needed in today's increasingly global market place can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

Since *Brown*, Massachusetts has pioneered efforts to decrease segregation in its public schools. In 1965, Massachusetts enacted the Racial Imbalance Act ("RIA"), which made it "the policy of the commonwealth to encourage all school committees to adopt as educational

objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools" and provided that "prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines, establishing of grade levels, and the selection of new school sites." M.G.L. c. 71, § 37C. Under the RIA, several Massachusetts school districts have instituted "Magnet Schools" programs in response to the persistent challenge of racial isolation in public schools. Others, such as the school district in Lynn, Massachusetts, have adopted voluntary desegregation programs, like those in Seattle and Jefferson County that are before the Court. *See Comfort v. Lynn School Committee,* 418 F.3d 1, 7-9 (1st Cir. 2005).

One year after it enacted the RIA, Massachusetts adopted legislation that authorized the "school committee of any city or town or any regional district school committee [to] adopt a plan for attendance at its schools by any child who resides in another city, town, or regional school district in which racial imbalance ... exists in a public school." M.G.L. c. 76, § 12A. Under this statutory grant, the Metropolitan Council for Educational Opportunity ("METCO"), an organization overseen by the Massachusetts Department of Education, initiated a voluntary program to transport students from urban and inner-city neighborhoods to suburban schools, which receive additional state funding. In 2006, 3,300 students and thirty-eight school districts participated in the METCO program.

Despite these efforts in Massachusetts and despite the decades-long efforts by courts and legislatures at the state and federal level to cultivate integration nationwide, Mann's vision of a diversified

"common school" remains unrealized. As the nation's population grows more diverse,[2] integration of public schools has proven challenging, and at times elusive. Substantial gaps remain in educational opportunity between white and non-white students.[3]

Therefore, the integration of public schools through voluntary desegregation programs is an issue of vital importance to the nation as well as the *Amici*. Voluntary desegregation programs, like the Lynn School district plan, and other similar voluntary plans that seek

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[2] Currently, the U.S. population is about 69.1% white/non-Hispanic, 12.5% Hispanic, 12.3% black, 3.6% Asian / Pacific Islander, and 0.9% American Indian / Alaskan Native. OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF, U.S. CENSUS BUREAU at 3 (Mar. 2001); POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: *1990* AND *2000*, Tbl. 3, U.S. CENSUS BUREAU (Apr. 2001). However, by 2050, the percentage of the population that is white/non-Hispanic is projected to decrease to approximately 52.8%. PROJECTIONS OF THE RESIDENT POPULATION BY RACE, HISPANIC ORIGIN AND NATIVITY: MIDDLE SERIES, 2050 TO 2070, POPULATION PROJECTIONS PROGRAM, POPULATION DIVISION, U.S. CENSUS BUREAU (Jan. 13, 2000). Moreover, since 1968, the proportion of white students enrolled in public schools has decreased by 17%, while the proportion of black students has increased by 29% and the proportion of Hispanic students has increased by 283%. ERICA FRANKENBERG, CHUNGMEI LEE AND GARY ORFIELD, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?, CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, at 23 (Jan. 2003) *available at* http://www.civilrightsproject.harvard.edu.

[3] According to one study, black students were found to be far less likely than white students to complete high school – only 78.7% completed high school, compared to 90.5% of white students. Black students are also far less likely to pursue higher education – in 1994, 47.3% of black students enrolled in eighth grade six years earlier had pursued no post-secondary

to achieve racial diversity in Massachusetts cities and towns, as well as the Seattle and Jefferson County plans before the Court, have a striking record of success. They further a compelling interest by ensuring that students nationwide gain access to the benefits of an integrated education at an early age. Moreover voluntary desegregation programs are narrowly tailored because they do not perpetuate illegitimate stereotypes and they do not unduly burden third parties. The *Amici* see rich educational as well as social benefits to such voluntary school desegregation plans and want to ensure that educators, school committees, and superintendents continue to have the choice to use such plans where necessary to achieve the educational opportunity promised students in the teachings of Horace Mann and this Court's decision in *Brown* over fifty years ago. For these reasons, and those more fully set forth below, the *Amici* respectfully request that the decisions of the Ninth Circuit in *Parents Involved in Community Schools v. Seattle School District, No. 1*, 426 F.3d 1162 (9th Circuit 2005), and Sixth Circuit in *McFarland v. Jefferson County Public Schools*, 416 F.3d 513 (6th Circuit 2005) be affirmed.

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education, whereas only 34% of white students fell into that category. FREDERICK D. PATTERSON RESEARCH INSTITUTE OF THE UNITED NEGRO COLLEGE FUND, THE AFRICAN-AMERICAN EDUCATION DATA BOOK, VOLUME III: THE TRANSITION FROM SCHOOL TO COLLEGE AND SCHOOL TO WORK *at* 118 (1997). High school graduation rates in some of the nation's largest school districts with large minority populations are appallingly low. Graduation rates for high school students in the class of 2004 were only 38.9% in New York; 47.3% in Baltimore; 49.2% in Detroit; 52.7% in Los Angeles; and in Boston 54.3%. Jing MAO & WALT HANEY, HIGH SCHOOL GRADUATION RATES: ALTERNATIVE METHODS AND IMPLICATIONS, EDUC. POL'Y ANALYSIS ARCHIVES (2004), available at *http://epaa.asu.edu/epaa/v12n55/v12n55.pdf.*

SUMMARY OF ARGUMENT

Voluntary desegregation programs, like those of Seattle and Jefferson County as well as that of the Lynn School District and other Massachusetts cities and towns, further a compelling state interest. A fully integrated society is vital to the continued growth of our nation. Moreover, public schools cannot achieve their central mission without integration. Voluntary desegregation programs promote integration by achieving a "critical mass" of racially diverse classrooms which erode the stereotypes and prejudices that persist in our society. Furthermore, they foster diversity at an age when doing so is critical to a child's development.

In addition, voluntary desegregation programs are narrowly tailored because, unlike "quota systems" that have been previously rejected by the Court, these programs do not perpetuate stereotypes or racial stigmas. Moreover, voluntary desegregation programs do not impose undue burdens upon third parties; indeed, they increase the overall benefit among the students in the school district population as a whole because all students are afforded greater access to a diversified classroom.

ARGUMENT

I. Public Schools Have a Compelling Interest in Maintaining Diverse Classrooms

Nearly thirty years ago, Justice Powell recognized "the attainment of a diverse student body" as a compelling state interest in the context of higher education. *Bakke*, 438 U.S. at 311-12. More recently, the Court formally affirmed Justice Powell's holding in *Grutter*. 539 U.S. at 325. The First, Sixth and Ninth Circuits have correctly held that voluntary desegregation

programs at the elementary, middle and high school level are equally as compelling (if not more so) as efforts to achieve racial diversity at the undergraduate and graduate school level. *See Comfort*, 418 F.3d at 15-16; *McFarland*, 416 F.3d 513, *aff'g per curiam*, 330 F.Supp. 2d 834, 852-3 (W.D. Ky. 2004); *Parents Involved in Cmty. Sch.*, 426 F.3d at 1177.

As the First Circuit explained, institutions of higher learning emphasize the exchange of ideas. *Comfort*, 418 F.3d at 18 n.9; *see also Bakke*, 438 U.S. at 312 (the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues...."). A diverse student body at the undergraduate and graduate school level cultivates "diverse viewpoints, thereby enriching class room discussions and academic experiences." *Comfort*, 418 F.3d at 15.

Voluntary desegregation programs at the primary school level, on the other hand, primarily "foster[] racial cooperation rather than "viewpoint diversity."

> [A]t the elementary, middle, and high school level, the goal of teaching socialization is at least as important as the subject matter of instruction. The value of a diverse classroom setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because it enables students to learn racial tolerance by building cross-racial relationships. In this context a meaningful presence of racial minorities -- and of whites at minority-dominated schools -- is crucial

> not only to reducing feelings of tokenism, but also to disarming stereotypes that students in the classroom majority might harbor about students of other races.

Id. at 17 n. 9. The First Circuit also recognized that voluntary desegregation programs create a "critical mass" of integration among student populations that is necessary to fully achieve the goals of integration. *Comfort*, 418 F.3d at 21 As discussed more fully below, the First Circuit's observations – both with respect to the prevalence and danger of racial stereotyping as well as the benefits of integrated primary school classrooms – find ample support from psychologists and social scientists.

A. The Harms of Racial Isolation and Stereotyping

The central mission of public education is to instill in all children "the values on which our society rests," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979), and to provide them with a foundation to realize their full potential by "expand[ing] their knowledge, broaden[ing] their sensibilities, kindl[ing] their imagination, foster[ing] a spirit of free inquiry, and increase[ing] their human understanding and tolerance." *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (brackets in original and quotation marks omitted). Public schools cannot achieve these goals if they remain segregated along racial lines. Even if educational opportunities for white and minority students are equalized, minority children still must overcome the significant hurdle of negative stereotyping and prejudice.

Despite efforts to eradicate negative stereotyping and prejudice in the United States, both still persist, even among individuals who do not consciously perceive themselves to be prejudiced. In a 1989 study of young, white college students, participants were asked to rate black and white candidates for a resident counselor position. One third of the candidates were distinctly "qualified," one third were distinctly "unqualified," and one third simply met the minimum job requirements. The study participants consistently identified the most "qualified" candidates, regardless of race. Similarly, the participants consistently eliminated the least "qualified" candidates regardless of race. However, with respect to the middle third that were neither highly "qualified" nor "unqualified," the study participants selected and gave stronger recommendations to white candidates with much greater frequency. The study was repeated in 1999 with precisely the same results. JOHN F. DOVIDIO & SAMUEL L. GAERTNER ET AL., AVERSIVE RACISM AND SELECTION DECISIONS: *1989 and 1999*, 11 PSYCHOL. SCI. 315 (2000).

Unconscious stereotyping and prejudice has endured, in part, because individuals use categories to absorb and process information about the world around them. Racial and ethnic stereotyping operates at a basic level, independent of conscious attitudes, beliefs or perceptions. STEVEN J. SPENCER ET AL., AUTOMATIC ACTIVATION OF STEREOTYPES: THE ROLE OF SELF-IMAGE THREAT, 24 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (Nov. 1998).

A learning environment that breaks down distinctions between social groups based upon stereotyping – conscious or unconscious – can diminish

prejudice. MAHZARIN R. BANAJI, ET AL., BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY, 134, 144 (A. Tesser & N. Schwartz eds., 2001). Because children form perceptions early in their development, it is critically important that the process of educating children about the differences among people from varied ethnic and racial backgrounds begin as early as possible in a child's development. Expert report of Dr. John Francis Dovidio and Expert report of Melanie Killen, *Comfort v. Lynn School Comm.*, C.A. No. 99-CV-11811NG (D. Mass. 1999), *Bollen v. Lynn School Comm.*, C.A. No. 01-CV-10365NG (D. Mass. 2001). *See also* SUSANNE E. DUTTON, ET AL. RACIAL IDENTITY OF CHILDREN IN INTEGRATED, PREDOMINANTLY WHITE, AND BLACK SCHOOLS, 138 J. OF SOC. PSYCHOL. 41, 42 (1998). Thus, the American public school system must play an ongoing role in instilling values of understanding and tolerance in the education of our children if the lingering effects of prejudice are to be eradicated.

B. Racially Integrated Primary Schools Provide an Indispensable Benefit to Our Society

The benefits of racial diversity in public school classrooms are significant. Indeed, as the *Grutter* Court noted, "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Grutter*, 539 U.S. at 330, *citing* Br. of Amicus Curiae Am. Educ. Research Ass'n. *et al.*, *Grutter v. Bollinger*, 539 U.S. at 330-331 (No. 02-241); M. CHANG ET AL., COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (2003). Harvard University's Civil Rights Project, has found that in

addition to developing a better understanding and greater tolerance for other racial groups, racial and ethnic integration is linked to greater academic achievement as well. CHUNGMEI LEE, RACIAL SEGREGATION AND EDUCATIONAL OUTCOMES IN METROPOLITAN BOSTON, 4-5 (April 2004) available at http://www.civilrightsproject.harvard.edu. As Professor Patricia Y. Gurin reported in connection with her study of the University of Michigan Law School, "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." *Expert Report of Patricia Y. Gurin, Gratz v. Bollinger*, 183 F.R.D. 209, (E.D. Mich. 1998) (No. 97-75231), *Grutter v. Bollinger*, 263 F. Supp 2d 209, (E.D. Mich. 1997)(No. 97-75928). The academic advantages gained from integrated classrooms are not limited to better test scores—students taught in integrated classrooms are more likely to graduate from high school, pursue higher education, and enter the workforce in more productive and higher-paying jobs. *See* studies cited by Br. of Amicus Curiae Nat'l. Educ. Assoc. at 25, *Grutter*, 539 U.S. 306 (2003) (No. 02-241).

School environments benefit from integration as well. Studies have demonstrated that "schools with balanced classrooms are more likely to be characterized by lower levels of racial tension and less racial polarization than schools with unbalanced classrooms." SANDRA KOSLIN ET AL., CLASSROOM RACIAL BALANCE AND STUDENTS' INTERRACIAL ATTITUDES, 45 SOCIOLOGY OF EDUC. 386, 405 (1972). Decreased levels of racial tension and polarization, in turn, makes schools more desirable,

allowing them to attract more highly qualified teachers. See Br. of Amicus Curiae Am. Sociological Ass'n at 9, *Grutter*, 539 U.S. 306 (No. 02-241).

C. Voluntary School Desegregation Programs are Integral to Achieving the Benefits of Integration

The benefits of integrated classrooms do not appear automatically with the mere presence of students of differing racial and ethnic groups, however. It is, therefore, necessary to create social conditions that allow group members to interact effectively with and learn about members of racial and ethnic groups different from their own. MAHZARIN R. BANAJI, BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY at 144.

Specifically, two social conditions must work in tandem to achieve these benefits. The groups of students must have meaningful contact with one another and there must be sufficient representation of each group so that the students in the smaller group are not marginalized. As the students have more contact with more members of other groups and as the size of the groups approach equal size, the benefits of integrated classrooms likewise increase.

When members of different racial groups interact with one another they develop mutual understanding, respect, and empathy. These emotions in turn break down stereotypes and foster positive interracial relations. CHRISTOPHER ELLISON & DANIEL A. POWERS, THE CONTACT HYPOTHESIS AND RACIAL ATTITUDES AMONG BLACK AMERICANS, 75 SOC. SCI. Q. 385 (June 1994). The contact must be meaningful, however. There are four factors that are recognized as contributing to meaningful inter-group

contact: equal status among the groups; authority support for inter-group contact; common goals among members of the groups; and opportunities for personalized contact with members of the other groups. Expert report of Melanie Killen, *Comfort v. Lynn School Comm.*, 263 F. Supp. 2d 209 (D. Mass. 1999), (C.A. No. 99-CV-11811NG), *Bollen v. Lynn School Comm.*, (D. Mass. 2001) (C.A. No. 01-CV-10365NG). Where all four factors are present, members of all groups benefit.

Integrated K-12 schools are the model proving grounds for meaningful inter-group contact. In integrated schools, students have multiple opportunities to work together in small, personalized groups. Additionally, teachers are able to lend the necessary pedagogical support by encouraging inter-group interaction. It is not surprising, therefore, to find that studies have shown that in integrated schools, group members are able to transcend racial stereotyping and build meaningful relationships with members of other groups. *See e.g.*, DUTTON, 138 J. OF SOC. PSYCHOL. at 48.

In order for students to attain the full benefits of inter-group contact; however, timing is critical. Interracial contact during a student's formative years produces the strongest benefits. *Id.* at 42. Moreover, once students' stereotypes break down, the benefits are long-lasting. Adults who had meaningful interracial contact as students are much "more likely to function in desegregated environments in later life." JOMILLS HENRY BRADDOCK II & JAMES M. MCPARTLAND, SOCIAL-PSYCHOLOGICAL PROCESSES THAT PERPETUATE RACIAL SEGREGATION, 19 J. BLACK STUDIES 267, 269 (1989). For this reason, integration of public schools at the K -12 level is critical. By providing early inter-group contact,

integrated schools give students distinct and tangible advantages later in life that have been recognized by leaders of the United States Armed Forces, major American corporations, and the Supreme Court. Br. of Amicus Curiae Lt. Gen. Julius W. Becton, Jr. *et al.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Br. of Amicus Curiae 3M et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); *Grutter*, 539 U.S. at 330-31.

D. Voluntary School Transfer Programs Provide the "Critical Mass" That Is Essential To Effectively Achieving Integration

The benefits of interracial contact cannot be achieved; however, unless there are sufficient numbers in each group to overcome tokenism and to provide sufficient opportunities for inter-group contact. The Supreme Court in *Grutter* recognized that in a school setting "a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." 539 U.S. at 333. Achieving a critical mass "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races." *Id.* at 330 (internal quotation marks omitted) (brackets in original); *see also* WILLIS D. HAWLEY ET AL., STRATEGIES FOR EFFECTIVE DESEGREGATION (1983). Nonetheless, these benefits cannot be separated from the necessity of a critical mass of minority representation, without which, these benefits are undermined.

Token representation of groups has severely negative consequences for both the majority and minority populations. Where one group is significantly underrepresented, its members feel isolated and

alienated. *See* Br. of Amicus Curiae The Am. Educ. Research Ass'n at 24, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), (citing studies). Similarly, token representation does not provide sufficient inter-group contact to overcome the stereotypes of the members of the majority group. Thus, where minorities are underrepresented, stereotypes and animosity among and between groups are reinforced. *See, e.g.*, SHELLY E. TAYLOR ET AL., CATEGORICAL AND CONTEXTUAL BASES OF PERSON MEMORY AND STEREOTYPING, 36 J. PERSONALITY AND SOC. PSYCHOL. 778 (July 1978). Achieving a critical mass is therefore essential to achieving the benefits of integration.

Critical mass is not defined by some specific number. Rather, "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330. Each group must be sufficiently represented for all students to feel safe and comfortable enough to interact with those of other races. ROXANNE HARVEY GUDEMAN, DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 251, 267-68 (Gary Orfield & Michael Kurlaender eds., 2001) *quoted in* Br. of Amicus Curiae The Am. Educ. Research Ass'n, at 24, *Grutter v. Bollinger*, 539 U.S. 306 (2003)(No. 02-241). To this end, voluntary transfer programs promote a "critical mass" by fostering diversity across the school district as a whole.

E. Residential Segregation Patterns Require that Race Conscious Desegregation Plans Be Permitted

Because of the patterns of residential segregation by race within cities, towns and districts across the United States and in Massachusetts, integrated schools

do not simply occur on their own. Conscious and voluntary programs fostering the diversity necessary for true educational opportunity must be specifically developed to meet this compelling interest. In Massachusetts, as is common elsewhere in the country, white students are concentrated in the suburbs while students of color are concentrated in the inner cities. Because of these residential patterns school segregation continues to be a major obstacle to equal opportunity for children of color, with black and hispanic students often attending schools unequal to those of whites, and with little opportunity for inter-racial contact. *See* JOHN R. LOGAN ET AL, SEGREGATION IN NEIGHBORHOODS AND SCHOOLS: IMPACTS ON MINORITY CHILDREN IN THE BOSTON REGION, Lewis MUMFORD CENTER FOR COMPARATIVE URBAN AND REGIONAL RESEARCH, UNIVERSITY OF ALBANY, (2003). Because school populations reflect these longstanding patterns of residential segregation, school districts need the ability to develop voluntary desegregation plans to achieve the diversity necessary for a good education. These plans must be able to take racial and ethnic differences into account in order to achieve their purpose.

II. Voluntary Desegregation Programs Are Narrowly Tailored

In addition to furthering a compelling state interest, voluntary desegregation programs appropriately have been held to be narrowly tailored for at least two reasons. These programs do not perpetuate illegitimate racial prejudices or stereotypes and they do not unduly burden third parties. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No.* 1, 426 F.3d 1162 (9th Cir. 2005); *McFarland v. Jefferson County Pub. Schs*, 330 F. Supp. 2d 834, 859 (W.D. Ky. 2004).

A. Voluntary Desegregation Programs in the K-12 Context Do Not Perpetuate Racial Stigmas

The Court has previously recognized that the mechanical use of race as a means for artificially insulating ethnic minorities from competition in the context of graduate and undergraduate admission programs may perpetuate stigmas of racial inferiority. In particular, Justice Powell observed in *Bakke* that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Bakke*, 438 U.S. at 298; *see also Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility"). However, these concerns are not relevant with respect to voluntary desegregation programs in the K-12 context. *Comfort*, 418 F.3d at 17; *Parents Involved in Cmty. Sch.*, 426 F.3d at 1181; *McFarland*, 330 F. Supp. 2d at 859.

Unlike the competitive graduate and undergraduate admissions polices at issue in *Grutter*, *Gratz* and *Bakke*, voluntary desegregation programs in the K-12 grades do not exclude any students from participation, but only enrich their experience. All students have full, unfettered access to a school within their district. They are not denied "admission" as may be the case with schools of higher education. Thus, "there is ... little chance that the decisive use of race in a plan concerned strictly with racial diversity creates the unwarranted presumption that race is a proxy for viewpoint." *Comfort*, 418 F.3d at 18.

Moreover, when school assignments or transfers occur in programs like that of Seattle or Jefferson County they are not based upon the qualifications of the candidate. Accordingly, a decision to deny or reject an assignment or transfer should not foster a perception that a particular student is more or less "qualified" than another. Because these programs are typically not tied to merit, "the risk of imposing stigmatic harm by fueling the stereotype that certain groups are unable to achieve success without special protection" is not present." *Id.* In fact, these programs "strive for exactly the opposite result – that is to preempt racial stereotypes through inter-group contact." *Comfort*, 418 F.3d at 18. Consequently, "concerns motivating the individualized consideration requirements in a competitive, race-preferential admissions context that focuses on diversity along a number of axes are not present." *Id.*

B. Voluntary Desegregation Programs Do Not Unduly Harm Third Parties.

In addition to identifying racial stigmatization as a potential pitfall, the Court has held that race-based programs must not unduly harm third parties. *Grutter*, 539 U.S. at 341. This concern also is not present with voluntary desegregation programs in K-12 public schools because they do not impose undue harm upon third parties. *Comfort*, 418 F.3d at 17; *Parents Involved in Cmty. Sch.*, 426 F.3d at 1181. The policy behind voluntary desegregation programs is to "create communities of equal and integrated schools for everyone." *McFarland*, 330 F. Supp. 2d at 860. By definition, these communities are all-inclusive. *Id.* Therefore, these plans neither deny anyone a benefit nor impose a burden. *Id.* Indeed, they increase the overall

benefit among the students in the school district population as a whole because all students are afforded greater access to a diversified classroom. *See Comfort*, 418 F.3d at 19 ("by reducing racial isolation and increasing inter-group contact, [voluntary desegregation programs] ameliorate[] racial and ethnic tension and breed interracial tolerance.").

Moreover, to the extent these plans do impose a burden on third parties, that burden is minimal, even compared with the competitive admission program that was held constitutionally acceptable in *Grutter*. *See Comfort*, 418 F.3d at 17. As the Western District of Kentucky noted in *McFarland*, "the consequences of assigning students to various public schools are quite different from denying an applicant admission to a selective college or job placement:

> The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education precisely because they always involve vertical choices--one person is hired, promoted, receives a valuable contract, or gains admission. Ordinarily, when [a school district] assigns students to a particular elementary, middle, or high school, the assignment has no qualitative or 'vertical' effects. This is so because ... as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible."

330 F. Supp. 2d at 860.

In short, a transfer or assignment to a specific school within a school district to which all students are guaranteed a seat, is markedly less burdensome than the denial of a spot at a unique or selective educational institution. *See Comfort*, 418 F.3d at 17.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request that this Court recognize that integration is critical to the success of public education and has many significant, tangible benefits and urge the Court to affirm the Sixth and Ninth Circuits' decisions upholding the school assignment policies of the Seattle and Jefferson County school districts.

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IN THE
SUPREME COURT OF THE UNITED STATES

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF REP. JIM McDERMOTT ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of individual Members of the United States House of Representatives as *amici curiae* in support of respondents in Nos. 05-908 and 05-915.[1] For many years, Congress has enacted numerous statutes aimed in varying ways at encouraging local school boards to establish and maintain racially integrated public schools. Prior to this Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), many school districts maintained racially segregated schools that the Court in *Brown* determined once and for all violated the 14th Amendment to the Constitution. For too many years after *Brown*, dismantling racially segregated school systems and replacing them with integrated school systems generally was achieved only as a result of litigation and judicial decree and often in the face of strong resistance.

Gradually, Congress came to realize that ending the discredited system of school segregation and bringing about the 14th Amendment's promise of integrated public education could not be left to the courts alone. As a result, Congress enacted a series of laws that declared racially integrated public schools to be a paramount national policy and established various incentives whose purpose was to encourage local school districts to voluntarily integrate their schools. This national policy properly defers to the expertise of local school officials in establishing and maintaining racially integrated schools. Petitioners' challenges to the Seattle and Jefferson County, Kentucky (metropolitan

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[1] A list of the individual Members of Congress joining in this brief is included in the appendix to this brief. Pursuant to Rule 37.6 of the Rules of this Court, no counsel for a party in either case authored this brief in whole or in part. No person or entity other than the *amici* and their counsel made a monetary contribution to preparation or submission of this brief. The parties in both cases have lodged universal letters of consent with the Clerk of this Court for the filing of briefs *amicus curiae*.

Louisville), plans for maintaining integrated school systems threaten to undermine the statutory policy to encourage localities to foster school integration on a voluntary basis.

The *amici* Members of Congress join in this brief to inform the Court that the Congress strongly supports local school board efforts to achieve fully integrated public schools at the elementary and secondary school levels. We urge the Court to uphold these locally-initiated voluntary school choice programs aimed at providing the students of these communities the educational benefits of racial diversity and the assurance that no student suffers from the educational barriers that result from racial isolation. As Members of Congress committed to promoting equal opportunity for all students at the elementary and secondary school levels, the *amici* have a substantial interest in protecting 35 years of consistent congressional enactments promoting voluntary school integration.

INTRODUCTION & SUMMARY OF ARGUMENT

Petitioners and their *amici*[2] assail the voluntary actions of the local school authorities in Seattle and Louisville because both school districts, in their multifaceted school assignment programs, have taken race into account in one of the steps for assigning students to particular schools. It is hardly surprising that programs aimed at achieving and maintaining racial integration in communities where the housing pattern is highly segregated will need to consider race as part of the school assignment program. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162, 1177 (9th Cir. 2005) (en banc) (describing

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[2] For ease of identification, we refer in this brief to the petitioner in No. 05-908 by the acronym "PICS" and to the Solicitor General's *amicus curiae* brief in that case as "S.G. PICS Br.". In No. 05-915, we refer to the petitioner by the name "Meredith" and to the Solicitor General's *amicus curiae* brief in that case as "S.G. Meredith Br.".

the Seattle Plan as "striv[ing] to ensure that patterns of residential segregation are not replicated in the District's school assignments.").[3] Relatively few students are actually affected by a race-based assignment. According to the Ninth Circuit, roughly 300 out of 3000 students entering Seattle high schools in 2000 were assigned to four oversubscribed schools out of ten high schools citywide. *Id.* at 1170 & n.6, 1183 n.24. The following year, after the race-based tiebreaker was modified, only three schools were affected by the racial factor. *Id.* at 1170 n.7. Similarly, in Louisville, more than 95% of all elementary school students received their first or second choice school within a nearby cluster of schools. *JCPS*, 330 F. Supp.2d at 845 n.18. In both jurisdictions, student and parental choice and proximity to residence have a far greater effect in determining the students' assignments. *PICS*, 426 F.3d at 1185; *JCPS*, 330 F. Supp. 2d at 842-43.

A. Petitioners object to race playing virtually any role in school assignments. *See* PICS Br. at 21, 25; Meredith Br. at 6.[4] They go so far as to challenge the legitimacy of local school officials relying on racial diversity and avoiding racially isolated schools as compelling governmental interests. PICS Br. at 34-36; Meredith Br. at 4, 6. Their blanket condemnation of even partial reliance on race in

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[3] To simplify citation to the lower court opinions in these cases, we refer to the Seattle case as "*PICS*" and to the Louisville case as "*JCPS*." Furthermore, because the Sixth Circuit's decision (416 F.3d 513 (2005)) was a *per curiam* affirmance of the District Court's judgment based on its opinion, references to the lower court decision in *JCPS* will generally be to the District Court opinion (330 F. Supp. 2d 834 (W.D. Ky. 2004)).

[4] Petitioner Meredith argues that "race must solely be a plus factor not the dominant factor in any type of race-conscious plan utilized by the JCPS." Meredith Br. at 6. That is precisely what the District Court found to be the case. Race is just one of several factors affecting school assignments, the predominant factors being "residence, school capacity, program popularity, random draw and the nature of the student's choices . . . ." *JCPS*, 330 F. Supp. 2d at 842.

student assignments absent judicial remedial measures overlooks the fact that this Court upheld a voluntary school desegregation plan in 1971 that "properly took into account the race of its elementary school children in drawing attendance lines." *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971). School officials must be accorded discretion in assigning students to particular schools to achieve racial integration whether the action is a response to judicial decree, congressional policy, or the judgment that the educational benefits of integration merit the highest priority in the community. The plans adopted by the Seattle and Louisville school officials reasonably respond to the difficult challenge of maintaining integration in the face of segregated housing patterns.

In upholding the Seattle and Louisville voluntary plans, the lower courts faithfully applied the principles of strict judicial scrutiny "to 'smoke out' illegitimate uses of race" masquerading as benign classifications. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)). After a thorough and searching judicial inquiry, those courts satisfied themselves that the school-assignment plans were narrowly tailored to further the compelling governmental interest of maintaining integrated schools, providing a racially diverse educational environment, and avoiding racial isolation of minority students. *PICS*, 426 F.3d at 1172-73; *JCPS*, 330 F. Supp.2d at 848-49. It is not only true that the lower courts had ample evidence to support the local school boards' assertion that these interests are compelling governmental interests, but more important, Congress has spoken directly to the question. In a series of statutes enacted since 1972, Congress has repeatedly enacted into law a national policy supporting racial integration of public schools, student diversity at the earliest stage of education, and preventing minority group isolation. *See* Emergency School Aid Act, Pub. L. No. 92-318, 86 Stat. 354 (1972); Magnet Schools

Assistance Program, Pub. L. No. 98-377, 98 Stat. 1299 (1984); No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1394 (2002), 20 U.S.C. §§ 6301 *et seq.* Each of these statutes expressed as national policy the government's interest in public school integration and provided incentives for local school board compliance. Implementation details were left to local officials.

B. The courts below took this Court at its word that strict scrutiny is not "strict in theory, but fatal in fact." *PICS*, 426 F.3d at 1172 (internal quotation marks omitted) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)). Their analyses were obviously influenced by this Court's guidance that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it" and that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* at 1173 (quoting *Grutter*, 539 U.S. at 326-27); *see also JCPS*, 330 F. Supp.2d at 849-50. In upholding the Seattle and Louisville plans, the lower courts recognized that race is simply a plus factor in a multi-step process in which student choice was dispositive in the vast majority of assignments. The racial composition of each school was to reflect the racial population of the entire school district with approximately a 15% margin of acceptability on either side of the district-wide breakdown. No fixed number of positions is reserved for minority students. Race becomes a factor in school assignments only at the margins where racial isolation would result if school officials failed to act.

C. Finally, despite the lower courts' approval of these plans using the framework of the strict scrutiny test, we agree with the thoughtful concurring opinions authored by two respected Court of Appeals judges (Judge Kozinski of the Ninth Circuit and Chief Judge Boudin of the First Circuit) urging this Court to revisit the applicable standard of review in this narrow class of cases where local school authorities

strive to avoid replicating segregated housing patterns in the schools. *See PICS*, 426 F.3d at 1193-96 (Kozinski, J., concurring); *Comfort v. Lynn School Committee*, 418 F.3d 1, 27-29 (1st Cir.), *cert. denied*, 546 U.S. ___, 126 S. Ct. 798 (2005) (Boudin, C.J., concurring). Given the tension between the deference historically accorded to local school boards in setting education policy and the Court's application of strict scrutiny to racial classifications, some loosening of the standard of review may be warranted so that local school boards can implement congressional policy in support of racially integrated schools using similar open choice plans without the threat of costly multi-year litigation.

ARGUMENT

I. BOTH THIS COURT AND CONGRESS HAVE ESTABLISHED THE PRINCIPLE OF RACIAL INTEGRATION AT THE ELEMENTARY AND SECONDARY LEVELS OF PUBLIC EDUCATION AS A COMPELLING GOVERNMENTAL INTEREST.

Both the Seattle and Louisville school assignment plans are aimed at preserving racially integrated public schools that in both cities were once racially segregated. The school board in Louisville was subject to court-ordered desegregation for many years (*JCPS*, 330 F. Supp.2d at 840-41), while the Seattle school officials successfully desegregated their schools voluntarily (*PICS*, 426 F.3d at 1166-69).

A. This Court Has Repeatedly Stated that Local School Boards Have a Duty to Prevent Racial Segregation in Public Schools.

For more than a half century, since *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court has emphasized the importance of public education as an integral component

of our democratic society and the duty of local school officials to provide each child the opportunity to receive an education on equal terms.[5] *See, e.g., id.* at 493; *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). In reaching the conclusion that "[s]eparate educational facilities are inherently unequal" (347 U.S. at 495), the Court reviewed such intangible considerations as "ability to study, to engage in discussions and exchange views with other students." *Id.* at 493 (quoting *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950)). The Court had based its earlier decisions that universities could not provide separate but equal educational opportunities on these intangibles. *Ibid.* (citing *McLaurin* and *Sweatt v. Painter*, 339 U.S. 629 (1950)). The Court stated that these "considerations apply with added force to children in grade and high schools." *Id.* at 494. To separate Black children from others "solely because of their race generates a feeling of inferiority as to their status in the

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[5] The Court's words bear repeating in full:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

347 U.S. at 493.

community that may affect their hearts and minds in a way unlikely ever to be undone." *Ibid.* With these words, the Court established as a constitutional principle under the Equal Protection Clause the goal of ending racial discrimination in the public schools. *Id.* at 495 ("Separate educational facilities are inherently unequal.")

Nevertheless, despite *Brown's* lofty goals, the Court understood that while the harms of segregation were evident, regardless of the cause of the segregation, the Court's remedial power under the 14th Amendment extended only to state-imposed segregation. The Court explained that "[s]egregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Id.* at 494 (quoting lower court findings).

Later cases emphasized the responsibilities of local school officials to bring about voluntary integration of schools as sound educational policy. *See Green v. County School Board*, 391 U.S. 430, 436 (1968) ("the transition to a unitary non-racial system of public education was and is the ultimate end to be brought about."). The Court's message was unambiguous: "School boards . . . then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. The Court's belief (and hope) was that local school authorities would take the lead in dismantling the unconstitutional system of segregated education and to achieving integrated public schools. *Id.* at 438-39.

A group of cases decided in 1971 illustrated both the breadth of the judicial power as well as its limitations. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402

U.S. 1 (1971), the Court recognized that local school officials, using their broad discretionary powers in formulating education policy, like the school boards in these cases, "might conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Id.* at 16. At the same time, the Court acknowledged that "judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." *Ibid.* And, most important, the Court dismissed the notion that it was impermissible for school boards to consider race in making student assignments. *Id.* at 24-25; *see also North Carolina State Bd. Of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable *quite apart from any constitutional requirements.*") (emphasis added); *McDaniel v. Barresi*, 402 U.S. at 41 (the local school board, "as part of its affirmative duty to disestablish the dual school system, properly took into account the race of its elementary school children in drawing attendance lines.").

Two years later, the Court reaffirmed that local school officials have a duty to achieve integration and not merely refrain from discrimination on account of race. *Keyes v. School District No. 1*, 413 U.S. 189, 200-01 n.11 (1973). Although *Keyes* was not a case in which there had been a dual school system, the Court found that parts of the school district were in fact segregated through various devices such as design of attendance zones and school site selection. *Id.* at 203.

In a separate opinion, Justice Powell acknowledged that the cases since *Brown* had evolved toward an "affirmative-duty doctrine" so that a distinction between *de jure* and *de facto* segregation no longer made sense. *Id.* at 219-23 (Powell, J., concurring in part and dissenting in part). He proposed defining the constitutional duty imposed on local school boards as the duty to "operate *integrated school systems* within their respective districts." *Id.* at 225-26 (emphasis in original). As he explained, "Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle." *Id.* at 227. "[S]chool boards have a duty to minimize and ameliorate segregated conditions by pursuing an affirmative policy of desegregation." *Id.* at 236.

Perhaps, anticipating today's cases, Justice Powell explained the importance of racial diversity in public schools and made clear that school boards have discretion to go beyond constitutional minima:

> In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.

Id. at 242.

In sum, by the early 1970s, local school boards were under an affirmative duty to ensure that their school systems were racially integrated and had broad discretion in choosing the manner of achieving integration. However, the judicial

power to order desegregation under the Equal Protection Clause remained confined to segregation resulting in some manner from official action. If more was to be expected of the local school authorities, it would be up to Federal, state and local policymaking authorities to make that decision. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 302 n. 41 (1978) (opinion of Powell, J.) (recognizing the "special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.").

B. Congress Has Established as National Policy the Goals of Achieving and Maintaining Racially Integrated Public Schools.

By 1970, it became apparent that the courts alone could not achieve racially integrated schools nationwide. At a time when Congress perceived the need for Federal legislation to assist local communities in improving the quality of public education in general, Congress seized the opportunity to establish as national policy the goals of achieving and maintaining racially integrated public schools. Over the past 35 years Congress has repeatedly declared by law its commitment to school integration, student-body diversity at the earliest stage of student education, and prevention of minority isolation in public schools. These laws described below recognized that implementation of these goals was the responsibility of local school boards. To encourage voluntary action, Congress provided financial incentives for specific types of programs aimed at promoting school desegregation, particularly establishment of magnet schools. Given congressional action establishing integration of our elementary and secondary public schools as paramount national policy, that should suffice in demonstrating that these goals are compelling governmental interests.

In 1970, President Nixon recommended to Congress the enactment of what was to become the Emergency School Aid Act ("ESAA"). The ESAA was enacted in 1972, among other things, to raise student achievement by addressing *de facto* segregation. Pub. L. No. 92-318, 86 Stat. 354 (1972).[6] In proposing the ESAA, President Nixon focused on the adverse consequences of racial separation and isolation and the benefit to all students of a diverse educational environment:

> The Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education—not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

H.R. Rep. No. 92-576, at 3 (1971); S. Rep. No. 92-61, at 7 (1971). As enacted, the legislation sought to reduce segregation by race in elementary and secondary schools "without regard to the origin or cause of such segregation." *Bd. of Educ. v. Harris,* 444 U.S. 130, 141 (1979) (quoting ESAA § 702 (internal quotation marks omitted)). In other words, as this Court observed, "Congress was disturbed about minority segregation and isolation as such, *de facto* as well as *de jure*, and that, with respect to the former, it intended the limited funds it made available to serve as an enticement device to encourage voluntary elimination of that kind of segregation." *Ibid.*

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[6] The ESAA was repealed and simultaneously reenacted by the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2268 (1978). *See Bd. of Educ. v. Harris*, 444 U.S. 130, 132 n.1 (1979).

The ESAA was eliminated as a separate program in 1981 and consolidated with more than 30 other programs into a single block grant. Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, § 5, 95 Stat. 357 (1981). This consolidation sharply reduced available federal funds for desegregation efforts.

By 1984, the growing concern about insufficient support for voluntary desegregation led to enactment of the Magnet Schools Assistance Program ("MSAP"), Pub. L. No. 98-377, Title 7, 98 Stat. 1299 (1984). One of the central goals of the MSAP was improving student achievement through "the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools." MSAP § 703, 98 Stat. 1299. In this statute, Congress again codified the goal of combating minority student isolation in our public schools.[7]

The specific goal of achieving student body diversity at the elementary school level was formally added to the statute in the 1994 reauthorization of the MSAP, Pub. L. No. 103-382, § 5101(4)(A)(ii), 108 Stat. 3690 (1994). Congress made the express finding that "it is in the best interest of the

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[7] The Solicitor General notes that for several years beginning in 1998 the Department of Education described the statutory goal of "reducing, eliminating or preventing minority group isolation through magnet schools as a compelling interest (S.G. PICS Br. at 26 (citing, *e.g.*, 63 Fed. Reg. 8021, 8022 (1998))), but that in 2004 the Department dropped the phrase "compelling interest" in restating the goal (*id.* at 26-27 (citing 69 Fed. Reg. 4990, 4992 (2004)). The Solicitor General does not claim that this omission has any legal significance and the notice gave no reason for the omission. The *Federal Register* notices invited the public to submit grant applications under MSAP; they were not rulemaking notices and hence there is no suggestion that the Department's characterization of congressional policy warrants *Chevron* deference. *See, e.g., Gonzales v. Oregon*, 546 U.S. ___, 126 S.Ct. 904, 914-15 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Federal Government to . . . continue the [Government's] support of . . . school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, *beginning at the earliest stage of such student's education*." MSAP § 5101(5)(a), 108 Stat. 3691 (emphasis added). Contrary to the petitioners' arguments that racial diversity may not be a compelling governmental interest below the university level (PICS Br. at 47-48; Meredith Br. at 4), Congress did not view student diversity as relevant only to higher education. Rather, Congress spoke in the clearest terms in designating student body diversity as a priority for the youngest students in the public education system.[8] Although the Act specifically focused on the significant contributions of magnet schools to "our nation's efforts to achieve voluntary desegregation in our Nation's schools," it noted that "where magnet programs are implemented for only a portion of a school's student body, special efforts must be made to discourage the isolation of . . . students by racial characteristics." MSAP § 5101(4)(A)(ii), 108 Stat. 3690. Plainly, the goals of diversity and prevention of isolation were not limited to magnet schools even if the financial grants authorized by the Act were so limited.

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[8] Nothing in *Grutter* precludes the Court from upholding the validity of Congress' determination that student diversity is a compelling governmental interest below the university level. To be sure, the Court relied on the "special niche" universities occupy under the First Amendment to justify deference to the University of Michigan Law School's assertion of a compelling interest in a diverse student body. *Grutter*, 539 U.S. at 328-29. However, in addition to its First Amendment rationale, the Court also relied on information provided by the *amici* in that case of "the educational benefits that flow from student body diversity." *Id.* at 330. The lower courts in these cases had the benefit of similar information bearing on elementary schools (in Louisville) and secondary schools (in Seattle and Louisville) and this information resulted in appropriate findings. *PICS*, 426 F.3d at 1174-77; *JCPS*, 330 F. Supp.2d at 852-54. The combination of a strong evidentiary record and congressional policymaking firmly establish student diversity in the public schools as a compelling governmental interest.

In 2001 at the urging of President Bush, Congress passed the No Child Left Behind Act ("NCLB" or the "Act"), Pub.L. No. 107-110, 115 Stat. 1394 (2002), 20 U.S.C. § 6301 *et seq.*, one of the most sweeping reforms of the U.S. educational system in 30 years. Once again, Congress focused on removing educational impediments affecting minority students. One of the Act's stated goals is "[c]losing the achievement gap between high and low performing children, especially the achievement gaps between minority and non-minority students." 20 U.S.C. § 6301(3).

In furtherance of this goal, the Act reauthorized MSAP (now for a third time) with provisions for federal financial assistance to support voluntary desegregation efforts by local jurisdictions. In doing so, as before, the Act noted that "it is in the best interests of the United States . . . to continue the Federal Government's support of . . . local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds." 20 U.S.C. § 7231(a)(4)(A). Further, the Act noted that "it is in the United States' interest to ensure that all students have equitable access to a high quality education that will prepare all students to function well in a technologically oriented and a highly competitive economy comprised of people from many different racial and ethnic backgrounds." 20 U.S.C. § 7231(a)(4)(B). This congressional statement captures succinctly why student body diversity below the university level is no less a compelling governmental interest than the interest in a diverse student body at an elite law school.

The Congress that passed the NCLB was acutely aware that minority students throughout the country were often not receiving the education they needed. Given Congress' aim of advancing minority student achievement, the Act includes a number of race-conscious provisions as a means of

advancing and tracking minority student achievement. For example, the Act contemplates the possible use of race in assigning students to magnet schools, specifically exempting grant recipients acting pursuant to a plan approved by the Secretary of Education from a statutory prohibition against discrimination by race. 20 U.S.C. § 7231d(b)(2)(C)(ii). The accountability provisions require that schools separately classify and track students' progress by race and ethnicity. If schools fail to make "adequate yearly progress" in each classification, they are subject to an array of sanctions including loss of Federal funds. 20 U.S.C. §§ 6311(b)(2)(B), 6311(b)(3)(C)(xiii), 6311(g)(2). Other provisions in the NCLB require that race be considered in the distribution of Federal funds. For instance, one section authorizes the Secretary of Education to provide grants to school districts to assist them in implementing NCLB and conditions the receipt of those grants on demonstrating a broad "strategy to eliminate the achievement gap that separates low-income and minority students from other students." 20 U.S.C. § 6622(b)(2). The Act authorizes the Secretary to grant *Close Up* fellowship grants with "special consideration" given to "students with special needs including . . . minority students" (20 U.S.C. § 6494), and provides grants to school principals "who have a record of improving the academic achievement of all students, but particularly students from racial and ethnic minority groups" (20 U.S.C. § 6623).

In sum, for 35 years, Congress has repeatedly determined that racial integration of the public schools is a critical part of the nation's policies for improving minority student performance. This is what the Court first said in *Brown* (*see* pp. 6-8 *supra*), and what the Congress has repeatedly said since 1972. Encouraging school boards to voluntarily achieve and maintain integrated schools that reflect the community at-large and not merely one segment is not racial discrimination and it is not giving preferences to groups that had been disadvantaged in the past at the expense

of other students. It is simply a way of ensuring that majority and minority students jointly benefit from the cultural and ethnic diversity that is now common in the workplace, the armed services, and in many places of worship. It is preparation of young people for the experiences of life at an early age.

As Members of Congress with a strong interest in the success of the education legislative programs enacted during the past 35 years, we urge the Court to recognize that the school choice plans adopted by the Seattle and Louisville school authorities are common-sense proposals aimed at carrying out the Federal statutory policy of making racial integration of our public schools a matter of the highest priority. If the Court were to conclude that these integration plans are not constitutionally acceptable, we fear that the schools in these communities will simply become more segregated over time, reflecting the housing patterns in these and many other cities, and that in future years the newly segregated schools could become the subject of litigation and the possibility of more draconian remedies than the modest school assignment plans now before the Court.

II. THE SEATTLE AND LOUISVILLE SCHOOL CHOICE PLANS ARE NARROWLY TAILORED STUDENT ASSIGNMENT PLANS IN WHICH RACE IS ONLY ONE OF SEVERAL COMPONENTS AIMED AT MAINTAINING RACIALLY INTEGRATED PUBLIC SCHOOLS IN COMMUNITIES WITH *DE FACTO* SEGREGATED HOUSING PATTERNS.

The lower courts correctly applied strict scrutiny review despite the very significant differences between these cases and those in which this Court stated that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 539 U.S.

at 326 (quoting *Adarand*, 515 U.S. at 227). Petitioners and their *amici* fault the lower courts for adapting their analyses to reflect the particular circumstances of elementary and secondary education rather than mechanically applying the *Grutter* Court's "race-conscious university admissions" analysis to elementary and secondary schools. *Id.* at 333-34 (the narrow-tailoring "inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student diversity in public higher education."). The courts below followed this Court's "teaching that the very purpose of strict scrutiny is to take such relevant differences into account." *Id.* at 334 (internal quotation marks omitted) (quoting *Adarand*, 515 U.S. at 228). We address in this section some of the petitioners' objections that could affect voluntary school integration plans in general.

A. PICS is especially critical of what they believe is the Seattle plan's failure to give individual consideration to each student's contribution to diversity. PICS Br. at 44-45. They are joined in this argument by the Solicitor General. S.G. PICS Br. at 19-21. While acknowledging the Ninth Circuit's explanation that the selective admission process typical of university admissions is not typical of elementary and secondary school admissions, the United States nevertheless asserts that where individualized consideration is not relevant to a particular use of race, its omission from the narrow tailoring analysis would, in effect, "threaten[] to read the Equal Protection Clause out of the Constitution." *Id.* at 21 (quoting *PICS*, 426 F.3d at 1210 (Bea, J., dissenting)).

That argument, we believe, misreads what the Court explained in *Grutter* was the importance of individualized consideration in the context of selective admissions at the university level. Because the law school admission process was one in which applicants compete with one another for a limited number of seats based on a range of qualifications, the Court sought to assure that no racial or ethnic group

would be insulated from competition in the admission process. 539 U.S. at 334 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. at 315-16 (opinion of Powell, J.)). For that reason, race could be a plus factor but could not replace the range of qualifications considered for admission in a process that is already highly individualized. *Ibid.*; *see Gratz v. Bollinger*, 539 U.S. 244, 271-72 (2003) (the "automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant.").

In the Seattle school choice program, race is a plus factor at only the oversubscribed high schools where there exists a danger of racial isolation. All the other criteria used for school assignments still apply. A vast majority of students would be assigned to a particular school based on student choice, the first factor to be considered. If a school is oversubscribed, the second step is to implement the tiebreaker for applicants with siblings already attending the school. The racial factor is only triggered at the third step and only to the extent of ensuring a critical mass of minority students (no greater than 15% above or below the percentage in the total school population).[9] Once the school achieves a critical mass, the racial factor no longer applies.[10] In short, *Grutter* and *Bakke* do not require schools without a competitive admission process to establish individualized criteria that would otherwise be inapplicable when race is to be a factor in the admission process. Rather, it is a directive

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[9] The mix of the existing student body and the incoming class are legitimate factors in determining when the racial factor is triggered. *See Gratz v. Bollinger*, 539 U.S. 244, 279 (2003) (O'Connor, J., concurring) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-18 (1978) (opinion of Powell, J.)).

[10] Indeed, even if the minority ratio at a school dropped below the percentage deemed to constitute a critical mass due to transfers or other circumstances, the racial factor would not be reinstated in the middle of the school year or in later grades. *See PICS*, 426 F.3d at 1170.

APPENDIX

The following Members of the United States House of Representatives join in submitting this brief as *amici curiae* in support of respondents:

Rep. Jim McDermott (Washington)*
Rep. John Conyers, Jr. (Michigan)
Rep. Danny K. Davis (Illinois)
Rep. Raúl M. Grijalva (Arizona)
Rep. Rubén E. Hinojosa (Texas)
Rep. Michael M. Honda (California)**
Rep. Sheila Jackson Lee (Texas)
Rep. Betty McCollum (Minnesota)
Rep. George Miller (California)
Rep. Major R. Owens (New York)
Rep. Linda Sánchez (California)
Rep. Maxine Waters (California)
Rep. Melvin L. Watt (North Carolina)***
Rep. Robert I. Wexler (Florida)
Rep. Lynn Woolsey (California)

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* Rep. McDermott's congressional district includes most of the Seattle School District No. 1.

** Rep. Honda is joining in this brief on behalf of the 11 Members of the Congressional Asian Pacific American Caucus.

*** Rep. Watt is joining in this brief on behalf of the 43 Members of the Congressional Black Caucus.

APPENDIX

(Kozinski, J., concurring).[15] If, as we urge, the Court affirms the Sixth and Ninth Circuits in these cases, other communities adopting similar open choice assignment plans should not have to endure the lengthy litigation hurdles of strict scrutiny that Seattle and Louisville have had to endure.

CONCLUSION

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits should be affirmed.

Respectfully submitted,

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[15] Judge Kozinski noted that the *PICS* case has "taken over five years so far, generating 11 published opinions from the 24 judges who have considered the matter in the federal and state courts." An entire class has completed its four years of high school education without ever having been affected by the plan. *PICS*, 426 F.3d at 1195 (Kozinski, J., concurring).

Ibid. (citation omitted; italics in original). Justice Ginsburg interpreted this response as establishing a dual standard under the rubric of "strict scrutiny" in which the standard is likely to be "'fatal' for classifications burdening groups that have suffered discrimination in our society" but "dispelled the notion that 'strict scrutiny' is 'fatal in fact'" for a classification aimed at achieving a racially unified society. *Id.* at 275 (Ginsburg, J., dissenting).

One can readily understand the Court's initial skepticism in adjudicating the constitutional validity of these actions at a time not too long ago when governmental race-based actions were often of doubtful validity. Strict scrutiny may have been necessary at the time to "smoke out" the invidious classification masquerading as benign. *See Richmond v. J.A. Croson Co.*, 488 U.S. at 493 (plurality opinion). Today, however, Congress has spoken in unambiguous terms to establish as paramount national policy the goal of achieving fully integrated public schools, providing a racially diverse classroom experience for our children as training for a racially diverse workplace experience, and assuring to the extent practical that no minority suffer the educational disadvantages of racial isolation in our schools. *See* pp. 11-17 *supra*. If ever there was a compelling governmental interest first identified by this Court (*see* pp. 6-11 *supra*) and later expanded by our elected branches, this is it. It is true, of course, that implementation and fine-tuning of the policy occur at the local level. Strict scrutiny, with its hostile verbiage, almost inevitably means that local school boards that "step up to the plate" to make difficult decisions on how to bridge a racial divide in their school systems and propose a solution that includes some consideration of race in the mix of assignment factors face multi-year litigation with "incentives for the parties to bloat the record with depositions, expert reports, exhibits, documents and various other materials they hope will catch the eye of the judges who ultimately decide the issue." *PICS*, 426 F.3d at 1195

> inclusion. . . . Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.

Id. at 301 (Ginsburg, J., dissenting) (citations omitted). Justice Ginsburg reaffirmed her view in *Johnson v. California*, 543 U.S. at 516 (Ginsburg, J., concurring). In the same case, faced with an apparent conflict between the Court's declaration that "*all* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized" and case law that applied a deferential standard of review "to *all* circumstances in which the needs of prison administration implicate constitutional rights," Justice Thomas, joined by Justice Scalia, "deferred to the reasonable judgments of officials experienced in running this Nation's prisons." *Id.* at 524 (Thomas, J., dissenting) (italics in original).

Perhaps the debate among the Members of this Court is more about the label placed on the standard of review than on the degree of deference to accorded to school officials. In responding to Justice Stevens' dissent in *Adarand*, Justice O'Connor, writing for the Court, insisted that "strict scrutiny *does* take relevant differences into account—indeed, that is its fundamental purpose." *Adarand*, 515 U.S. at 228 (internal quotation marks omitted; italics in original). She went on to explain:

> Strict Scrutiny does not "trea[t] dissimilar race-based decisions as though they were equally objectionable," . . .; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not.

opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups." *Gratz*, 539 U.S. at 302 (Ginsburg, J., dissenting) (internal quotation marks omitted) (quoting *Adarand*, 515 U.S. at 276 (Ginsburg, J., dissenting)).

The Court itself has engaged in a vigorous debate for several years on whether strict scrutiny is truly necessary in all cases involving official racial classifications. As noted earlier, a majority of the current Court at one time or another has suggested a departure from strict scrutiny in reviewing benign race-based programs or where case law establishes a strong tradition of deference to a governmental official's actions within his area of responsibility. For example, in *Adarand*, Justice Stevens expressed his concerns with applying the label "strict scrutiny" to benign race-based programs. He explained that this

> label has usually been understood to spell the death of any governmental action to which a court may apply it. The court suggests today that "strict scrutiny means something different—something less strict—when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis and place well-crafted benign programs at unnecessary risk.

515 U.S. at 243-44 n.1 (Stevens, J., dissenting). In *Gratz*, Justice Ginsburg, joined by Justices Souter and Breyer, criticized the Court's application of the same standard of review for all official race classifications. 539 U.S. at 298 (Ginsburg, J., dissenting). She stated that

> government decisionmakers may properly distinguish between policies of exclusion and

maintaining segregated schools, but the Jefferson County Board was further along than the *McDaniel* Board in ridding itself of its discredited past. The scope of local school authority discretion should not differ in seeking to achieve an integrated school system and seeking to maintain an integrated system already achieved. *See JCPS*, 330 F. Supp.2d at 851 ("It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law.").

What both Judge Kozinski and Chief Judge Boudin stress is that the merits of such school choice plans, with a racial component aimed at promoting racial integration and avoiding racial imbalance, are legitimate subjects of debate "left to legislatures, city councils, school boards and voters." *Comfort*, 418 F.3d at 28 (Boudin, C.J., concurring); *see also PICS*, 426 F.3d at 1194 (Kozinski, J. concurring) ("Through their elected officials, the people of Seattle have adopted a plan that emphasizes school choice, yet tempers such choice somewhat in order to ensure that the schools reflect the city's population."); *id.* at 1195 ("there is much to be said for returning primacy on matters of educational policy to local officials.").[14] Rational-basis review would allow "different communities [to] try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs." *Comfort*, 418 F.3d at 28 (Boudin, J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). And it would not prevent "careful judicial inspection" to ensure that the race-based component stayed within reason so as not "to trammel unduly upon the

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[14] *See also Washington v. Seattle School District No. 1*, 458 U.S. 457, 474 (1982) ("in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.").

integration and the presumption of constitutional error implicit in the strict scrutiny standard.[12] *Compare, e.g., Swann*, 402 U.S. at 16 (referring to broad discretionary powers of school authorities "whose powers are plenary"), *with Adarand*, 515 U.S. at 223-24 (quoting prior cases using such phrases as "inherently suspect", constitutionally suspect", and "odious to a free people"). Although one petitioner and the Solicitor General argue that race-based assignments are only permissible as judicial remedies to proven constitutional violations,[13] the cases do not support that position. *See Grutter*, 539 U.S. at 328 ("we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.").

In *McDaniel v. Barresi*, 402 U.S. 39 (1971), the Court upheld a race-conscious voluntary program developed by local school officials to replace a student assignment system that had not previously been the subject of judicial review. Writing for a unanimous Court, Chief Justice Burger emphasized the breadth of the school authority's discretion and made no reference to the strict scrutiny test. *Id.* at 40-42. To be sure, *McDaniel* involved the voluntary effort by the local Board of Education in Clarke County, Georgia, to dismantle a dual school system. *Id.* at 41. The Jefferson County Board of Education had also maintained a dual school system that had previously been adjudicated in violation of the 14th Amendment, but at the time it adopted the plan at issue in this case, it had achieved a unitary school system. *See JCPS*, 330 F. Supp. 2d at 841. Thus, like Clarke County in *McDaniel*, Jefferson County had a history of

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[12] Both the Ninth Circuit and the Kentucky District Court cited to numerous decisions of this Court that stressed the vital nature of local control of public education and the substantial deference owed to these local officials in formulating educational policy for their communities. *See PICS*, 426 F.3d at 1188 n.33; *JCPS*, 330 F. Supp.2d at 850-51 and cases cited therein.

[13] *See* PICS Br. at 25-26; S.G. PICS Br. at 10; S.G. Meredith Br. at 10.

> races, and no race is given a preference over another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. The program does use race as a criterion, but only to ensure that the population of each public school roughly reflects the city's racial composition.

426 F.3d at 1194. Chief Judge Boudin made a similar point in describing the school assignment plan for Lynn, Massachusetts (quoted by Judge Kozinski, *id.* at 1193):

> The Lynn plan . . . is fundamentally different from almost anything that the Supreme Court has previously addressed. It is not, like old-fashioned racial discrimination laws, aimed at oppressing blacks, . . . nor, like modern affirmative action, does it seek to give one racial group an edge over another (either to remedy past discrimination or for other purposes) . . . . By contrast to *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141, 160 L.Ed.2d 949 (2005), the plan does not segregate persons by race. . . . Nor does it involve racial quotas.

Comfort, 418 F.3d at 27 (Boudin, C.J., concurring) (citations omitted). Because of these differences between the Seattle plan and the cases in which this Court has applied strict scrutiny in the past, Judge Kozinski proposed a "robust and realistic rational basis review" modeled on *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). *PICS*, 426 F.3d at 1194 (Kozinski, J., concurring).

There is obvious tension between the many cases that emphasize the importance of deferring to the educational judgment of local school officials seeking to achieve school

e.g., *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227; *Shaw v. Reno*, 509 U.S. 630, 650 (1993). Yet this uniformity of decision has not masked the doubt expressed by a majority of the present Court as to the suitability of the strict scrutiny standard in reviewing the legitimacy of some governmental actions based on race. *See*, *e.g.*, *Johnson v. California*, 543 U.S. at 516 (Ginsburg, J., joined by Souter and Breyer, JJ., concurring); *id.* at 524 (Thomas, J., joined by Scalia, J., dissenting); *Gratz*, 539 U.S. at 298-302 (Ginsburg, J., joined by Souter and Breyer, JJ., dissenting); *Adarand*, 515 U.S. at 243-49 (Stevens, J., joined by Ginsburg, J., dissenting).

Now, two respected Court of Appeals judges, one of whom, Judge Kozinski, who concurred in the en banc Ninth Circuit's judgment upholding the Seattle plan, have urged this Court to revisit the applicable standard of review in cases such as these in which local school authorities seek to ensure racially integrated public schools in communities with highly segregated housing patterns. *See PICS*, 426 F.3d at 1193-96 (Kozinski, J., concurring); *Comfort v. Lynn School Committee*, 418 F.3d 1, 27-29 (1st Cir.), *cert. denied*, 546 U.S. ___, 126 S. Ct. 798 (2005) (Boudin, C.J., concurring).[11] According to Judge Kozinski, the Seattle plan

> is not meant to oppress minorities, nor does it have that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the

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[11] Recent legal commentary urges a similar reexamination of the appropriate standard of review. *See*, *e.g.*, James Nial Robinson II, *Trying to Push a Square Peg through a Round Hole: Why the Higher Education Style of Strict Scrutiny Review Does Not Fit When Courts Consider K-12 Admissions Programs*, 2004 B.Y.U. Educ. & L.J. 51.

("Justice Kennedy cited Amherst College, which admitted between about 8.5% ... and 13.2% ... minority applicants over a ten-year period, as an example of a range not suggestive of a quota" (citing 539 U.S. at 391 (Kennedy, J., dissenting)). The District Court found that "the range in the percentage of Black students among all JCPS schools is much broader than the range in minority admissions at either Amherst College or Michigan Law School." *Ibid.* (footnote omitted).

For the same reasons, the record is plain that the school boards are not seeking to achieve some racial balance "for its own sake." *Richmond v. J.A. Croson Co.*, 488 U.S. at 494. The establishment of wide ranging goals intended to ensure the compelling interest of racially integrated schools, student diversity, and avoidance of racial isolation are inconsistent with guaranteeing a specific percentage of seats in the schools to particular racial minority groups, which is what this Court has described as "outright racial balancing." *Grutter*, 539 U.S. at 330. Once those goals have been achieved, race no longer is a consideration in student assignments.

III. THE COURT SHOULD DETERMINE WHETHER STRICT SCRUTINY IS AN UNDULY RESTRICTIVE STANDARD OF REVIEW WHEN LOCAL SCHOOL AUTHORITIES VOLUNTARILY SEEK TO ACHIEVE OR MAINTAIN PUBLIC SCHOOL INTEGRATION IN COMMUNITIES IN WHICH HOUSING PATTERNS ARE *DE FACTO* SEGREGATED.

Since the Court announced the strict scrutiny standard in racial classification cases in 1989 (*see Richmond v. J.A. Croson Co.*, 488 U.S. at 493-94 (plurality); *id.* at 520 (Scalia, J., concurring in judgment)), the Court has consistently reaffirmed its applicability to all such classifications. *See*,

reserved exclusively for certain minority groups." 539 U.S. at 335 (internal quotation marks omitted) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)). No fixed number of positions has been reserved for minority students either in Seattle or in Louisville. *PICS*, 426 F.3d at 1184-85; *JCPS*, 330 F. Supp.2d at 856-57. What each school district seeks to achieve is a critical mass of underrepresented minority students where student choice leaves certain schools with too few minority students using a percentage range based on the demographics of the school district. "The . . . goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota." *Grutter*, 539 U.S. at 335-36.

As noted earlier, the Seattle plan uses the 15% plus or minus range from the overall percentage of the racial groups' population in the school district to determine when one or the other group is considered to be racially isolated and hence lacking a critical mass at an oversubscribed school. *PICS*, 426 F.3d at 1185. Once a critical mass is achieved at a particular school, the racial tiebreaker ceases to operate and it does not apply to student transfers after the ninth grade. *Id.* at 1170; *see* note 10 *supra*.

The Jefferson County Board's goal is to achieve a minority population ranging between 15% and 50% at each school, with the actual minority population ranging widely within that broad goal. *JCPS*, 330 F. Supp.2d at 857. The District Court inferred that "[t]his wide fluctuation suggests a lesser use of race and the absence of a specific target." *Id.* at 858. The court compared the Louisville statistics with those from the University of Michigan Law School, cited in *Grutter*, and with those from Amherst College, cited by Justice Kennedy in his dissent. *Id.* at 857 ("Justice O'Connor called the Michigan Law School's percentage of minority students, which varied from 13.5% and 20.1%, 'a range inconsistent with a quota'" (citing 539 U.S. at 336)); *ibid.*

that race not trump otherwise applicable admission criteria though it may be part of the mix with flexibility in how to weigh the various factors. *See Grutter*, 539 U.S. at 334 (prohibiting universities from putting various racial groups on separate admission tracks); *Bakke*, 438 U.S. at 317-18 (opinion of Powell, J.) (describing flexible admission program that places all applicants on the same footing but allows a different weight to be given to each factor, including race or ethnic background).

The Louisville plan works in a similar way. According to the District Court that reviewed the plan, "Many factors determine student assignment, including address, student choice, lottery placement, and, at the margins, the racial guidelines. But race is simply one possible factor among many, acting only occasionally as a permissible 'tipping' factor in most of the JCPS assignment process." *JCPS*, 330 F. Supp.2d at 859. The fact that race may make a difference in particular cases does not mean that the other factors that determine school assignments were not considered. *See Grutter*, 539 U.S. at 339 (citing *Bakke*, 438 U.S. at 316 (opinion of Powell, J.)). The Court's approval of race as one of many factors would be meaningless if the Court were ultimately to hold that whenever race made a difference, its use was invalid.

B. Petitioners and their *amici* accuse the school boards of setting up a quota system and engaging in racial balancing. *See, e.g.*, PICS Br. at 25-29, 43-44; S.G. PICS Br. at 15-18, Meredith Br. at 5, 7. Again, the lower courts looked to this Court's *Grutter* opinion for guidance on whether the Seattle and Louisville assignment plans constitute impermissible quotas or permissible goals and whether the school boards engaged in unconstitutional racial balancing.

According to *Grutter*, a quota is "a program in which a certain fixed number or proportion of opportunities are

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PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Respondents.

CRYSTAL D. MEREDITH, Custodial Parent
and Next Friend of Joshua Ryan McDonald,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeal for the Ninth and Sixth Circuits

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BRIEF *AMICI CURIAE* OF MEDIA & TELECOMMUNICATION COMPANIES IN SUPPORT OF RESPONDENTS

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LIST OF *AMICI CURIAE*

Amici curiae include the following media and telecommunications companies:

Access.1 Communications Corporation
The Bakewell Company
BET Networks, a division of Viacom International Inc.
Border Media Partners LLC
Bustos Media, LLC
Diamond Broadcasting
Emmis Communications Corporation
Granite Broadcasting Corporation
Hispanic Broadcasters of Philadelphia, LLC
Inner City Broadcasting Corporation
ION Media Networks, Inc.
KB Prime Media LLC
La Favorita Broadcasting, Inc.
LIN Television Corporation
Millennium Digital Media, LLC
MTV Networks, a division of Viacom International Inc.
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Norsan Group Inc.
Perry Broadcasting Company Inc.
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INTEREST OF *AMICI*[1]

Amici are media and communications companies – broadcast, cable, digital, print and telecommunications providers whose workforces range from six to more than eleven thousand employees. They employ college graduates as well as a significant number of workers whose highest level of education is high school or below. As disseminators of ideas and information – the bedrock of our democracy – *amici* occupy a unique and particularly important role among American businesses.

Amici have in common their commitment to one fundamental proposition: that it is vitally important to their future – and to that of all American businesses – that there be a well-educated, diverse pool of potential employees who have not learned the racial biases that are fostered in segregated schools and who have instead learned the skills of valuing and communicating with people of different backgrounds and skin colors.

The benefits to *amici* of hiring employees from diverse backgrounds who have the skills necessary to work together are substantial and quantifiable. There is positive friction generated when individuals from different disciplines, cultures and thinking styles come together to develop creative ideas. Members of such heterogeneous teams are more innovative, have different approaches to problem-solving and are more likely to question routine business practices. In

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or its counsel, make a monetary contribution to the preparation or submission of this brief. *Amici* appreciate the extensive assistance of their researcher, Dr. Dean Colby of the University of Colorado.

addition, to survive in today's competitive global economy, *amici* must respond to the needs and interests of increasingly diverse customers and advertisers. As a result, *amici* recognize that employees skilled in forming cross-cultural relationships provide a key competitive advantage, especially in the creative fields of media and telecommunications.

Amici can say with certainty that a heterogeneous workforce, with employees who have experience dealing with and thriving in a multicultural environment, is crucial to the success of their companies. *Amici* also know from experience that while on-the-job diversity training is useful, it is no substitute for lessons learned early in life. Developing the skills of cross-cultural communication and tolerance is like learning a language – it is much easier for the young. And the lessons learned and attitudes formed at a young age last a lifetime.

Amici urge the Court to find that it is a government interest – and a truly compelling one – that America's young people, the workforce of tomorrow, be educated in schools that prepare them to work together productively in the diverse, multicultural world in which they will live. A ruling that racial diversity in K-12 public education is *not* a compelling government interest would send a devastating message to Americans and to the world – that as a nation, we believe that we have done enough with respect to racial integration and are prepared to accept the resegregation of our schools, regardless of the detrimental effects on our communities and our workforces. Should such resegregation be allowed to occur, *amici* would be significantly hindered in their mission – and, in many cases, obligation – to disseminate ideas and information in a way that is meaningful to the increasingly diverse population of our country. And

both American businesses and our democracy would be significantly poorer for the loss.

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SUMMARY OF ARGUMENT

Racial integration of elementary and secondary schools is a compelling interest because it is crucial to the future of our democracy and our ability to compete in the global economy. Educators, social scientists and courts agree that exposing students to peers from different racial and cultural backgrounds provides significant educational and social benefits that are vital to the success of the businesses of this nation. To thrive in today's changing marketplace, American businesses must cultivate heterogeneous workforces and appeal to an increasingly diverse customer base. An effective heterogeneous workforce requires employees who possess skills in cross-cultural communication and tolerance that are best learned in elementary and secondary schools. In addition, because minorities will make up an increasing percentage of tomorrow's workforce, American businesses have a vested interest in improving the lagging educational achievement of minority students.

Forcing educators to ignore race in making school assignments would do a tremendous disservice to our students and our country. The racial and ethnic diversity of our nation's schoolchildren is a significant national asset that must not be wasted or ignored. But we cannot profit from this diversity without first addressing the profound challenges presented by having students of different backgrounds unevenly distributed within geographic districts. This Court must not tie the hands of educators who aim to address these challenges directly and achieve the goal that clearly is in the national interest – educating children in racially and culturally diverse public schools. To do so would exact an enormous toll on the future of American businesses and American democracy.

ARGUMENT

I. America's Businesses Need A Diverse Workforce That Has Learned The Skills Of Cross-Cultural Communication And Tolerance.

The business case for workplace diversity is so thoroughly documented that it cannot be disputed. Innovative companies deliberately create heterogeneous workforces – workforces that include people from different racial and cultural backgrounds, of different genders and with different life experiences – because those differences result in varied approaches to problem-solving. In addition, the dramatically increasing market power of minorities requires that companies' workforces reflect the diversity of their customers.

A. A Heterogeneous Workforce Is More Creative And Better At Problem-Solving Than A Homogeneous Workforce.

In 1991, Robert Reich predicted that "in the emerging global economy, the only true competitive advantage lies in skill in solving, identifying and brokering new problems." Robert B. Reich, *The Work of Nations: Preparing Ourselves for 21st Century Capitalism* 184 (1991). His prediction was even more accurate than he could have anticipated.

As this Court recognized in *Grutter v. Bollinger*, 539 U.S. 306 (2003), American businesses have made workforce diversity an increasing priority. *Id.* at 330 ("major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, culture, ideas and

viewpoints") (citing Brief for 3M et al. as *Amicus Curiae* at 5; Brief for Gen. Motors Corp. as *Amicus Curiae* at 3-4).

One of the primary forces behind this phenomenon is the desire of those businesses to benefit from the innovation that derives from a heterogeneous workforce. Modern companies "deliberately establish heterogeneous teams to 'create a marketplace of ideas, recognizing that a multiplicity of points of view need to be brought to bear on a problem.'" Taylor Cox, Jr., *Cultural Diversity in Organizations: Theory Research & Practice* 32 (1993) (quoting R.M. Kanter, *The Change Masters* 167 (1983)); *see also* Corporate Executive Bd., Corporate Leadership Council, *The Business Case for Diversity* 3 (2003) ("Diverse backgrounds and experiences provide a catalyst for increased innovation, more so than a homogeneous staff, as a diverse mix of employees can: challenge long-accepted views; create dynamic environments leading to increased productivity; encourage a wider array of ideas and solutions; and offer varied perspectives."). Most important, the value of heterogeneity for team performance is clearest in the domains of creative and intellective tasks – the tasks that are essential to our country's global competitiveness. Richard A. Guzzo & Marcus W. Dickson, *Teams in Organizations: Recent Research on Performance & Effectiveness*, 47 Ann. Rev. Psychol. 307, 312, 331 (1996); *see also* Cox, *supra*, at 33 (citing P. L. McLeod et al., *Cultural Diversity & Creativity in Small Groups: A Test of the Value-in-Diversity Hypothesis* (Univ. of Mich., Ann Arbor, Working Paper, 1993)) (research shows that ideas produced by ethnically diverse groups were rated an average of 11 percent higher than those of homogeneous groups on both feasibility and overall effectiveness).

B. A Heterogeneous Workforce Offers An Advantage In Marketing And Customer Relations, Both Domestically And Globally.

Companies also have a critical need for effective heterogeneous workforces as a result of the increasing diversity of the domestic and global markets. Domestically, the customer base is changing rapidly. As explained by the Federal Communications Commission's expert advisory body on career advancement:

> The changing demographics of our nation have had a tremendous impact on our country's economy and the way businesses approach their bottom lines. Among Americans 70 and older, the ratio of majority to minority is 5.3 to 1. For Americans below the age of 40, the ratio is 2 to 1. For children under 10, the ratio is 1.5 to 1. Moreover, according to the U.S. Department of Commerce, in the year 2000, minority consumers spent $1.3 trillion in the marketplace. That number will nearly double to $2.5 trillion in the year 2020. *To be competitive, businesses must recognize this trend and take action to invest in and support*

> *the needs of its most important resource – their workforces.*

The Career Advancement Subcomm. of the FCC's Advisory Comm. on Diversity for Commc'ns in the Digital Age, *Workplace Diversity: A Global Necessity & an Ongoing Commitment* 8 (2004) [hereinafter FCC's Advisory Comm.] (emphasis added), *available at* http://www.fcc.gov/DiversityFAC/040614/recommend/Best Practices Report.doc; *see also* Corporate Executive Bd., *supra*, at 4 ("From 2000 to 2045, minority purchasing power is expected to increase from $1.3 to $6.1 trillion."). Statistics regarding the global market are equally compelling. In recent years, global merchandise exports have surged to comprise more than 20 percent of world gross domestic product. Ben S. Bernanke, Chairman of the Bd. of Governors of the Fed. Reserve Sys., Remarks at the Fed. Reserve Bank of Kansas City's Thirtieth Annual Economic Symposium: *Global Economic Integration: What's New & What's Not?* (Aug. 25, 2006), *available at* http://www.federalreserve.gov/boarddocs/speeches/2006 /20060825/default.htm#fn5.

These shifting demographics require companies to serve a market in which members of racial minority groups and overseas customers have significant buying power – making cross-cultural communication skills increasingly valuable in our economy. To respond to these changes, companies need employees with the ability to think across cultural lines. *See* Corporate Executive Bd., *supra*, at 4 ("By reflecting the diversity of a company's base in its workforce, companies are more likely to be sensitive to the needs of specific cultures and lifestyles."); *see also* Jonna L. Holland & James W. Gentry, *The Impact of Cultural Symbols on Advertising Effectiveness: A Theory of Intercultural*

Accommodation, in Advances in Consumer Research 488 (Merrie Brucks & Deborah J. MacInnis eds., 1997) ("As the demographics of the North American market continue to change, and as international marketing becomes increasingly vital to every business, *expertise in communicating with groups of various cultures is becoming an essential marketing skill.*") (emphasis added). As a result, "[s]tudents must broaden their experience and learn to communicate with people who are not like themselves if they hope to get a job in today's changing marketplace." Debbie Treise & Elaine Wagner, *Learning to Create Ad Strategies for Different Target Audiences*, 54 Journalism & Mass Commc'ns Educator 42, 49 (1999).

Media companies are acutely aware of the importance of cultivating effective heterogeneous workforces. In February 2003, the FCC's expert advisory body on career advancement surveyed 20 companies from the broadcast, telecommunications, cable, satellite, Internet and broadband industries, all of which "recognized diversity as an important goal to achieving success in the marketplace." *See* FCC's Advisory Comm., *supra*, at 15. One cable company described as its mission: to "create an environment of inclusion through attracting and retaining top talent who engage in a healthy give and take of ideas, who think, act and react to diverse consumer needs, who foster creativity and innovation and who help achieve our globalization objectives." *Id.*

C. Contributing To An Effective Heterogeneous Work Force Requires Cross-Cultural Communication Skills And Tolerance That Must Be Learned.

To harness the power of more creative, heterogeneous workforces, companies must recognize that such workforces are likely also to be less cohesive than homogeneous groups. *See* Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 Acad. Mgmt. Rev. 402, 403 (1996). As explained in a Corporate Leadership Council report:

> Some individuals are uncomfortable working in diverse environments, which requires sharing work as well as rewards with people unlike themselves. Even for individuals who approach diverse situations with an open mind, research indicates that the actual engagement process is sometimes difficult.

Corporate Executive Bd., *supra*, at 5.

To meet this challenge and thrive in our changing economy, businesses need employees who are skilled in cross-cultural communication and tolerance. Merely hiring a diverse group of individuals will not produce the desired creativity and innovation. Rather, to achieve success as part of a heterogeneous workforce, those individuals must be able

to work and interact effectively with people of different ethnicities and racial groups. *See* Michael Kurlaender & John T. Yun, The Civil Rights Project, Harvard Univ., *The Impact of Racial & Ethnic Diversity on Educational Outcomes: Lynn, MA School District*, 6-7 (2002); NAACP Legal Defense & Educ. Fund et al., *Looking to the Future: Voluntary K-12 School Integration, a Manual for Parents, Educators, & Advocates* 17 (2005); *see also* Corporate Executive Bd., *supra*, at 6 (the most effective communication style does not pretend that there are no differences but values diverse backgrounds and perspectives and discourages exclusion). Otherwise, the hiring companies will not be able to reach their creative potential or respond to the needs of our increasingly multicultural society. Kurlaender & Yun, *supra*, at 6-7.

Similarly, utilizing a diverse workforce to market effectively to minority customers requires much more than simply assigning a minority representative to that audience. In fact, such a strategy generally backfires. Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Moderating Effects of Work Group Perspectives on Diversity*, 46 Admin. Sci. Q. 229, 265 (2001) (staffing patterns that matched the racial make-up of the markets served fostered perceptions that white-staffed functions were higher status than those staffed by people of color and created interracial and inter-functional tensions). Instead, to capitalize on a diverse workforce to connect with minority audiences, all employees must be skilled in cross-cultural communication and tolerance.[2] *Id.* at 265, 267.

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[2] The importance of these skills also is evident in connection with related issues critical to our national security. For example, experts have noted that American Muslims have been less likely than their European counterparts to participate in terrorism because the United States has more successfully integrated Muslims into

D. America's Minority Schoolchildren Will Be Essential To The Future Workforces Of America's Businesses.

Even in those businesses that have not actively cultivated diverse workforces, minorities have begun to make up an increasing percentage of the employees – and that percentage will only continue to grow. Researchers project that as soon as 2009, women and minorities will comprise half of the American workforce. Corporate Executive Bd., *supra*, at 4. Business leaders are therefore acutely aware of the critical role that today's minority children will play in the future of their companies. These leaders also recognize that their companies' success rides on increasing the quality of American education, especially for minority populations. John J. Castellani, President, Business Roundtable, Testimony Before the Comm. on Educ. & the Workforce of the U.S. House of Representatives: *The Changing Nature of the Economy: The Critical Roles of Education & Innovation in Creating Jobs & Opportunity* (March 11, 2004), *available at* http://www.businessroundtable.org//taskForces/taskforce/document.aspx?qs=6D75BF159F849514481138A77EC1851159169FEB56339B2; *see also* Business Roundtable, Press Release, Education Leaders Give No Child Left Behind a Grade of "A", but Cite Implementation Problems (Dec. 3, 2003) (on file with author), *available at* http://www.businessroundtable.org//taskForces/taskforce/document.aspx?qs=6D55BF159F849514481138A74EA1851159

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mainstream society. *See* Daniel Benjamin & Steven Simon, *The Next Attack* 117-25 (2005); *see also Johnson v. California*, 543 U.S. 499, 507-09 (2005) (racial integration in prisons tends to diffuse racial tensions and prepares inmates for reentry into society).

169FEB56C36B7 (quoting Kati Haycock, Dir. of The Educ. Trust: "'There isn't a community in the country that isn't now aware of the need to do something differently' to help [minority and disabled] children").

II. Integrating K-12 Schools Is A Compelling Interest Because Integrated Schools Teach Skills That American Children And Businesses Need To Succeed In The Future.

The interest in integrating K-12 schools is even more compelling than that articulated by the Court in *Grutter*. In that case, in the context of affirmative action in higher education admissions, the Court recognized a compelling interest in "the educational benefits that flow from student body diversity." 539 U.S. at 330. As the Court explained, those benefits are not limited to the diversity of viewpoints that are shared on a college campus. *Id.* Rather, the benefits include promoting cross-racial understanding, breaking down stereotypes and preparing students to succeed in an increasingly diverse society. *Id.* Thus, the same principle underlies the compelling interests in integrating K-12 schools and in achieving diversity on college campuses: Students benefit socially and academically from learning environments that include peers from different races and cultural backgrounds.

But the two interests are not identical, and the need for students to experience such diverse educational environments is more urgent at the K-12 level. It is in elementary and secondary school that impressionable children form life-long racial attitudes. Those educated in heterogeneous classrooms learn to value people whose skin colors and accents are different from their own. And it is that learned tolerance that

enables them as adults to value the ideas of colleagues unlike themselves and to work together on complex solutions. Furthermore, at the lower school level, racially integrated classrooms can result in dramatic improvement in the achievement of minority students. NAACP et al., *supra*, at 16-19; James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 Ohio St. L.J. 327, 337 (2006).

These unsurprising differences between the goals of integrating K-12 schools and achieving broad diversity in higher education do not diminish the extent of the interest in either case. NAACP et al., *supra*, at 29; Ryan, *supra*, at 327, 333, 335, 339-40, 342. For fundamental to any strict scrutiny analysis of race-based governmental action is consideration of the "particular context" and any "relevant differences" that distinguish that context from other uses of race. *Grutter*, 539 U.S. at 327; *see also Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 16 (1st Cir. 2005) (en banc) (explaining that the focus on racial, rather than viewpoint, diversity at the K-12 level "is the result of contextual differences between higher education, where the emphasis is on the exchange of ideas, and primary education, where the emphasis is on fostering interracial cooperation"). And in the context of elementary and secondary school education, school districts' interest in educating students in racially diverse schools is unquestionably compelling.

A. Integrated K-12 Schools Teach The Skills Of Cross-Cultural Communication And Tolerance At An Age When Those Skills Are Best Learned.

This Court has long viewed public schools as teaching much more than academic fundamentals and playing a major role in "maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221-23 (1982). As the Court stated in *Plyler*:

> We have recognized 'the public schools as the most vital civic institution for the preservation of a democratic system of government' and as the primary vehicle for transmitting 'the values on which our society rests.' . . . Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. Similarly, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court described our public education system as providing "the very foundation of good citizenship." *Id.* at 493; *see also* Erica Frankenberg et al., The Civil Rights Project, Harvard Univ., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 11 (2003) ("When we look at the short-term outcomes of schooling such as test scores, our focus is too narrow and we are severely

underestimating the roles that schools play."). On par with the teaching of academic subject matter, "education for success in a diverse society is not simply something desirable public elementary and secondary schools do; it is why these schools exist." Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary & Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 Mich. J. Race & L. 63, 138 (2002).

Public schools are pivotal to society in large part because of their heavy influence during students' most impressionable years. Relevant to the issue before the Court, studies demonstrate that children form strong racial attitudes by late elementary school. *See* Suzanne E. Dutton et al., *Racial Identity of Children in Integrated, Predominantly White, & Black Schools*, 138 J. Soc. Psychol. 41, 42, 50-51 (1998) (children develop and begin to act on prejudice by age eight to 12; most children will have formed strong racial attitudes by late elementary school). For this reason, cross-cultural communication skills and tolerance are best taught when children are young. *See Comfort*, 418 F.3d at 15-16 (citing significant evidence in the record that the benefits of exposure to racial diversity are greater at younger ages and quoting the district court in *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 356 (D. Mass. 2001): "It is more difficult to teach tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking"); Michael J. Anderson, *Race as a Factor In K-12 Student Assignment Plans: Balancing the Promise of Brown with the Modern Realities of Strict Scrutiny*, 54 Cath. U. L. Rev. 961, 987-88 (2005) ("the need for exposure to other races is more urgent in elementary and secondary schools, as the benefits of cross-racial interaction are most profound at younger ages") (citing Dutton et al., *supra*, at 42).

Research also shows that attending integrated K-12 schools makes a significant difference in preventing the development of these early prejudices and teaching a tolerance that carries over into adulthood. Students who attend heterogeneous schools have been found to demonstrate more positive perceptions of peers of other races and a strong level of comfort with diverse classmates. *See* Heidi McGlothlin & Melanie Killen, *Intergroup Attitudes of European American Children Attending Ethnically Homogenous Schools*, 77 Child Dev. 1375, 1383-84 (2006); NAACP et al., *supra*, at 3; *see also* Dutton, *supra*, at 42 (segregated schools lead to lower levels of acceptance of other races and higher levels of racism). In addition children educated in desegregated environments later tend to live and work in more integrated communities. NAACP et al., *supra*, at 17. Conversely, students – and white students in particular – who are isolated in homogenous schools exhibit less tolerance of differences and are later less comfortable in diverse workplaces. *Id.* at 16, 18.

This is because "[s]tudents learn as much from their experiences as they do from what they are told. They can be told that people are equal regardless of race, but when they learn it from their own experience, it becomes a life-long lesson rooted in reality and not mere platitude or an idealistic notion." Mead, *supra*, at 140-41 (citing Brief for Am. Ass'n of Sch. Adm'rs et al. as *Amicus Curiae*, at 11, *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999)); *see also Grutter*, 539 U.S. at 347 (Scalia, J., dissenting) (the benefit of diversity "is a lesson of life rather than law – essentially the same lesson taught to (or rather learned by, for it cannot be 'taught' in the usual sense) people three feet shorter and twenty years younger than the full-grown adults at

the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens"). Also of critical importance to American businesses and society, for the large percentage of tomorrow's workforce that will not attend college – or might not even complete high school-- high school likely will be the last, and best, opportunity to learn to work side-by-side with peers of other races. *See Grutter*, 539 U.S. at 355 n.3 (Thomas, J., dissenting) ("It must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.").

B. Integrated K-12 Schools Are Necessary To Ensure Excellence In Our Public School Education.

Racially integrated schools benefit all children, not just minorities, because all children need to learn the skills necessary to succeed in the diverse, multicultural world that they are entering. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982) ("'[I]t should be equally clear that white as well as negro children benefit from exposure to 'ethnic and racial diversity in the classroom.'"); Dutton et al., *supra*, at 42 ("Racial identity and acceptance are important for all races, especially in this increasingly multiracial society. . . . As a controlled environment, school can play a vital role in improving racial identity, understanding and education."); Ryan, *supra*, at 337 ("racially integrated schools can increase racial tolerance and crossracial understanding, break down stereotypes, and help prepare all students for diverse workplaces").

The Court acknowledged this phenomenon in *Grutter*, noting that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" 539 U.S. at 330. Yet, today, the typical white public school student attends a school that is 80 percent white, a statistic that is far out of proportion with the overall representation of white children in public schools. Frankenberg et al., *supra*, at 4. And most blacks and Latinos attend schools in which approximately two-thirds of the students are also black or Latino and more than half of the population is of the student's own race. NAACP et al., *supra*, at 13. Asians, on the other hand, live in the nation's most integrated communities and attend the most integrated schools – and have a college graduation rate almost double the national average. Frankenberg et al., *supra*, at 4.

Integrated schools also are critical to the mission of preparing minority children to fulfill their vital role in the future of American businesses. Research clearly demonstrates that students who attend schools that are predominantly minority are less likely to achieve educational success than those who attend schools that are predominantly white. Overall graduation rates and standardized test scores are significantly lower in high schools that are predominantly minority. Gary Orfield & Chungmei Lee, The Civil Rights Project, Harvard Univ., *Why Segregation Matters: Poverty & Educational Inequality* 5-7 (2005). Among minority students in particular, those in integrated schools not only have lower dropout rates but also perform better on standardized tests than those in predominantly minority schools. Jennifer Cheeseman Day with Amie Jamieson, U.S. Census Bureau, *Census 2000 Brief, School Enrollment: 2000* 6 (2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-

26.pdf. In addition, attending integrated schools increases minority children's exposure to the networks and resources that provide access to future educational and employment opportunities. *See* Frankenberg et al., *supra*, at 12; NAACP et al., *supra*, at 16, 18. After studying data submitted by virtually all U.S. schools to the Department of Education, researchers at The Civil Rights Project at Harvard University concluded that "[s]egregated schools have much higher concentrations of poverty[3] and other problems and much lower average test scores, levels of student [sic], teacher qualifications, and advanced courses." Frankenberg et al., *supra*, at 11. If forced to continue to attend such segregated schools, a large percentage of today's minority children will not be equipped to participate as effective members of the heterogeneous workforces that are so critical to our nation's economy.[4]

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[3] About half of all black and Latino children attend schools in which 75 percent or more of the students are poor. In contrast, more than half of all white children attend schools in which 25 percent or fewer of the students are poor. NAACP et al., *supra*, at 13-14 (citing Orfield & Lee, *supra*); *see also* U.S. Dept. of Educ., Nat'l Ctr. for Educ. Statistics, *The Condition of Education, Concentration of Enrollment by Race/Ethnicity and Poverty* (2006), *available at* ttp://nces.ed.gov/programs/coe/2006/section1/indicator 06.asp (according to the most recent statistics, 48 percent of black and 49 percent of Hispanic students are enrolled in schools with the highest measure of poverty, compared with five percent of white students).

[4] Ironically, refusing to enable localities to integrate their schools also would delay the universal hope that "over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *See Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring) (noting that this goal cannot be realized until more minority students are equipped through high-quality lower school education to meet the admission requirements of selective institutions); *see also* NAACP, *supra*, at 44.

III. Forcing Educators To Ignore Race In Making School Assignments Would Exact A Tremendous Toll On The Future Of American Businesses And Democratic Institutions.

Although educators and business leaders alike look forward to a day when our country is truly color-blind, we are not yet there. *See Grutter*, 539 U.S. at 333 ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."). And until we reach that goal, if we cannot talk about our racial diversity and address it directly as a tremendous potential asset, it will continue to be a tremendous national problem.

Petitioners ignore the lasting significance of race in our country in urging that K-12 educators do not have a compelling interest in integrating their schools because they seek only racial diversity, not the more broadly defined diversity found to be compelling in *Grutter* and *Gratz*. After a period of significant gains in desegregation between the 1960s and the late 1980s, our schools now are becoming more segregated, not less. NAACP et al., *supra*, at 11. Nationwide, more black students attended primarily black schools in 2000 than in 1988. *Id.* In 2000, 31 percent of black students in the South attended majority white schools, the lowest number since 1968. *Id.* And despite some improvement during the last decade, census figures for 2000 still show high levels of residential segregation, especially for blacks. John Iceland et al., U.S. Census Bureau, *Census 2000 Special Reports, Racial and Ethnic Residential Segregation in the United States: 1980-2000* 3-4 (2002), *available at*

http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf; Frankenberg et al., *supra*, at 4-6, 15-17. That means that if all children attend the public schools closest to their homes, our schools will remain segregated, and few students – minority or white – will receive the benefits of integrated education. Frankenberg et al., *supra*, at 4-6 ("The persisting high levels of residential segregation for blacks and increasing levels for Latinos, as reported in the 2000 Census, indicate that desegregated education will not happen without plans to make it happen."). Nor will these students graduate with the cross-cultural communication skills and tolerance that are so vital to the future success of American businesses.

Petitioners' argument also fails to recognize that the use of race in K-12 student assignments is less troubling, not more so, than the affirmative action plans at issue in *Grutter* and *Gratz*. Unlike in college admissions, in every public school district across the country, each child is guaranteed a place by law. Ryan, *supra*, at 335-36. Thus, the consideration of race at the elementary and secondary school levels does not deprive any child of the opportunity for an education. *Id.*; Mead, *supra*, at 125. This fundamental distinction renders inapplicable direct comparisons to the focus in *Grutter* and *Gratz* on proper considerations for "admissions" programs, through which only a select set of students is granted an opportunity to receive higher education at a state institution. *See Grutter*, 539 U.S. at 333-44 (discussing factors related to competition among applicants and individualized consideration of applicants' qualifications "for [a] seat" in the limited class); Mead, *supra*, at 124-25 (noting that unlike with affirmative action, "no education is denied and no education is delayed" at K-12 schools and explaining that "this difference marks a way to distinguish such "injuries" from those suffered by plaintiffs in [*Adarand*, *Croson*,

Wygant or Bakke]"); Ryan, *supra*, at 336 ("Indeed, although often lumped together, voluntary integration plans at the public school level are not affirmative action plans.").

As recognized by the courts below, because of the nature of K-12 education, local districts cannot effectively integrate America's public schools without considering the number of students of each race in each school. There simply is no other way to accomplish this critical objective. Yet, this direct consideration of race need not be problematic in the Court's strict scrutiny analysis. For just as the compelling interest in integrating K-12 schools differs in some respects from that in achieving broad diversity in higher education, so logically do the constitutionally permissible means of reaching these ends. The First Circuit recently addressed this issue, explaining that

> [u]nlike [in *Gratz* and *Grutter*], the [K-12 integration plan] is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest.

See Comfort, 418 F.3d at 18.

Furthermore, this Court has long recognized the tradition of local control of public education and school districts' authority to make school assignments to maximize educational benefits – even if that means that students do not attend the schools closest to their homes. *See Freeman v.*

Pitts, 503 U.S. 467, 490 (1992) ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'"); *Board of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."). For example, in *Washington v. Seattle School District No. 1*, the Court noted that "[t]he question whether to provide an integrated learning environment rather than a system of neighborhood schools surely" was the type of decision that was "firmly committed to the school board's discretion." 458 U.S. at 479-80, (also recognizing the many other educational reasons for assigning a student to a school other than that closest to his or her home). In light of this longstanding and important deference to local control, "courts should respect a local district's conclusion that racially integrated schools are part of its institutional mission and presume that local officials are acting in good faith to achieve that mission." Ryan, *supra*, at 339 (summarizing the Court's history of recognizing local control).

Especially considering the strength of the nation's interest in integrated K-12 schools, this Court should not now prohibit school districts from exercising their assignment authority simply because race is one factor in the process. The costs – and the educational benefits – of segregated schools are the same regardless of whether the schools are segregated by law or by residential demographics. *See* Mead, *supra*, at 136 ("Education's obligation to equip each student for success in a diverse world makes integration a compelling interest, regardless of how the environment came to be as it is today."). For the Court to hold that it is unconstitutional for school officials to make assignments on the basis of race as

part of a voluntary desegregation plan would do great harm to American students, businesses and citizens.

CONCLUSION

Together with the rest of Americans, *amici* look forward to the day when racial prejudice has been eradicated in this country and when race need no longer be a factor in educational or business decisions. But we will never reach that day without a concerted, conscious effort to teach our children at their most impressionable ages to understand and appreciate people of different colors, backgrounds and cultures. These critical values cannot be learned from a book. Rather, to internalize tolerance and master cross-cultural communication, students must interact with peers of other races on a daily basis and in a variety of everyday situations – as is only possible in the K-12 classrooms where they spend the majority of their time.

Thus, the Court must not close the door on local communities that desire to advance multicultural understanding by integrating their public schools. To do so would considerably dim the futures of American businesses vying to compete in an increasingly global economy and would set back our nation's progress toward the goal of achieving a truly color-blind society.

We urge the Court to find that achieving racial diversity in K-12 schools to maximize the educational benefits to all students is a compelling interest – and that it is constitutionally permissible for school officials to use measures aimed directly at minimizing racial imbalance in K-12 school enrollment. Whether or not the particular plans at issue in these cases are found acceptable, the Court must not

hold that the plans fail simply because they acknowledge that racial diversity is the goal and that the only way to measure success in achieving that goal is by considering the number of students of each race throughout the district and in individual schools.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of JOSHUA RYAN McDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF OF THE NAACP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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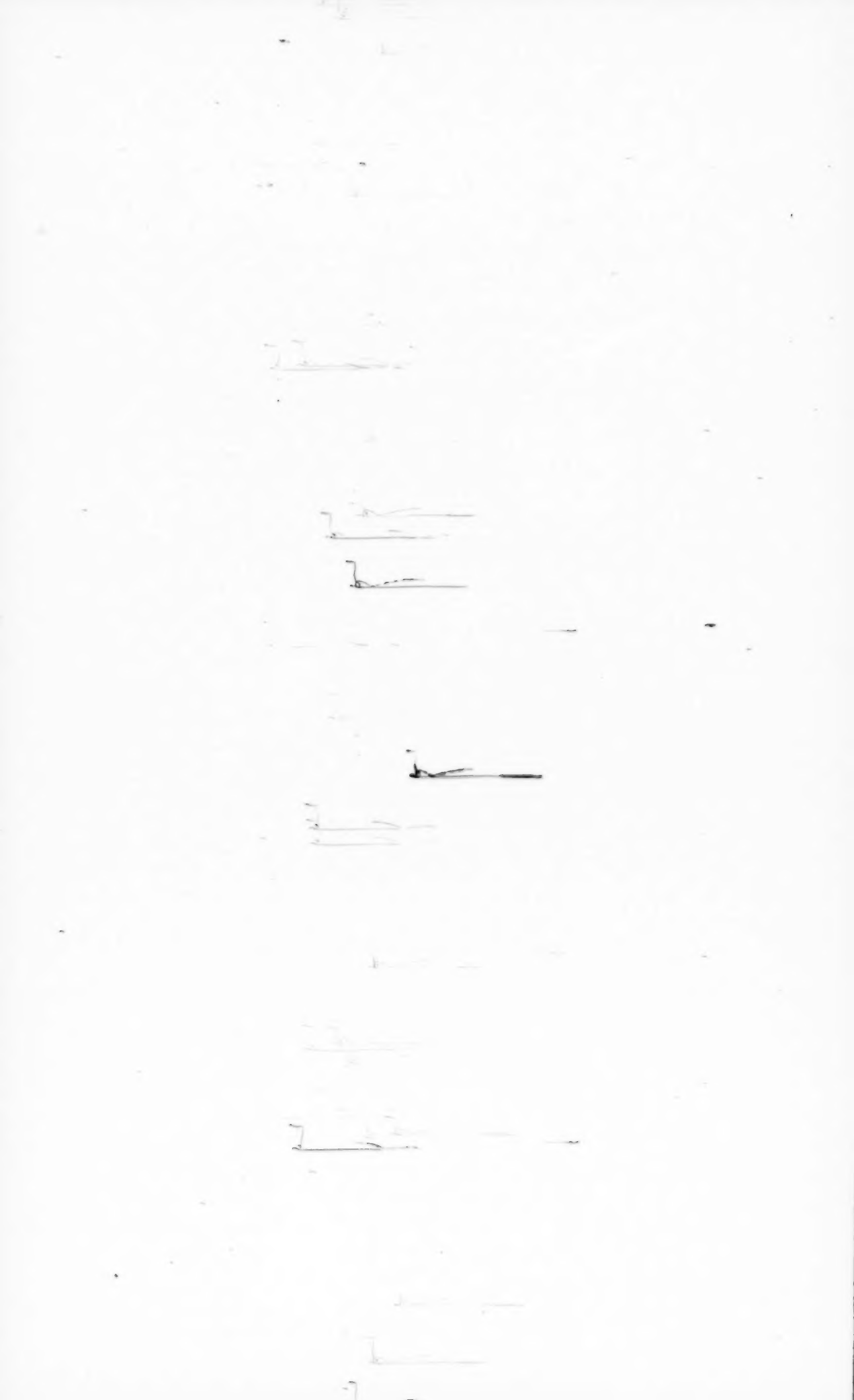

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has affiliates and members nationwide, including in Kentucky, Washington and Florida, and in other parts of the world.[2] The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias.

The NAACP has a significant interest in the outcome of this case. The organization is deeply concerned with ensuring excellence as well as equity in public education. Educational opportunity for African Americans has been a fundamental goal of the NAACP since its founding. Within the context of school desegregation, the NAACP works to confront unequal educational outcomes, to eliminate physical segregation and to eliminate "within school" segregation.

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1 Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity, other than amicus curiae and its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given blanket consent to the filing of all amicus briefs in this case, in letters of consent filed with the Clerk of this Court.

2 Earlier this year the Eastern Shoshone Indian Tribe at Ft. Washakie, Wyoming became the first Native American tribe to purchase an NAACP corporate membership.

The NAACP has been active in monitoring and litigating issues concerning racial equality in the public education system of the State of Florida, which is the subject of the Brief of Florida Governor John Ellis "Jeb" Bush and the State Board of Education as *Amici Curiae* In Support of Petitioners, Nos. 05-908 & 05-915 ("Florida Governor's brief"). In addition to representing parties or appearing in significant race-related litigation in Florida,[3] NAACP

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[3] *E.g., Fla. ex rel. Hawkins v. Bd. of Control,* 350 U.S. 413 76 S. Ct. 464 (1956) (admission of Negro could not be delayed on basis of considerations applicable to desegregation of public elementary and secondary schools, and Negro was entitled to prompt admission under rules and regulations applicable to other qualified candidates); *Gibson v. Fla. Legislative Investigation Comm.,* 372 U.S. 539, 83 S. Ct. 889 (1963) (state legislative committee empowered to investigate subversive and Communist activities failed to show a substantial connection between local race relations association, a wholly legitimate association, and Communist activities, and was not entitled to compel association president to produce association's membership records); *Sweet v. Childs,* 507 F.2d 675 (5th Cir. 1975) (class action by black public high school students against county and state officials, challenging school disciplinary policies); *NAACP, Inc. v. Fla. Bd. of Regents,* 863 So.2d 294 28 Fla. L. Weekly S815 (Fla. 2003) (civil rights organization had associational standing to challenge State Board of Education rule amendments prohibiting the use of race or gender preferences in admissions); *Bush v. Holmes,* 886 So.2d 340, 29 Fla. L. Weekly D2543 (Fla. Dist. Ct. App. 2004) (facial constitutional challenge to state school voucher program; court held that no-aid provision of State Constitution prohibited indirect benefit to sectarian schools resulting from receipt of funds by such institutions through voucher program), *aff'd in part,* 919 So.2d 392, 31 Fla. L. Weekly S1, S65 (Fla. 2006); *Jacksonville Branch, NAACP v. Duval County Sch. Bd.,* 978 F.2d 1574, 78 Educ. L. Rep. 659 (11th Cir. 1992) ((1) under terms of consent agreement, Organization was required to pursue negotiation remedy before seeking judicial enforcement of agreement's staff assignment provisions; (2) Organization was not entitled to order compelling board to comply with consent agreement's provisions for free transportation of all students); *Jacksonville Branch, NAACP v. Duval County Sch. Bd.,* 883 F.2d 945, 55 Educ. L. Rep. 861 (11th Cir. *(cont'd)*

branches monitor post-unitary status in Florida school districts.[4] A few years ago, the NAACP issued a report card, *Schooling in Florida: Still Unequal* in *Brown 50 Years and Beyond: Promise and Progress—State Data Sheets 10* (NAACP National Education Department 2004) (prepared by the Education Trust for the NAACP 2004).

In 2005 the Florida State Conference of NAACP Branches co-sponsored public hearings along with the Advancement Project and the NAACP Legal Defense and Educational Fund to expose, in part, the connections between disparities in educational opportunities and extreme discipline policies. The hearings were held in Pinellas, Hillsborough, Duval, Palm Beach, Broward and Miami-Dade counties.[5] The hearings concluded that prevention and intervention programs are the most effective methods for maintaining safe schools and creating a productive learning environment. The hearings also revealed a connection between quality of education and school discipline. Across Florida, black

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1989) (evidence concerning racial composition in students and faculty of various schools was insufficient to establish that county school system had achieved unitary status, as required to warrant dissolution of injunction requiring school board to integrate system); *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 978 7 Educ. L. Rep. 262 (11th Cir. 1982) (evidence supported conclusion that at-large system school board electoral operated to preclude black population, representing substantial percentage of registered Democratic voters in county, from electing a member of its own race to the school board).

[4] *E.g.*, St. Lucie County (Fort Pierce) NAACP (district declared fully unitary in 1997).

[5] *See* NAACP, *Arresting Development: Addressing the School Discipline Crisis in* Florida, *available at* http://www.advancementproject.org/reports/ArstdDvpmES.pdf; *also available at*: http://www.naacpldf.org/content/pdf/pipeline/arresting_development_full_report.pdf.

students struggle with low achievement in terms of low-test scores and graduation rates, as well as high retention and dropout rates. At the same time, these same students face a disproportionately high number of disciplinary actions.

The NAACP, the nation's oldest and largest civil rights organization, files this *amicus curiae* brief on behalf of its members nationwide – indeed, worldwide – to urge this Court to uphold more than fifty years of its precedents designed to ensure school integration and educational opportunity for children of color. The NAACP, together with our members and affiliates in the State of Florida, urge the Court that, contrary to the claims in the Florida Governor's brief, strict race neutrality in elementary and secondary education has not reduced the achievement gap in that State, and that there remain significant disparities among blacks, Hispanics and white students in many phases of learning.

African Americans have been excluded from economic, educational and social opportunities for hundreds of years – both by law and by private custom. For this reason, the NAACP supports the use of reasonable, race-conscious measures, including voluntary desegregation plans, in public schools (K-12). This nation cannot afford to abandon the goal of school integration at this critical phase when many communities are facing the challenges of resegregation and continuing inequality of educational opportunities. The Court should continue to uphold reasonable race- and ethnic-conscious measures to achieve the significant educational benefits that flow from school integration.

SUMMARY OF ARGUMENT

This Court should reject the Florida Governor's suggestion that the promotion of academic achievement is the only legitimate state function with respect to education. While student achievement undoubtedly is a primary goal of

elementary and secondary education, the Florida State Legislature as well as this Court have recognized the important role of elementary and secondary schools also in inculcating important social values. Among these important values is racial and ethnic harmony and appreciation for diverse, plural experiences. Consequently, the Court should not foreclose the ability of school districts to choose to employ the reasonable race-conscious means they prefer to as means of values inculcation.[6]

The Florida Governor's suggestion that strictly race-neutral approaches are adequate, or even better equipped than race-sensitive measures, to maximize student achievement is belied by his own statistics. Florida's school policies are certainly not race neutral in impact, at least if one carefully examines the proffered data contained in the Florida Governor's brief. An analysis of black and Hispanic student access to gifted programs, high school completion rates, retention rate and graduation rates demonstrates just how lacking the State's race-neutral approach has been for minority schoolchildren with respect to these important key markers of academic achievement.

Given the achievement gap between minority and non-minority students that continues to characterize educational achievement in the State of Florida, the Florida Governor's brief prematurely calls for the end of voluntary school integration as a mechanism for improving the quality of education and the life chances for African American and

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[6] If the Court were to recognize diversity or the use of a voluntary desegregation plan as a compelling state interest in high school, Florida would not be precluded from continuing "race neutral" measures. Indeed, *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003), and *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003), have not affected California and Washington state restrictions on race-conscious measures.

Hispanic schoolchildren. When the data for Florida used in the Florida Governor's brief is appropriately disaggregated to focus on subgroups, it becomes clear that Florida's race-neutral accountability system embodied in its A+ Plan has failed to benefit all children equally. Hence, the NAACP urges this Court to allow school districts the choice of education policies and to reaffirm the value of integration.

ARGUMENT

I. VALUES INCULCATION IS A LEGITIMATE FUNCTION OF PUBLIC SCHOOLS.

The NAACP submits that values inculcation is a legitimate function of public schools.[7] The Florida Governor attempts to marginalize the "social benefits" and "community benefits" of integration. *See* Florida Governor's Brief at 5, 13, 14. Contrary to the Florida Governor's suggestion that academic achievement is the only or principal legitimate function of public schools, however, this Court repeatedly has noted that an important objective of public education is the inculcation of fundamental values necessary for the maintenance of a democratic political system. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 272, 274-75 (1988) (noting the importance of

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[7] This does not mean, of course, that various members of the learning community will not occasionally disagree about the appropriate pedagogical approaches to convey certain values, *e.g.*, the debates over the teaching of "scientific creationism" and sex education. In the early 1990's, for example, the Austin, Texas NAACP President sought to speak at a public meeting of a sex education task force appointed by the school district. The task force chair refused to allow the branch president to speak, apparently out of a disagreement with the branch's position on sex education. The speech problem was rectified when, in response to the NAACP's formal complaint, the Texas Education Agency ordered the school board to take remedial steps to correct its unconstitutional behavior.

public elementary and secondary schools in awakening children to cultural values); *id.* at 278 (Brennan, J., dissenting) (stating that public elementary and secondary schools "inculcate[] in tomorrow's leaders the 'fundamental values necessary to the maintenance of a democratic political system...' All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "community values"") (*quoting Board of Education v. Pico ex rel. Pico*, 457 U.S. 853, 864 (1982); *Ambach v. Norwick*, 441 U.S. 68, 77(1979) (citations omitted) (third alteration in original)).

Indeed, this Court has stated:

> The role and purpose of the American public school system was well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic....It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." In *Ambach v. Norwick*, we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting Charles A. Beard & Mary R. Beard, *New Basic History of the United States* 228 (1968) (citations omitted) (alterations in original)).

Its protestations notwithstanding, even Florida apparently believes in value inculcation, one form of which is "character education." On February 18, 2000, an employee

of the Florida Department of Education wrote District School Superintendents about the 3rd Annual Florida Conference on Character Education scheduled for April 9-11, 2000 in Altamonte Springs, Florida. The purpose of conference was to assist in implementing character development programs. The official noted, "The 1999 Florida Legislature added character education to Section, 233.061, F.S., required instruction. [*sic*] This requirement calls for all elementary schools to teach character development."[8]

Indeed, even before the Florida Legislature required character education, several districts in Florida, including Escambia, Clay, Lee, Seminole and Martin, had implemented character education programs.[9] Florida described character education as follows:

> Character education is the process of helping young people to develop good character. Specifically, character education is helping young people know, care about, and act on core values such as fairness, honesty, compassion, responsibility, and self-respect.
>
> ....
>
> Our society is split over specific moral issues such as abortion, euthanasia, and capital punishment. However, despite the differences, we are able to identify common

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[8] Memorandum from Betty Coxe to District School Superintendents of 2-18-2000, *available at* http://www.firn.edu/doe/dps/dpsmemo00/00-093.htm.

[9] *See* Florida Department of Education, *Character Education*, Vol. 2, Issue #2, Florida Safe and Drug-Free Schools Notes (1998), *available at* . http://www.unf.edu/dept/fie/sdfs/notes/character_ed.pdf

> core values across cultures and belief systems. It is these core values that are identified, agreed upon, promoted, practiced, and internalized in a character education program.[10]

District diversity and voluntary integration plans are a type of values inculcation. They are an extension of the state's legitimate interest in antiracist, multicultural education. The public school curriculum goes beyond the traditional academic goals of reading, writing and arithmetic, and multicultural education extends beyond the curriculum. A complete education is holistic, addressing the child's development in areas of social skills, workplace skills and critical thinking, nurturing a young person's ability to grow

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[10] *Id.* at 1-2. In discussing strategies for effective character education, the Florida article also notes that any school-wide effort requires that schools and teachers:

> Ask: "What positive character-building experiences is the school already providing for its students? What negative moral experiences (peer cruelty, adult disrespect of students...) is the school failing to address? What important moral experiences (cooperative learning, school and community service, *opportunities to learn about and interact with people from different racial, ethnic, and socioeconomic backgrounds*) is the school now omitting? Including?"

Id. at 6 (emphasis added). The race and ethnic interaction question is appropriate. Florida was ranked 17th among the most segregated states for black students in 2001-2002 with respect to the percentage of blacks in 90-100% minority schools. 31.5% of Florida blacks were in such heavily segregated schools. *See* NAACP, *Brown Fifty Years and Beyond: Promise and Progress Advocacy Report,* at 6 (2004), *available at* http://www.naacp.org/about/resources/publications/education_brown_advocacy_report.pdf (citing 2001-2 NCES Common Core of Data).

in all respects. Certainly the Florida Governor cannot be suggesting that his or his State's support for mainstays of the school experience – such as recital of the Pledge of Allegiance, the singing of the Star Spangled Banner at games, extracurricular activities, including high school sports, or character education – is inappropriate as a matter of educational policy.[11]

School authorities traditionally are charged with broad power to formulate educational policy and could legitimately conclude that race-conscious student selection processes are required to effectuate the district's educational policy goals. Those who run our schools *might* conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have experience with a mix of students according to racial background or national origin. Diversity in the classroom can increase the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races. Diversity also brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. Diversity is thus a

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[11] A Florida Department of Education official described Florida's character education legislation in the following manner:

> Such programs must be secular in nature and must stress such character qualities as attentiveness, patience, and initiative. The legislation also amended Section 233.0612, F.S., addressing authorized instruction, to add ethics to the list of subjects a school district may teach.

Memorandum from David Mosrie to District School Superintendents, dated July 30, 1999, *available at* http://www.firn.edu/doe/dps/dpsmemo00/00-004.htm.

valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world.[12]

Diversity and voluntary desegregation plans also are tools to address and combat the effects of *de facto* segregation. Districts have a legitimate interest in making sure that children are not casualties of the phenomenon of racially isolated housing patterns. The focus here is on the educational benefits of integrated learning environments.

In summary, public schools function beyond reading, writing and arithmetic. A fundamental role of public schools is values inculcation, of which Florida's character education program constitutes one form. School district diversity and voluntary integration plans constitute another form of values inculcation, and districts have at least as much interest in implementing such plans as they might in implementing a character education program.

II. SIGNIFICANT RACIAL DISPARITIES PERSIST IN FLORIDA EDUCATIONAL ACHIEVEMENT.

In the years following *Brown v. Board of Education* until the 1980's, some progress was made in desegregating Florida's schools. But from the 1990's to the present, Florida's schools have been resegregating, particularly in

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[12] *See, e.g.*, on the benefits of an integrated education, the seminal study by A. Wells, J. Holme, A. Revilla and A. Atanda, *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* (TEACHERS COLLEGE, COLUMBIA-UNIVERSITY AND UCLA (2004)), *available at* http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf and the pending book based on the study, *Both Sides Now: the Story of Desegregation's Graduates* (HARVARD UNIVERSITY PRESS 2007); *see also* J. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 257 (1999).

large urban districts, with dire consequences for African American, Hispanic, and low-income students. Beginning in 1999 and continuing to the present, the Florida Governor has retreated from the goal of school desegregation or integration as a strategy to ensure that African American and Hispanic children receive an equal educational opportunity. The State instead has adopted a race-neutral reform called the A+ Plan for education. This plan focuses on standards, testing, and accountability, instead of on educational equity.

The A+ Plan may well be race-neutral in its design. *See* Florida Governor's Brief, at p. 5. However, it is not race-neutral in its effects. The latest research on the effects of the A+ Plan demonstrates that "[u]sing accountability mechanisms to evaluate schools and dole out incentives and disincentives without taking into account the racial distribution of students is clearly unfair and probably will not maximize the efficiency of such initiatives in accomplishing their objectives."[13] As a result of this approach, Florida's African American students, who were once the targets of invidious racial discrimination, are now underrepresented with respect to virtually every positive indicator, and overrepresented with respect to most negative indicators of student academic achievement.

This brief examines increasing racial disparities in retention rates, high school completer rates, graduation rates, and access to gifted programs, using the same data set that the Florida Governor's brief uses.[14] The data demonstrates

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[13] K. Borman, D. Michael, D. Eitle, R. Lee, et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41:3 AM. EDU. RES. J. (2004), *available at* 2004 WLNR 15850705.

[14] The professor and researcher who provided expert analysis for this brief used a standard methodology of collecting data files available *(cont'd)*

that recent reforms have neither improved educational quality nor educational equity in Florida. Instead, they have had a disparate racial impact on black and brown students. Contrary to the claims of the Florida Governor, the State of Florida is experiencing a significant – and in many respects *widening* – achievement gap, especially as between African American and white students.

A. Increased Racial Disparities in High School Completion Rates

An analysis of statewide education shows that more Florida students completed high school in recent years – up from 109,954 in 2000 to 141,436 in 2005. *See* Table I, Appendix ("A") at A-1. Much of this increase may be attributed to Florida's overall population growth during the same time period. However, just as the No Child Left Behind Act requires school systems to report test score data disaggregated by student race and ethnicity to expose ethnic variations in performance, it is necessary to disaggregate Florida high school completion data by race and ethnicity in order to determine if there has been a disparate impact on diplomas received by race in light of Florida's A+ program.

When we disaggregate the types of diplomas received by different racial and ethnic groups, we can see where race

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(cont'd from previous page)

on the Florida Department of Education website. They downloaded the data into Microsoft Excel format to produce the information in the tables of the attached appendices and to present the analysis in the brief. The educational researchers include Kathryn M. Borman, Ph.D., Professor, and Reginald S. Lee, M.A., Senior Research Associate, University of South Florida. The Florida pubic data sources include: http://www.firn.edu/doe/eias/eiaspubs/xls/gradrate.xls *and* http://www.firn.edu/doe/eias/eiaspubs/xls/esemem0506.xls.

matters. There are striking and statistically significant ethnic and racial differences in the type of diplomas awarded to students. The analyses reveal that despite an overall increase in the number of diplomas conferred, the racial achievement gap actually widened in ever category of high school completion.

The State of Florida awards two basic categories of diplomas – the Standard Diploma and other special types lumped together as Total Special Diplomas and Certificates. The Standard Diploma, the most desirable type of diploma, is awarded only to those who earn passing grades on Florida's high stakes assessment test (the Florida Comprehensive Assessment Test or "FCAT"), and who pass the requisite number of courses. Other types of diplomas – Special Diplomas, Certificates of Completion, and Special Certificates of Completion are collectively referred to as Total Special Diplomas and Certificates. These Total Special Diplomas do not qualify students for college admissions. Students who receive these Special Diplomas have "completed", but not "graduated" from high school. In addition, the Special Diplomas send a strong signal to employers that the student was not proficient on Florida's standardized tests. Without a standard diploma, a student's lifetime employment chances are seriously diminished and certainly he or she is less likely to pursue post-secondary educational opportunities and many types of high paying permanent jobs.

The overall declining rates of Standard Diploma awards for all racial groups and the increasing racial gaps in Special Diploma and Standard Diploma awards flatly refute the claims in the Florida Governor's brief that recent reforms have improved outcomes across-the-board for all students, let alone for students of color. Thus, they cannot be characterized as race neutral in their impact.

1. Standard Diplomas

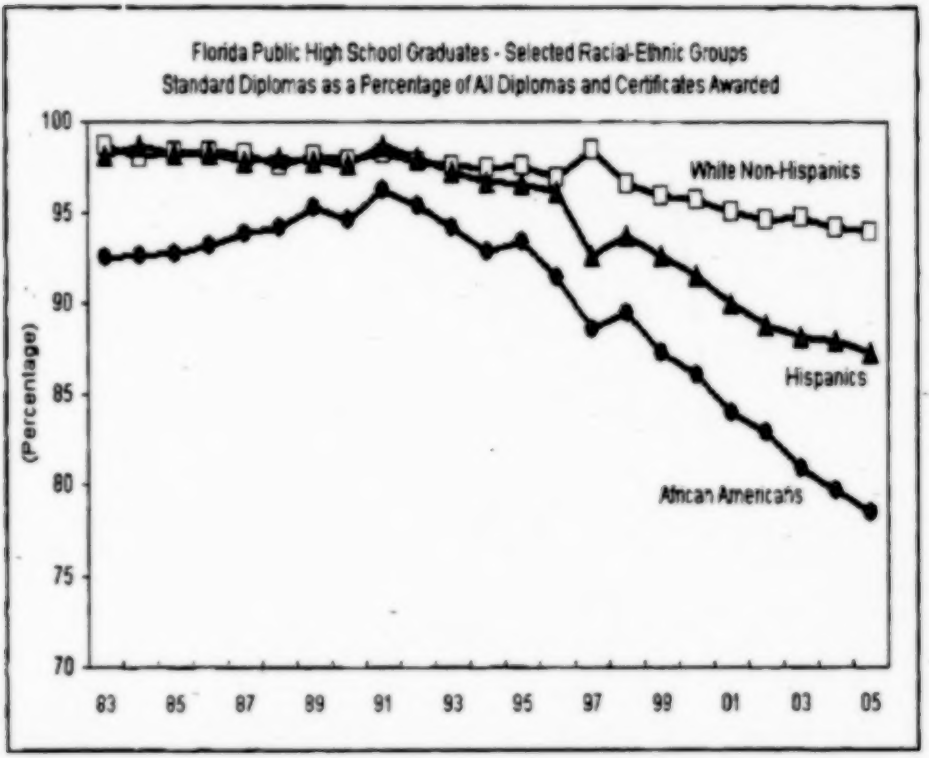
Since implementation of the A+ Education Plan in Florida, proportionally fewer Florida students in every racial group earned Standard Diplomas. Even worse, racial and ethnic gaps among students present in 2000 grew significantly larger during the next five years.

The percent of all students completing the Standard Diploma decreased steadily from 92.9% in 1999-2000 to 89.3% in 2005. *See* A-1. Across all ethnic groups, a smaller proportion of Florida students were awarded a Standard Diploma in 2005 than in 2000. *Id.* Yet, African American and Hispanic students represent most of this downward trend.

Between 2000 and 2005, the percentage of white students who received a standard diploma decreased 1.7 percentage points (down to 94% from 95.7%.). *Id.* During the same period, the percentage of African American students receiving this same diploma decreased by 8.4 percentage points (down to 78.4% from 86.8%). *Id.* This means the White/African American gap in Standard Diploma awards increased from 8.9% to 15.6% since the A+ Plan has been in effect.

While 92% of Hispanics were awarded the Standard Diploma in 2000, only 87.3% received this diploma in 2005. *Id.* Thus, the White/Hispanic gap in Standard Diploma awards also increased from 3.7% in 2000 to 6.7% in 2005.

The following chart (taken from the Florida Department of Education's own documents) illustrates graphically and vividly the downward trend in Standard Diplomas.[15]



The increasing race gaps in Standard Diploma awards between blacks and whites and between Hispanics and whites refutes the Florida Governor's claims that recent reforms have improved outcomes and are race neutral in their impact.

2. Total Special Diplomas

While they are being increasingly denied *Standard Diplomas*, students of color are increasingly awarded the

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[15] *Five Year Graduation Rates by Gender, 2003-2004 Through 2004-06*, http://www.firn.edu/doe/eias/eiaspubs/xls/gradrate.xls

inferior *Special Diplomas*. And, again, they are leading the negative trend.

While only 13.19% of African American students were awarded Total Special Diplomas when the A+ Plan began in 2000, approximately 21.56% received these substandard diplomas by 2005. A similar increase occurred for Hispanics, with 7.97% being awarded the Standard Diploma in 2000 compared to 12.73% in 2005. *See* A-1.

Meanwhile, 4.32% of white students were awarded Total Special Diplomas in 2000 compared to 6.0 % in 2005. This means the white and African American gap in Total Special Diplomas awards also *increased **from*** 8.9% in 2000 to 15.6% in 2005. The white and Hispanic gap in Standard Diploma awards also *increased* from 3.7% in 2000 to 6.7% in 2005.

B. Increased Racial Disparities in Retention Rates in Florida Schools

An analysis of retention data in Florida school districts during the 2003-2004 period indicates that, compared to their white peers, both African American and Hispanic students are retained at higher rates. *See* A-3 (state-wide data).

Across the state of Florida, African American students *are more than twice as likely* to be retained as white students. In fact, 12.3 % of African American as compared with 5.9 % of white students were retained in this one year alone. Hispanic students' retention rate is 8.9 % statewide. If one considers that these data represent just one year of retentions, then the disparate cumulative effect of the state retention policy on the educational opportunities of African Americans in particular is much larger than this snap shot implies. If on average more than one in ten black students in the state is not going on to the next grade each year, over the span of their

K-12 educational career, far too many black children in Florida will be left behind under the current policy regime.

The district-level data is even more disturbing. African American students are retained in grade at higher rates than their white peers in 57 of Florida's 67 county-wide school districts. The same is true for Hispanic students in 49 of the 67 districts. In some cases, as in Okeechobee County, the data demonstrates startling large differences in the rates of retention across racial/ethnic groups. In this district, the gap between white and African American students' retention rates is more than 13% for the 2003-2004 school year alone. In Gulf County, the gap between white and Hispanic students' retention rate exceeded an alarming 17%. These data directly challenge the position of the Florida Governor's brief, which asserts that Florida's reform policies are race neutral in both their design and impact.

C. Gifted Programs

Gifted educational programs generally provide extra resources and enriched learning opportunities for children. But in Florida, racially disparate placement rates deny African American students equal access to gifted education programs; thus, they are denied an equal educational opportunity. On average, a white child attending public schools in the state of Florida is over three times more likely to be placed in a gifted and talented educational program than the average black student. *See* A-4 toA-6. Indeed, across the state, less than 2 percent of all African American students are identified as "gifted" and granted access to supplemental gifted education services.

In some Florida counties, less than a fifth of one percent of the black students enrolled are identified as gifted. In addition, in some counties the gap between the percentage of black students and the percentage of white students identified as gifted is as high as 12 %, meaning that in these

counties, a white child is four times more likely to be placed by the school district in a gifted education program than a black student in the same district. Meanwhile, in only one of Florida's 67 counties does one find a higher percentage of black students than white students enrolled in coveted gifted educational programs.

Overall, the average white student attending public schools in Florida is only somewhat more likely than an Hispanic student to be placed in a gifted program. However, in some school districts white students are seven times more likely to be in the gifted education program.

D. Improving Outcomes For All

The Florida Governor's *amicus* brief correctly points out that high school graduation rates are increasing across the board for all racial groups. However, it does not reveal that, despite the overall upward trend, the racial gap has not only been preserved, it has *widened*: rates for black students continue to lag behind those for white students. Specifically, from 2001 to 2005 the graduation rate for white students rose from 71% to 80% (an increase of 9 percentage points), yet the graduation rate for black students increased from 51% to 57% (up only 6 percentage points). *See* A-7.

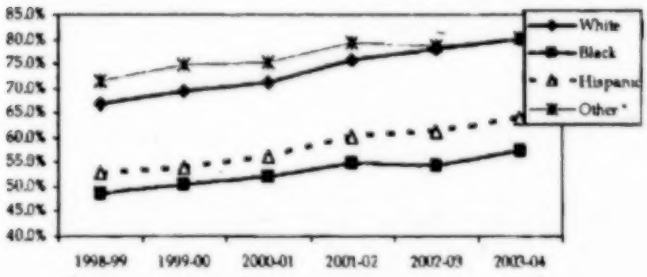
While the overall progress is commendable in some respects, the figures for black students remain deplorable. Moreover, these figures actually indicate a *widening* of the gap in this important marker of educational progress. As the next graph illustrates, the gap in graduation rates between

blacks and whites grew from 19 to 23 percentage points during the three-year period from 2001 to 2004.[16]

Improvement for All Racial/Ethnic Groups—Not only have rates improved for the overall population, they have improved for every racial/ethnic group during the period from 1998-99 to 2003-04, the latest year for which complete results are available (see figure 21).

Figure 21

Florida High School Graduation Rates by Race, 1998-99 to 2003-04



* "Other" contains Asian, American Indian, and multi-racial students.

	White	Black	Hispanic	Asian	Am. Indian	Multiracial	Total
1998-99	66.9%	48.7%	52.8%	73.4%	61.7%	64.7%	60.2%
1999-00	69.4%	50.6%	53.7%	77.4%	65.1%	64.8%	62.3%
2000-01	71.2%	51.9%	56.0%	77.5%	68.8%	68.4%	63.8%
2001-02	75.9%	54.9%	60.1%	82.0%	70.0%	74.1%	67.9%
2002-03	78.1%	54.2%	61.1%	81.0%	72.1%	73.8%	69.0%
2003-04	80.1%	57.3%	64.0%	82.3%	73.2%	78.1%	71.6%

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[16] A report to the U.S. Department of Education (May 2005) by the State of Florida, John L. Winn, Commissioner, *Raising Student Achievement: Florida's Compelling Evidence*, p.18, *available at* http://www.ed.gov/admins/lead/account/growthmodel/fl/flachievement.pdf.

The difference in graduation rates among white, black, and Hispanic students is graphically obvious in Figure 21 above. Furthermore, the data table indicates the white-black gap as 18.2 (66.9 % – 48.7 %) in 1998-1999 and increasing to 22.8 (80.1 – 57.3) in 2003-2004. Similarly the white-Hispanic gap is 14.1 (66.9 % – 52.8 %) in 1998-1999 and increases somewhat by 2003-2004 to 16.1 (80.1% – 64.0 %).

While the State of Florida is correct in its subheading for this graph, "Improvement for All Racial/Ethnic Groups," the gap has widened, we submit, largely due to the use of race-neutral measures as opposed to race-conscious measures. The standards for academic achievement should be the same for all; to be satisfied with a widening gap would suggest that black students should always be relegated to relative mediocrity, even if the bar is raised.

* * *

Given the data set forth above, the reports in the Florida Governor's brief regarding aggregate educational progress distort the reality of widening gaps in Standard Diploma awards, retention in school, and access to gifted programs for African American and Hispanic schoolchildren in the state. Clearly, the state's own educational achievement data fail to document the brief's exaggerated claims of race-neutral results of "Florida's across-the-board progress" for all children. Florida Governor's brief at 5.

Moreover, no evidence beyond the unsubstantiated rhetoric in the Florida Governor's brief demonstrates that prohibiting reasonable voluntary measures to promote integration and reduce the trend of re-segregation somehow *increase* educational achievement for minority children. In fact, racially disaggregated data from Florida show that just the opposite is true. The "race-neutral" A+ Plan has been anything but race-neutral: the results in this section show that racial gap in school outcomes has increased in Florida.

Schools and districts that do well for some students and not others cannot claim success through race-neutral programs unless their results actually close the gap between poor and non-poor, minority and non-minority children. Whereas here, school districts find that their race-neutral programs have unintended racially disparate consequences, they should have the autonomy to exercise sound educational

discretion in selecting a scientifically proven successful remedy of voluntary school integration with racial and ethnic conscious factors to improve education achievement for minority children, where necessary and appropriate.

CONCLUSION

The NAACP as *amicus curiae* respectfully requests that this Court affirm the decisions of the courts below.

Respectfully submitted,

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APPENDIX

Appendix

Florida High School Completers
By Type of Diploma/Certificate

						Percentage				
	1 Standard Diploma	2 Special Diploma	3 Certificate of Completion	4 Special Cert. Of Completion	5 Total	6 Standard Diploma (1/5)	7 Special Diploma (2/5)	8 Certificate of Completion (3/5)	9 Special Cert Of Completion (4/5)	10 Total Spec. Dip/Cert (7+8+9)
All Graduates*										
1999-2000	102,177	3,781	3,839	157	109,954	92.9	3.44	3.49	0.14	7.07
2000-01	106,128	4,653	4,762	133	115,676	91.7	4.02	4.12	0.11	8.25
2001-02	113,595	5,638	5,486	110	124,832	91.0	4.52	4.40	0.09	9.00
2002-03	120,612	6,108	6,224	114	133,058	90.6	4.59	4.68	0.09	9.35
2003-04	124,756	6,242	7,552	131	138,681	90.0	4.50	5.45	0.09	10.04
2004-05	126,382	6,463	8,534	77	141,436	89.3	4.57	6.03	0.05	10.66
Whites										
1999-2000	62,441	1,813	917	91	65,262	95.7	2.78	1.41	0.14	4.32
2000-01	63,542	2,136	1,127	70	66,875	95.0	3.19	1.69	0.10	4.98
2001-02	67,585	2,634	1,181	57	71,457	94.6	3.69	1.65	0.08	5.42
2002-03	71,985	2,856	1,049	63	75,953	94.8	3.76	1.38	0.08	5.22
2003-04	73,418	2,883	1,530	62	77,893	94.3	3.70	1.96	0.08	5.75
2004-05	73,175	3,012	1,621	41	77,849	94.0	3.87	2.08	0.05	6.00
African Americans										
1999-2000	20,740	1,248	1,866	38	23,892	86.8	5.22	7.81	0.16	13.19
2000-01	21,509	1,859	2,223	42	25,633	83.9	7.25	8.67	0.16	16.09
2001-02	22,548	2,153	2,553	29	27,281	82.6	7.89	9.36	0.11	17.36
2002-03	23,082	2,347	3,058	37	28,524	80.9	8.23	10.72	0.13	19.08
2003-04	23,439	2,362	3,594	43	29,438	79.6	8.02	12.21	0.15	20.38
2004-05	23,519	2,366	4,076	23	29,984	78.4	7.89	13.59	0.08	21.56
Hispanics										
1999-2000	15,440	357	951	19	16,777	92.0	2.13	5.73	0.11	7.97
2000-01	17,197	609	1,290	17	19,113	90.0	3.2	6.7	0.09	10.02
2001-02	19,117	785	1,613	21	21,536	88.8	3.65	7.49	0.10	11.23
2002-03	20,943	863	1,941	14	23,761	88.1	3.63	8.17	0.06	11.86
2003-04	22,817	895	2,199	24	25,935	88.0	3.45	8.48	0.09	12.02
2004-05	24,058	974	2,525	10	27,567	87.3	3.53	9.16	0.04	12.73

*Includes only the 67 county school districts.

Data Source:
http://www.firn.edu/doe/eias/dataweb/database_0506/student_0506/st56_1_2.pdf

Retention Rates in Florida School Districts 2003-2004

District	White (W)	Black (B)	Hispanic (H)	W-B diff	W-H diff	B-W ratio	H-W ratio
Alachua	4.4%	11.2%	6.4%	-6.8%	-2.1%	2.557	1.476
Baker	7.4%	11.7%	10.7%	-4.3%	-3.3%	1.585	1.455
Bay	6.3%	9.5%	10.7%	-3.2%	-4.4%	1.515	1.703
Bradford	9.5%	10.2%	15.5%	-0.7%	-6.0%	1.074	1.638
Brevard	7.0%	13.7%	11.4%	-6.7%	-4.4%	1.947	1.624
Broward	5.4%	12.8%	7.6%	-7.4%	-2.2%	2.380	1.408
Calhoun	6.2%	6.8%	5.6%	-0.6%	0.6%	1.092	0.896
Charlotte	3.3%	5.3%	4.4%	-2.0%	-1.0%	1.588	1.313
Citrus	6.5%	10.6%	7.2%	-4.0%	-0.6%	1.616	1.099
Clay	4.5%	6.0%	7.1%	-1.4%	-2.5%	1.317	1.560
Collier	3.5%	9.0%	8.9%	-5.5%	-5.4%	2.590	2.551
Columbia	9.7%	12.9%	9.7%	-3.3%	-0.1%	1.340	1.005
Dade	4.3%	10.3%	7.5%	-6.0%	-3.2%	2.386	1.742
Desoto	6.0%	7.2%	6.3%	-1.2%	-0.3%	1.194	1.050
Dixie	9.9%	10.1%	10.7%	-0.2%	-0.8%	1.019	1.081
Duval	9.2%	16.2%	14.8%	-6.9%	-5.6%	1.751	1.603
Escambia	5.3%	10.3%	5.4%	-5.0%	-0.1%	1.947	1.028
Flagler	3.6%	7.3%	4.7%	-3.7%	-1.1%	2.037	1.296
Franklin	9.8%	12.2%	0.0%	-2.4%	9.8%	1.242	0.000
Gadsden	17.5%	18.8%	15.1%	-1.3%	2.5%	1.074	0.859
Gilchrist	8.4%	18.6%	10.2%	10.2%	-1.8%	2.220	1.215
Glades	8.6%	11.3%	10.1%	-2.6%	-1.4%	1.303	1.163
Gulf	5.0%	7.1%	22.2%	-2.1%	17.2%	1.414	4.437
Hamilton	9.9%	13.7%	15.4%	-3.9%	-5.6%	1.393	1.566
Hardee	6.4%	8.2%	11.3%	-1.8%	-4.9%	1.273	1.759
Hendry	4.4%	5.7%	7.8%	-1.4%	-3.4%	1.313	1.779
Hernando	9.3%	12.5%	11.1%	-3.2%	-1.9%	1.348	1.200
Highlands	7.1%	11.8%	11.3%	-4.7%	-4.2%	1.667	1.598
Hillsborough	5.2%	10.3%	10.2%	-5.1%	-5.0%	1.975	1.958
Holmes	6.3%	8.4%	7.3%	-2.1%	-1.0%	1.325	1.154
Indian River	2.5%	5.8%	7.0%	-3.4%	-4.5%	2.365	2.821
Jackson	6.7%	10.3%	11.8%	-3.6%	-5.1%	1.530	1.755
Jefferson	17.3%	19.8%	20.0%	-2.5%	-2.7%	1.142	1.153
Lafayette	3.5%	6.3%	9.5%	-2.8%	-6.0%	1.796	2.737
Lake	4.9%	9.7%	9.2%	-4.8%	-4.4%	1.981	1.894
Lee	5.8%	13.7%	11.3%	-7.8%	-5.4%	2.341	1.929
Leon	6.0%	14.1%	9.0%	-8.1%	-3.1%	2.358	1.511
Levy	6.5%	10.7%	7.5%	-4.2%	-1.0%	1.649	1.160
Liberty	8.2%	10.3%	16.7%	-2.1%	-8.5%	1.257	2.040
Madison	9.5%	15.9%	22.2%	-6.4%	12.7%	1.678	2.342
Manatee	4.8%	10.8%	12.4%	-6.0%	-7.5%	2.236	2.550
Marion	9.1%	13.7%	12.5%	-4.6%	-3.4%	1.500	1.375
Martin	2.2%	6.4%	6.4%	-4.1%	-4.2%	2.864	2.896
Monroe	7.0%	9.6%	11.7%	-2.6%	-4.7%	1.369	1.667
Nassau	5.6%	8.0%	3.4%	-2.4%	2.2%	1.432	0.611
Okaloosa	5.6%	12.6%	8.1%	-7.0%	-2.5%	2.250	1.447
Okeechobee	7.0%	20.2%	9.1%	13.2%	-2.1%	2.898	1.302
Orange	6.8%	14.5%	11.4%	-7.7%	-4.6%	2.126	1.672
Osceola	5.4%	8.3%	7.6%	-2.9%	-2.2%	1.545	1.413
Palm Beach	6.4%	15.5%	11.8%	-9.1%	-5.4%	2.415	1.835
Pasco	5.8%	10.1%	9.0%	-4.3%	-3.2%	1.735	1.549

A-3

District	White (W)	Black (B)	Hispanic (H)	W-B diff	W-H diff	B-W ratio	H-W ratio
Pinellas	5.3%	10.7%	8.0%	-5.3%	-2.6%	2.003	1.496
Polk	7.4%	11.1%	12.0%	-3.6%	-4.5%	1.485	1.610
Putnam	8.1%	11.5%	11.9%	-3.4%	-3.8%	1.423	1.474
St. Johns	2.9%	6.0%	4.9%	-3.0%	-2.0%	2.027	1.664
St. Lucie	5.0%	9.3%	8.0%	-4.3%	-3.0%	1.862	1.602
Santa Rosa	4.2%	6.0%	4.5%	-1.8%	-0.4%	1.438	1.092
Sarasota	6.0%	11.4%	8.9%	-5.4%	-2.8%	1.887	1.469
Seminole	4.6%	11.0%	9.0%	-6.4%	-4.3%	2.373	1.938
Sumter	5.5%	11.8%	6.1%	-6.3%	-0.6%	2.156	1.119
Suwannee	7.7%	11.3%	10.4%	-3.6%	-2.7%	1.467	1.354
Taylor	10.8%	12.2%	6.3%	-1.4%	4.6%	1.125	0.578
Union	7.0%	11.1%	14.0%	-4.1%	-7.0%	1.578	1.998
Volusia	5.7%	10.3%	9.2%	-4.6%	-3.5%	1.796	1.609
Wakulla	6.7%	9.6%	5.9%	-2.9%	0.9%	1.427	0.874
Walton	7.4%	11.7%	11.5%	-4.3%	-4.2%	1.590	1.569
Washington	3.2%	6.9%	9.4%	-3.7%	-6.2%	2.146	2.911
State-wide	5.9%	12.3%	8.9%	-6.4%	-3.0%	2.075	1.508

Data Source:
http://www.firn.edu/doe/eias/eiaspubs/xls/retentions.xls

Enrollment in Programs for Students with Gifts and Talents

	Gifted Placement Rate			Odds Ratio	
District	**White**	**Black**	**Hispanic**	**W/B**	**W/H**
Alachua	0.1677	0.0383	0.1182	4.38	1.42
Baker	0.0166	0.0016	0.0714	10.51	0.23
Bay	0.0187	0.0017	0.0090	10.79	2.06
Bradford	0.0291	0.0054	0.0517	5.37	0.56
Brevard	0.0730	0.0184	0.0480	3.96	1.52
Broward	0.0587	0.0175	0.0366	3.36	1.60
Calhoun	0.0332	0.0414	0.0000	0.80	
Charlotte	0.0370	0.0179	0.0135	2.07	2.74
Citrus	0.0562	0.0217	0.0340	2.59	1.65
Clay	0.0364	0.0087	0.0209	4.18	1.74
Collier	0.0669	0.0251	0.0315	2.66	2.12
Columbia	0.0095	0.0014	0.0224	6.79	0.43
Dade	0.1467	0.0352	0.0703	4.17	2.09
Desoto	0.0223	0.0068	0.0050	3.27	4.42
Dixie	0.0039	0.0000	0.0000		
Duval	0.0433	0.0104	0.0287	4.15	1.51
Escambia	0.0645	0.0192	0.0579	3.36	1.11
Flagler	0.0436	0.0230	0.0125	1.90	3.48
Franklin	0.0132	0.0000	0.0000		
Gadsden	0.0351	0.0141	0.0075	2.48	4.70
Gilchrist	0.0631	0.0088	0.0339	7.13	1.86
Glades	0.0476	0.0066	0.0106	7.19	4.50
Gulf	0.0731	0.0142	0.1111	5.16	0.66
Hamilton	0.0024	0.0000	0.0062		0.39
Hardee	0.0489	0.0144	0.0049	3.39	10.02
Hendry	0.0328	0.0057	0.0121	5.73	2.70
Hernando	0.0282	0.0098	0.0167	2.88	1.69
Highlands	0.0399	0.0102	0.0154	3.91	2.59
Hillsborough	0.0575	0.0126	0.0212	4.57	2.71

	Gifted Placement Rate			Odds Ratio	
District	**White**	**Black**	**Hispanic**	**W/B**	**W/H**
Holmes	0.0013	0.0000	0.0000		
Indian River	0.0736	0.0355	0.0613	2.07	1.20
Jackson	0.0296	0.0015	0.0368	20.40	0.81
Jefferson	0.0087	0.0032	0.0000	2.70	
Lafayette	0.0103	0.0000	0.0119		0.87
Lake	0.0281	0.0084	0.0179	3.35	1.58
Lee	0.0912	0.0405	0.0537	2.25	1.70
Leon	0.0894	0.0111	0.0492	8.04	1.81
Levy	0.0532	0.0123	0.0214	4.31	2.48
Liberty	0.0010	0.0000	0.0000		
Madison	0.0437	0.0106	0.0000	4.13	
Manatee	0.0542	0.0207	0.0239	2.62	2.27
Marion	0.0417	0.0116	0.0248	3.59	1.68
Martin	0.0452	0.0092	0.0162	4.92	2.79
Monroe	0.0432	0.0074	0.0241	5.85	1.79
Nassau	0.0304	0.0066	0.0068	4.58	4.47
Okaloosa	0.0448	0.0047	0.0169	9.50	2.64
Okeechobee	0.0304	0.0102	0.0115	2.99	2.63
Orange	0.0902	0.0140	0.0228	6.43	3.96
Osceola	0.0094	0.0037	0.0035	2.57	2.68
Palm Beach	0.0691	0.0153	0.0271	4.51	2.55
Pasco	0.0355	0.0195	0.0189	1.82	1.88
Pinellas	0.0611	0.0141	0.0257	4.34	2.38
Polk	0.0460	0.0205	0.0240	2.25	1.92
Putnam	0.0367	0.0163	0.0365	2.25	1.01
St. Johns	0.0419	0.0095	0.0414	4.39	1.01
St. Lucie	0.0525	0.0202	0.0275	2.60	1.91
Santa Rosa	0.0409	0.0156	0.0309	2.62	1.32
Sarasota	0.1261	0.0359	0.0623	3.51	2.02
Seminole	0.0742	0.0225	0.0251	3.30	2.95
Sumter	0.0242	0.0060	0.0181	4.04	1.34
Suwannee	0.0108	0.0011	0.0036	10.00	2.99

	Gifted Placement Rate			Odds Ratio	
District	**White**	**Black**	**Hispanic**	**W/B**	**W/H**
Taylor	0.0497	0.0127	0.0313	3.90	1.59
Union	0.0394	0.0054	0.0000	7.30	
Volusia	0.0471	0.0161	0.0179	2.94	2.63
Wakulla	0.0345	0.0061	0.0294	5.62	1.17
Walton	0.0428	0.0141	0.0321	3.03	1.33
Washington	0.0225	0.0000	0.0313		0.72
State Totals	0.0600	0.0191	0.0436	3.15	1.38

Data Source:
http://www.firn.edu/doe/eias/eiaspubs/xls/esemem0506.xls

Comparison of Florida White and Hispanic High School Graduation Rates

School Year	White	Hispanic	White-Hispanic Gap
1998-1999	66.9	52.8	14.1
1999-2000	69.4	53.7	15.7
2000-2001	71.2	56.0	15.2
2001-2002	75.9	60.1	15.8
2002-2003	78.1	61.1	17.0
2003-2004	80.1	64.0	16.1
2004-2005	80.8	64.5	16.3

Data Source: Raising Student Achievement: Florida's Compelling Evidence, Florida Department of Education, May 2005

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Nos. 05-908 and 05-915

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit legal organization that assists African Americans and other people of color to secure their civil and constitutional rights. For more than six decades, LDF has worked to dismantle racial segregation and ensure equal educational opportunity. LDF represented African-American plaintiffs in the cases leading up to and including *Brown v. Board of Education*, 347 U.S. 483 (1954), and has litigated numerous subsequent landmark school desegregation cases. In addition to its involvement in court-ordered desegregation litigation, LDF has played and continues to play a critical role in ensuring diversity in higher education as well as racial integration at the primary and secondary school level.

LDF filed *amicus* briefs below in both of the cases now before the Court. In *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004), *aff'd*, *Meredith v. Jefferson County Bd. of Educ.*, 416 F.3d 513 (6th Cir. 2005), LDF was granted permission by the district court to participate as *amicus curiae*, submit legal briefs, attend the trial to examine and cross-examine witnesses, and present oral arguments as the court deemed necessary. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162, 1173 (9th Cir. 2005) (*en banc*), LDF filed an *amicus* brief in support of rehearing *en banc*.*

SUMMARY OF ARGUMENT

These cases involve the good faith, voluntary efforts of two large, racially diverse school districts to realize the

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* Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party in these cases authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation.

promise of *Brown v. Board of Education* in the face of pervasive, persistent *de facto* residential segregation and, in the case of Jefferson County, Kentucky, a legacy of *de jure* school segregation.

The Court need not apply strict scrutiny in this context. K-12 voluntary school integration does not emerge from the historical and legal backdrop of race-conscious "affirmative action." Rather, it is a milestone on the long and difficult road down which this nation has traveled in its quest to make real the aspiration — first articulated in *Brown* but repeated countless times thereafter — of equal, integrated public education. As relevant as the legal principles of decisions such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), may be, they do not dictate the standard of review here.

In its school desegregation cases over more than half a century, the Court has consistently emphasized the effectiveness of remedies to disestablish state-imposed segregation. It has never held that students assigned to integrated schools or denied the opportunity to attend preferred facilities have suffered cognizable harm, stigmatic or otherwise; nor has the Court treated claims of such harms as factors that might limit minority plaintiffs' right to a remedy. This history is a significant indication that heightened scrutiny is unnecessary in the voluntary integration context.

Further, at least since its unanimous ruling in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court has consistently supported the notion that state and local officials could go beyond remedies that might be judicially imposed on *de jure* segregated systems when those officials are acting to alleviate *de facto* segregation and achieve integration in their schools. This principle has never

been expressly undermined by any of the Court's subsequent decisions, and not surprisingly, lower courts and state and local governments have correctly read the pronouncements to mean that local voluntary efforts are not only constitutionally permissible, but encouraged.

The Court's school desegregation jurisprudence — and in particular, its most recent rulings that set forth standards for releasing school districts from court supervision — has also repeatedly affirmed the importance of local control and the deference that courts should afford school boards as they craft educational policies, including student assignment policies. It would be ironic, if not altogether perverse, for this emphasis on local control and deference to play a critical role in the dissolution of desegregation decrees, and yet be held insufficient to sustain good faith, voluntary efforts to promote integration in the very same schools.

Applying a more relaxed standard of scrutiny here would be not only jurisprudentially consistent with the Court's prior rulings, but also analytically and practically sound. Unlike in "affirmative action" cases, voluntary integration plans neither ration scarce or unique opportunities nor signify judgments regarding a student's aptitude, merit or value; in other words, they do not grant "racial preferences" as that term has been used in the affirmative action context. The kinds of Equal Protection concerns about the distribution of burdens and benefits, therefore, which may be germane to traditional affirmative action cases, are not triggered where school districts sensitively manage the assignment of K-12 students to public schools that are alike in material respects to achieve racial integration.

Moreover, student assignment plans in K-12 systems are the product of school authorities' consideration and balancing of numerous factors, including both operational

practicalities and multiple educational policy objectives. Their formulation and implementation occur in the context of, and often impact, each district's unique geographic patterns and demographic characteristics, of which school authorities are necessarily cognizant. In such a setting, the application of a strict scrutiny standard would sharply constrict the discretion that school boards and policymakers should have to fashion local educational goals. Application of vigorous rational basis review would avoid these consequences while affording ample protection against covert discriminatory purposes.

ARGUMENT

I. This Court Should Not Apply Strict Scrutiny To Respondents' K-12 Public School Student Assignment Policies

It is beyond question that the policies challenged here grow directly out of good faith efforts to achieve *Brown*'s vision of equal, integrated public education. Thus, "[v]iewing voluntary school integration as an extension of the Supreme Court's school desegregation jurisprudence makes sense." *McFarland*, 330 F. Supp. 2d at 851. Yet petitioners essentially disregard the more than five decades of school desegregation law, relying instead almost exclusively on a body of cases involving qualitatively different issues. While the relevance of those precedents cannot be denied, the Court cannot look to them alone; rather, it must reconcile them with its desegregation jurisprudence, the trajectory of which is separate and distinct from the cases that petitioners treat as controlling.

A. The Court Has Never Deemed the Application of Strict Scrutiny Necessary to Determine Whether K-12 Student Assignments to Achieve School Integration Are Motivated By Constitutionally Illegitimate Purposes

The purpose of "strict scrutiny" is to ensure that race-conscious governmental actions are not "in fact motivated by illegitimate notions of racial inferiority or simple racial politics . . . illegitimate racial prejudice or stereotype," and that "to whatever racial group . . . citizens belong, [they are] . . . treated with equal dignity and respect" in public decisionmaking. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). The Court has never found the use of strict scrutiny necessary to avoid these dangers when school systems act to promote integrated public schools.

We begin with *Brown*. That decision neither established nor supports the proposition that race may never be considered in the assignment of students to public schools. Rather, the Court there held that the use of race *for segregative purposes* is impermissible. 347 U.S. at 493, 495. Nothing in *Brown* indicates that race-conscious *integrative* student assignments violate the Equal Protection Clause. Indeed, its language and spirit (as well as the many subsequent pronouncements of this Court summarized *infra* I.B) suggest the opposite: that adoption of integrative policies would be encouraged, since the harms of racial segregation occur regardless of whether that segregation is *de jure* or *de facto*. *Id.* at 494-95.

No reference to strict scrutiny can be found in *Brown*, nor in any of the Court's later school desegregation or voluntary integration decisions. That standard has its origins in cases involving severe sanctions (civil or criminal) applied to individuals because of race, or because they crossed racial

barriers. *E.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *McLaughlin v. Florida*, 379 U.S. 184, 191-93 (1964); *Loving v. Virginia*, 388 U.S. 1, 9, 11 (1967). More recently, strict scrutiny been applied in so-called "affirmative action" cases, which seek to define the permissible parameters of race-consciousness in the distribution of finite goods or benefits, such as admission to selective colleges and universities, government contracts, and public employment. *See, e.g.*, *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

These distinct jurisprudential paths have not converged. Although the Court's school desegregation rulings discussed the appropriate remedies for a constitutional violation, *see, e.g.*, *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Swann*; *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968), it is telling that the Court never articulated a need to balance those remedies against any students' claims to a supposed "right" to attend "neighborhood" schools, or to be free from assignments to integrated schools where they would have to associate with pupils of a different racial or ethnic group.[1] To the contrary, the Court has recognized that school authorities may (and should) pursue steps to achieve

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[1] In the context of a "choice" student assignment plan, the logic of such a holding would suggest that school systems were constitutionally *required* to establish at least some number of one-race schools for those who would prefer them. The Court has firmly rejected such an interpretation of the Constitution. *See, e.g.*, *Palmore v. Sidoti* 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983) ("It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to [private] racially discriminatory educational entities"); *Brown*, 347 U.S. at 495 ("Separate educational facilities are inherently unequal.").

racial integration because it benefits *all* students, regardless of race. *See infra* I.B.

Even as the Court began to recognize the limitations of available judicial remedies, *e.g.*, *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 440 (1976); *Milliken v. Bradley*, 418 U.S. 717, 744 (1974), it expressed concern exclusively in terms of constraints on judicial authority over school boards — not any rights of individual students to be assigned to a specific school of their choice or schools closer to their homes. This despite the fact that many of these cases came before the Court as it concomitantly confronted the kinds of affirmative action challenges described above.

Nor did the Court's affirmative action rationale play a role in its most recent school desegregation cases, *see Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991), which were decided in the same years the Court also decided key affirmative action cases. Those rulings emphasized that courts should afford deference to school districts in evaluating requests for unitary status, *see infra* I.C, but they said nothing about any burdens that continued enforcement of desegregation orders might impose on so-called "innocent" third parties. *Cf., e.g., Wygant*, 476 U.S. at 276 (expressing concern, in the context of teacher layoffs affected by affirmative action, about "imposing discriminatory legal remedies that work against innocent people") (emphasis omitted).

These divergent approaches are not accidental and reflect the deep commitment of our Nation to the difficult and elusive goal of racial justice and equal treatment. As Judge Kozinski, in his concurring opinion below in *PICS*, reasoned, therefore, the appropriate standard of review in these cases is

not "strict — and almost always deadly — scrutiny," but rather a "robust and realistic rational basis review."[2]

That standard is especially appropriate in light of the long struggle toward the core equal opportunity principle of *Brown*, which is rightfully celebrated as the most significant ruling of this Court in the twentieth century. It is a symbol of high aspirations that has become embedded in public dialogue and policy analysis.[3] Adoption of a strict scrutiny framework as the mechanism for adjudicating challenges to the voluntary consideration of race by public school systems committed to *Brown*'s core values of equality and integration

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[2] Both of the courts below believed that application of strict scrutiny was required by this Court's recent rulings in *Johnson v. California*, 543 U.S. 499, 505 (2005), *Grutter*, and *Adarand*. *PICS*, 426 F.3d at 1172 n.12; *McFarland*, 330 F. Supp. 2d at 848-49. It is true that the Court has sometimes stated that all racial classifications are subject to strict scrutiny. *See, e.g., Johnson*, 543 U.S. at 505. This reflects a traditional and appropriate skepticism about racial classifications and provides general guidance for lower courts. Nevertheless, such statements reflect the Court's experience with the range of factual settings in cases raising such issues that have been presented to it and do not inexorably dictate that there are not other factual contexts, in which race is given consideration, where application of the strict scrutiny standard is not required. "[T]he Supreme Court's opinions are necessarily forged by the cases presented to it; where the case at hand differs in material respects from those the Supreme Court has previously decided, I would hope that those seemingly categorical pronouncements will not be applied without consideration of whether they make sense beyond the circumstances that occasioned them." *PICS*, 426 F.3d at 1195 (Kozinski, J., concurring). Indeed, separate opinions of individual Justices have suggested that strict scrutiny should *not* apply to every instance in which race is implicated. *See, e.g., Johnson*, 543 U.S. at 516 (Ginsburg, J., concurring) (citing cases); *id.* at 538-41 (Thomas, J., dissenting). *Amicus* believes, for the reasons set forth in this brief, that public school voluntary integration plans are one such context.

[3] *See, e.g., No Child Left Behind Act of 2001*, 20 U.S.C. §§ 6301 *et seq.*; *Magnet Schools Assistance Program*, 20 U.S.C. §§ 7321 *et seq.*

would mark a retrogressive shift that history may regard as equally unfortunate as the *Dred Scott* ruling was in an earlier day. The Court should not pursue such a course.

B. This Court Has Repeatedly Expressed Approval of Voluntary K-12 School Integration Efforts

Not only has this Court never applied strict scrutiny in the context of public school districts' voluntary integration policies, but it has expressly approved school board policies that foster integration *independent of any constitutional obligation to do so*. In *Swann*, the Court stated:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a proscribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities.*

402 U.S. at 16 (emphasis added); *accord North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (recognizing integration as a permissible goal to pursue "quite apart from any constitutional requirements"); *McDaniel v. Barresi*, 402 U.S. 39, 40-41 (1971).[4]

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[4] The dissent in *PICS* incorrectly suggests that this passage from *Swann* is taken "out of context" and does not speak to whether school authorities may consider race in student assignment in the absence of a finding that the district had engaged in *de jure* racial segregation. *PICS*, 426 F.3d at 1208-09 n.17 (Bea, J., dissenting). First, the language the dissent cites as additional context is irrelevant; it relates to limitations on the authority of courts to order remedies that exceed the scope of the violation. Second, the dissent ignores the clear language in the other opinions issued by the Court on the same day, *see North Carolina State Bd.*, 402 U.S. at 45; *McDaniel*, 402 U.S. at 40-41, which recognize the ability of state and

In the thirty-five years since *Swann*, a majority of the Court has never joined an opinion contradicting the notion that public school officials may go further than courts to foster integrated student bodies. In fact, subsequent signals from individual Justices, prior to and after the emergence of the Court's affirmative action jurisprudence, suggest the opposite — that local bodies *do* retain flexibility to make such decisions. *See, e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 488-89 n.7 (1979) (Powell, J., dissenting) (contrasting the difficult judicial considerations involved in court-ordered remedies with one state's voluntary school desegregation statute, calling the latter "the sort of effort that should be considered by state and local officials and elected bodies"); *Bustop, Inc. v. Bd. of Educ. of Los Angeles*, 439 U.S. 1380, 1383 (1978) (Rehnquist, J., in chambers);[5] *Keyes*, 413 U.S. at 242 (Powell, J., concurring) (noting that "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation [beyond what a court has ordered]," and that "[n]othing in

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local officials to adopt desegregation plans "quite apart from any constitutional requirements," as well as the Court's statement in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-74 (1982), about deference to the political process to resolve the issue of the efficacy and desirability of school desegregation.

[5] *Bustop* is particularly revealing. There, in the same year that the Court decided *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), then-Justice Rehnquist rejected the emergency petition of white parents who opposed a race-conscious voluntary student assignment policy for Los Angeles County, California. He indicated that while California was under no federal obligation to order desegregation of its schools, he had "very little doubt that it was permitted . . . to take such action" pursuant to its own constitution. *Bustop*, 439 U.S. at 1383. He went on to observe that the "novel" argument advanced by the challengers seemed to depend on the errant assumption that, in the context of public education, "each citizen of a State who is either a parent or a schoolchild has a 'federal right' to be 'free from . . . extensive pupil transportation.'" *Id.*

this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience").

Indeed, in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), not only did the Court decline to liken non-remedial, race-conscious student assignment policies to race preferences that it had condemned in affirmative action cases, but it struck down state-level efforts to ban their local adoption. There, it invalidated a statewide initiative banning all school districts from using busing to alleviate *de facto* segregation, finding that the initiative created a unique burden on racial minorities by selectively and improperly "plac[ing] effective decisionmaking authority over a racial issue at a different level of government." *Id.* at 474-75 (citing *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)). In so doing, the Court acknowledged:

> Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." [*Brown*, 347 U.S. at 493.] When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in — and are fully accepted by — the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," . . . while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage. . . . *[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.*

Id. at 472-74 (footnote omitted) (emphasis added).

The *Seattle* ruling demonstrates that the Court neither viewed nor analyzed the development of its affirmative action jurisprudence as undermining the authority of school districts to establish and maintain integration policies. Significantly, *Seattle* was decided four years after the Court confronted the affirmative action policy in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and yet the opinion hardly makes mention of *Bakke* at all.[6] Instead, it refers to *Brown*'s mandate, and the responsibility of school boards to consider "the desirability and efficacy of school desegregation." *Seattle*, 458 U.S. at 474.[7]

The courts below indicated that they were informed by these and other cases. *PICS*, 426 F.3d at 1179; *McFarland*, 330 F. Supp. 2d at 851. They are not alone. For decades, federal courts across the nation have repeatedly held that state and local officials may voluntarily employ race-conscious student assignment strategies to integrate their

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[6] Regardless, *Bakke* itself does not support the argument advanced by both petitioners and the United States. As a preliminary matter, because *Bakke* presented a classic "race preference" claim — *i.e.*, race was considered in a competitive admission process for a medical school with limited openings, etc. — the presumption of its application to these cases is inapposite. Yet, even in that context, Justice Powell's opinion allowed race to be taken into account as one factor, even though he explicitly recognized that meant that race would be a controlling and the deciding factor in at least some individual instances. 438 U.S. at 316-19.

[7] *Seattle* also cited with approval *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971), a case with similar facts and affirmed by this Court. As had *Seattle*, *Lee* found that "[a]lthough there may be no constitutional duty to undo *de facto* segregation, . . . it is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white." *Id.* at 714.

schools and reduce the harms associated with racial isolation. *See, e.g., Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 28 (1st Cir. 2004) (Boudin, C.J., concurring) ("in the absence of a constitutional violation," decisions about whether to pursue school integration "are customarily left to legislatures, city councils, school boards, and voters"), *cert. denied*, 126 S. Ct. 798 (2005); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000) ("[L]ocal school authorities have the power to voluntarily remedy *de facto* segregation existing in schools and, indeed, such integration serves important societal functions."); *Jacobson v. Cincinnati Bd. of Educ.*, 941 F.2d 100, 102 (6th Cir. 1992) (authority of school boards extends to adoption of voluntary integration policies "particularly when such a policy is implemented in order to prepare students for life in a pluralistic society"), *cert. denied*, 506 U.S. 830 (1992); *Parents Ass'n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574, 581 n.9 (2d Cir. 1984) (school boards permitted to adopt otherwise "constitutionally suspect measures to counteract the perceived problem of accelerated white flight"); *Clark v. Bd. of Educ. of Little Rock*, 705 F.2d 265, 271 (8th Cir. 1983) ("Although the possibility of white flight and consequent resegregation cannot justify a school board's failure to comply with a court order to end segregation, . . . it may be taken into account in an attempt to promote integration."); *Johnson v. Bd. of Educ. of Chicago*, 604 F.2d 504, 518 (7th Cir. 1979) ("[T]he absence of a constitutional *duty* on the part of the school authorities to establish racially-based enrollments does not preclude the Board from prescribing a racial balance to remedy the segregative impact of demographic change."), *vacated and remanded on other grounds*, 457 U.S. 52 (1982) (emphasis in original); *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 61 (6th Cir. 1966) ("Although boards of education have no constitutional

obligation to relieve against racial imbalance which they did not cause or create, . . . it is not unconstitutional for them to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm."); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000) ("If [a school district] voluntarily chooses to maintain desegregated schools, it acts within the traditional authority invested in a democratically elected school board."); *Willan v. Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416, 1422 (E.D. Wis. 1987) ("It is well-settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination."); *Offermann v. Nitkowski*, 248 F. Supp. 129, 131 (W.D.N.Y. 1965) ("[T]he Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system.") (all internal citations omitted).

States, too, have acted in reliance upon the basis of the Court's jurisprudence approving voluntary steps to integrate schools, through legislative, administrative, or judicial actions. *See, e.g., Booker v. Bd. of Educ. of Plainfield*, 45 N.J. 161 (N.J. 1965); *Vetere v. Allen*, 15 N.Y. 2d 259 (N.Y. 1965) (*per curiam*); *Jackson v. Pasadena City Sch. Dist.*, 59 Cal. 2d 876, 881-82 (Cal. 1963); Mass. Gen. L. ch. 71, §37C; Ohio Rev. Code § 3313.98(B)(2)(b)(iii).

There is simply no adequate basis to conclude that *Swann* and *Seattle* do not remain good law. The decisions of this Court following *Brown* have emphasized that *federal courts* may act only on the basis of a constitutional violation, and that the scope of remedies available in such circumstances is limited, but it has never been supposed or suggested that the

authority of *school boards* to do what courts cannot has likewise been diminished, *sub silentio*.[8] This Court should resist petitioners' urging that it import strict scrutiny analysis to evaluate voluntary school integration policies. As Judge Kozinski observed, 426 F.3d at 1195, because the nearly uniform result of applying strict scrutiny is invalidation of the challenged policy, this will inevitably chill, and all too often effectively eviscerate, the latitude school districts have traditionally enjoyed — and indeed need — in order to make sensitive, well-informed educational policy decisions.

At bottom, respondents have done precisely what this Court has long indicated that it hoped all public school systems — including those which have attained unitary status by faithfully implementing court-ordered relief and ultimately incorporating its underlying purposes into their own plans and goals — would do: they have made a conscious effort to build upon their prior achievements, to learn from their mistakes, and to continue striving toward *Brown*'s vision of equal, integrated public schools. *See McFarland*, 330 F. Supp. 2d at 852-54.

The Court has never given any indication that it intended to transform the Equal Protection Clause into a weapon with which opponents of school integration may challenge K-12 student assignment decisions made in good faith to provide equal educational opportunity. It should not now legitimate

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[8] To the extent that petitioners rely on the Court's language in cases dealing with the limitations of judicial remedial power to suggest that actions taken in the present cases are unconstitutional, *e.g.*, *Freeman*, 503 U.S. at 494 ("Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation."), it is readily apparent that those decisions do not undermine the Court's previous statements about the latitude afforded to school districts. "The absence of a duty [to desegregate] sheds little light on the constitutionality of a voluntary attempt." *Brewer*, 212 F.3d at 752.

that ironic outcome. *See Higgins v. Bd. of Educ. of Grand Rapids*, 508 F.2d 779, 795 (6th Cir. 1974) ("An integrated school experience is too important to the nation's children for this Court to jeopardize the opportunity for such an experience by constructing obstacles that would discourage school officials from voluntarily undertaking creative programs.").

C. Voluntary K-12 School Integration Is Also Consistent with This Court's Emphasis on Local Control and Deference to School Boards

The Court's cases encouraging public school districts to address racial isolation and promote racial integration through voluntary means also comport with the time-honored traditions of local control, deference to school administrators' educational judgments, and respect for the political process. *See McFarland*, 330 F. Supp. 2d at 850-51 (noting that the "deference accorded to local school boards goes to the very heart of our democratic form of government"). Even at the height of resistance to school desegregation, this Court afforded formerly *de jure* school districts the first opportunity to decide how best to remedy violations before federal trial courts could step in, despite its frustration with the perennial failure of local school administrators to take the measures necessary to desegregate their schools. *See Swann*, 402 U.S. at 13 (summarizing history); *id.* at 15-16 (allocating to local districts the initial opportunity and responsibility to formulate an effective desegregation plan).

In the years following the Court's approval of the broad judicial remedies in *Swann*, it began enlarging the goal of school desegregation from the unequivocal mandate to eliminate the vestiges of segregation "root and branch," *Green*, 391 U.S. at 438, to include as well the "end purpose [of] . . . restor[ing] state and local authorities to the control of

a school system that is operating in compliance with the Constitution." *Freeman*, 503 U.S. at 489. *See, e.g.*, *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("[L]ocal autonomy of school districts is a vital national tradition."). That notion of local control and deference is now a bedrock of public school desegregation law.

The Court has conveyed several rationales for restoration of local control. It has emphasized, for example, the value of permitting the political process to determine what kinds of educational policies best suit the needs of children within each school district. *See, e.g.*, *Freeman*, 503 U.S. at 490 ("When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course."); *Dowell*, 498 U.S. at 248 ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."); *accord PICS*, 426 F.3d at 1195 (Kozinski, J., concurring).

In the Court's estimation, local control also encourages responsiveness of local school boards to those whom they serve, *Freeman*, 503 U.S. at 490, community confidence in and support for the public school system, *Milliken*, 418 U.S. at 741-42, and "experimentation, innovation, and a healthy competition for educational excellence." *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *accord Comfort*, 418 F.3d at 28 (Boudin, C.J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

Equally as often, the Court has acknowledged the value of local authority because of its view that judges lack the competence to make sensitive, pedagogical decisions best left

to school boards and educational experts. *See, e.g.*, *Penick*, 443 U.S. at 488; *Milliken*, 418 U.S. at 744. This notion is consistent with Justice Thomas's recognition in *Johnson v. California*, 543 U.S. 499 (2005), at that in the prison context, "experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country." *Id* at 529 (Thomas, J., dissenting).[9]

Just as it provides support for ending court supervision, the emphasis on local control is similarly cogent and applicable to school authorities' *voluntary* decisions to seek and retain the benefits of integrated schools. As the *McFarland* court observed, "[i]t would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law." 330 F. Supp. 2d at 851. What an unfortunate path constitutional law will have taken if the importance of local control were invoked as a primary justification to dissolve court-ordered desegregation decrees, while unitary districts, acting in good faith, were not afforded the same discretion to implement policies that prevent a return to the kinds of segregated conditions that first led this Court to reach its conclusion in *Brown*.

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[9] Also analogous here is Justice Thomas's observation that, in the prison context, the Court has given greater deference to prison officials on constitutional issues "regardless of the standard of review that would apply outside prison walls." *Johnson*, 543 U.S. at 530 (Thomas, J., dissenting). The Court has likewise consistently afforded a higher degree of deference to school boards in constitutional cases to establish educational policies. *See generally* James E. Ryan, *The Supreme Court and Public Schools*, 86 Va. L. Rev. 1335 (2000) (citing cases). Indeed, if the Court were to deem strict scrutiny appropriate here, these cases would become an exception to the thrust of constitutional law jurisprudence affecting public schools.

II. Application Of A Rigorous Rational Basis Scrutiny Standard Is Appropriate Here Because It Takes Account Of The Relevant Differences Among K-12 School Assignments, University Admissions, And True Affirmative Action Cases

Not only are affirmative action cases the wrong place for this Court to turn to find the historical origins of voluntary K-12 school integration, but those cases also provide an ill-fitting framework for analysis of the issues raised here. The differences between the two contexts — as reflected in this Court's encouragement of voluntary efforts and its consistent rejection of any students' right to attend "neighborhood" or preferred public schools, *see supra* I.A — are differences in kind and not merely degree. The Court's constitutional test should likewise recognize the differences as such.

Furthermore, as a practical matter, restricting the scope of the constitutional inquiry here to little more than a modified application of the strict scrutiny principles applied in *Grutter* would do a disservice to the multitude of interests that school districts properly must (and actually do) weigh as they formulate and operate an effective student assignment plan. Applying rational basis scrutiny instead would allow federal courts to avoid the unnecessary and somewhat artificial task of extracting race from the interwoven web of considerations, while still providing them with the necessary judicial tools to scrutinize a challenged policy's actual purposes and impact.

A. Race-Conscious Public School Assignments Are Contextually and Analytically Distinct from Racial Preferences in Affirmative Action Cases

Perhaps above all, *Grutter* teaches that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U.S. at 327. We recognize that the similarities between this Court's affirmative action

rulings and the cases at bar are sufficiently facially appealing to support the assumption that the test described in *Grutter*, with minor modifications, governs here. What is more, the courts below did an inspired job of resolving the differences between the two contexts while staying as faithful to strict scrutiny's analytical framework as possible. *See PICS*, 426 F.3d at 1172-92; *McFarland*, 330 F. Supp. 2d at 848-64. Yet, a closer examination of the issues raised by voluntary school integration reveals that they are entirely different from those in affirmative action cases. Indeed, the operative facts and considerations involved here share so little in common with the affirmative action context that application of strict scrutiny itself — and not merely the specific facets of it — has been characterized as forced and ultimately unpersuasive. *See PICS*, 426 F.3d at 1193 (Kozinski, J., concurring).

In affirmative action cases, at issue is the constitutionality of racial considerations in the distribution of a limited good or benefit, such as admission to a selective college or university, *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003), a government contract, *Adarand*, 515 U.S. at 211, or public employment. *United States v. Paradise*, 480 U.S. 149, 153 (1987). Often referred to as "zero-sum games," these competitions determine who will and will not receive the benefit in question, regardless of the decisionmaker's approach. Thus, the issue there is whether it is constitutionally permissible to consider race among other factors in evaluating merit, qualification, or cost, with the result of favoring some applicants over others. In short, this Court has used strict scrutiny where it perceived a "racial *preference*" is at issue.

On the other hand, in the context of K-12 public education one begins with the proposition that students are not entitled to attend any particular school. *PICS*, 426 F.3d

at 1181 n.21; *McFarland*, 330 F. Supp. 2d at 860. So long as school districts do not segregate students by race, *see Brown*, 347 U.S. at 493, the determination of where and how to assign students traditionally has been one for the political process and school authorities to resolve. *See, e.g., Johnson*, 604 F.2d at 515 (citing cases). Indeed, in the vast majority of school districts across the nation, no choice whatsoever is offered to students; they are simply assigned to a school based on whatever pedagogical or practical reasons the district might have for making those assignments.

Unlike in the affirmative action context, public primary and secondary education is *not* a limited good: by law, all youth of specified ages must attend school, and those who choose to enroll in a public system will be and are assigned to a school in that system. *PICS*, 426 F.3d at 1181; *McFarland*, 330 F. Supp. 2d at 859. In both of the districts in question, the schools are resourced, staffed, and funded through the same means, and students are taught the same core curriculum. Denial of a substantially equal K-12 education is never an issue, *cf., e.g., Gratz*, 539 U.S. at 251, and petitioners do not contend that it is here.

It is true that, as with affirmative action, some degree of race-conscious decisionmaking occurs here. The challenged policies are designed to promote racial integration through the use of various strategies, including managed school choice. But every student regardless of race may request any of the available choice options, and at no school does attendance hinge on a determination of merit, qualification, or entitlement. *Compare Grutter*, 539 U.S. at 315 (noting that law school's admission policy selects from qualified candidates based on numerous indicia of ability), *with PICS*, 426 F.3d at 1181 ("[N]o assignment to any of the District's

high schools is tethered to a student's qualifications."), and *McFarland*, 330 F. Supp. 2d at 859-60 (same).

Thus, concerns about the permissibility of perceived preferences or favoritism in a selective, competitive process do not arise here. *Cf. Gratz*, 539 U.S. at 270-72. Nor are the dangers of stigmatic harm implicated. *Compare Bakke*, 438 U.S. at 298 (describing the risk of stigmatic harm that can be caused if affirmative action plans send the signal that minorities cannot succeed without "special protection"), *with Comfort*, 418 F.3d at 18 (explaining that because school assignments are not based on merit, there is no risk of causing stigmatic harm based on race).

Similarly absent are concerns that the failure to be assigned to a particular public school is the equivalent of being denied admission to the elite law school, medical, or undergraduate institutions in *Grutter*, 539 U.S. at 311; *Bakke*, 438 U.S. at 269; or *Gratz*, 539 U.S. at 249, respectively. *See Bakke*, 438 U.S. at 301 n.39 (describing medical school admissions and public K-12 assignments as "wholly dissimilar"). Nor are these cases like *Wessmann v. Gittens*, 160 F.3d 790, 791 (1st Cir. 1998), which involved a prestigious, selective public high school, as none of the schools here provides the kind of unique, competitive educational opportunities that would distinguish it in a constitutional sense from the districts' other schools. The courts below, therefore, correctly concluded that the schools here are "basically equal." *McFarland*, 330 F. Supp. 2d at 860; *PICS*, 426 F.3d at 1169.

To be sure, parents and students may desire one school over another (they would not have identified or ranked their preferences otherwise), but this Court has never held that preference alone automatically renders the grant or denial of a public school assignment constitutionally significant. Thus

federal courts have correctly refused to recognize it as such. *See, e.g.*, *Hampton*, 102 F. Supp. 2d at 380 n.43; *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 364-66 (D. Mass. 2003), *aff'd on other grounds*, 418 F.3d 1 (1st Cir. 2004), *cert. denied*, 126 S. Ct. 798 (2005).

These analytical distinctions are hardly superficial. Taken together, they do not merely militate in favor of slight modifications in application of the strict scrutiny factors, but rather bring into question whether the kinds of concerns this Court has raised in affirmative action cases should be implicated at all. One might even think that voluntary school integration policies present not a *zero* sum game, but rather a *positive* sum game: when a district adopts such a policy, *all* students in the system gain the benefit of an opportunity to attend integrated schools, which otherwise might not have been available for some or perhaps all of the students.

B. K-12 Student Assignment Policies are Based on a Balancing of Complex Educational Objectives and Practical Considerations that Legitimately Relate to and Interact with the Goal of Racial Integration

Applying rational basis scrutiny here also makes practical sense.[10] Such a standard recognizes that race is rightly and inextricably woven into the various considerations school authorities must weigh in determining how best to educate students.[11] To rule otherwise would be to reduce *Brown*

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[10] *See Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Court willing to revisit its prior holdings to develop more workable legal rules); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992) (Court considers practicality and workability of rules it fashions).

[11] Some of petitioners' arguments depend on ignoring the breadth of the varied and proper educational objectives that school systems have to focus exclusively on improving student achievement. Because, petitioners argue, racial integration does not successfully advance this goal, it has little or no pedagogical value. Apart from the questionable

from a celebrated statement of ideals to an artifact of legal history having little present-day value.

By definition, the task of student assignment connects pupils, who are potentially or actually mobile, with facilities, which are normally structures fixed to a geographic location. Every assignment-related decision — *e.g.*, to locate, repair, close or expand a school facility; to establish or alter its grade structure; to assign or move teachers to or from the school; to offer a specialized or optional program at the school; to offer transportation to the facility; to establish a geographic zone for the school or open it to a choice attendance process — has geographic connotations and, for that reason, a demographic background and demographic consequences. School administrators are unquestionably and rightly aware of those characteristics and consequences. It is why school systems are constantly studying, *inter alia*, birth rate and survival trends to predict short- and medium-term capacity needs. *See, e.g.*, *Meredith v. Jefferson County Board of Education* (No. 05-915), Joint Appendix ("*Meredith*

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empirical conclusion that underlies this argument, its narrow view of the responsibilities of a public school system ignores the plethora of democratic, social, and civil functions of public K-12 schools. More than fifty years ago in *Brown*, this Court announced that compulsory public primary and secondary education "is the very foundation of good citizenship," and "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment." 347 U.S. at 493; *accord Plyler v. Doe*, 457 U.S. 202, 221 (1982). As our society becomes increasingly racially and ethnically heterogeneous, such cultural and civic lessons are ever more vital. *See PICS*, 426 F.3d at 1195 (Kozinski, J., concurring) ("Schools, after all, don't simply prepare students for further education, though they certainly can and should do that; good schools prepare students for life, by instilling skills and attitudes that will serve them long after their first year of college.").

J.A.") at 99-103. Those data almost inevitably contain racial or ethnic information.

Each assignment decision, therefore, must strike a careful balance of pedagogical concerns and interests, some but not all of which implicate race. For instance, offering students some opportunity to choose the school they would like to attend — as both respondent school systems have done here — serves the purpose not only of encouraging integration through the voluntary movement of students, but also of providing students with a variety of distinct yet basically equal educational opportunities to suit their needs. *PICS*, 426 F.3d at 1169; *McFarland*, 330 F. Supp. 2d at 860.

Furthermore, the availability of many educational options might satisfy a school board's goal of making the system as a whole more attractive to students, most often white and middle class students, who might otherwise leave the public schools to attend private or parochial institutions. *See McFarland*, 330 F. Supp. 2d at 854; *Meredith* J.A. at 104-05. Thus, a school district's ability to maintain market share also furthers the legitimate cause of stemming the flight of these students. *See, e.g.*, *Ambach*, 738 F.2d at 581 (recognizing that stemming white flight can be an important interest of school boards); *Johnson*, 604 F.2d at 516-17 (same).

Providing some specialized educational programs and encouraging choice among schools may reduce white flight from the system overall, but if unfettered, such an assignment strategy might also lead to further racial isolation in a handful of schools in a racially diverse system. *McFarland*, 330 F. Supp. 2d at 854. This fear is not an abstract one, but one of particular concern here, given the practical challenges of intense residential segregation and poverty concentration in the communities these school systems serve, as well as the history of intentional segregation in Jefferson County, which

brings with it a reasonable suspicion of enduring favoritism toward certain communities. *See also Anderson v. City of Boston*, 375 F.3d 71, 83-84 (1st Cir. 2004).

Similarly, a school district sensitive to the messages and consequences of its assignment system can also help avert the possible neglect (or even appearance of neglect) of any individual schools in the district, particularly the ones that would otherwise become predominantly minority.[12] *PICS*, 426 F.3d at 1170-71. Good faith prevention of even the appearance of such results is of critical importance to gaining public confidence and preserving a school district's unitary status. *McFarland*, 330 F. Supp. 2d at 854.

Above all else, as democratically-elected bodies, school boards are motivated by the proper interest of maintaining the ongoing support of their constituents. *McFarland*, 330 F. Supp. 2d at 854. This Court has long valued the restoration of local control and authority to state and local officials held accountable through the democratic process. *See, e.g.*, *Freeman*, 503 U.S. at 489-90; *Dowell*, 498 U.S. at 247-48;

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[12] One critique of school desegregation is that it rests on the assumption that predominantly or overwhelmingly black institutions are inherently inferior *because* they are black. *See Jenkins*, 515 U.S. at 114 (Thomas, J., concurring). While the Court said in *Brown* that racially separate schools are inherently unequal, it is not the mere fact of racial identifiability that leads to the perception of racial inferiority or reality of racial inequality. Rather, it is the practical consequences of segregated predominantly minority schools — which are statistically more likely to be centers of concentrated poverty, plagued by inadequate resources, higher teacher turnover, lower levels of parent involvement, low expectations, and fewer curricular offerings regardless of any intentions or efforts of school officials, and which history has shown are susceptible to conscious or unconscious neglect by school districts preoccupied with satisfying their most vocal constituents — that create the nexus between racial segregation and inferiority, real or perceived. *See generally*, Brief of 553 Social Scientists as *Amici Curiae* in Support of Respondents.

Seattle, 458 U.S. at 481-82; *Brinkman*, 433 U.S. at 410; *Milliken*, 418 U.S. at 741-44; *Rodriguez*, 411 U.S. at 49-53. The success that respondent school boards have experienced in this regard represents a vindication of the faith this Court's decisions have shown in the power of communities to deal with issues of race and education in the absence of a federal court order.[13]

School authorities, therefore, like state legislatures, are always aware of the racial demographics in the communities they serve. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). Thoughtful decisionmakers — especially in communities like Jefferson County, which has a legacy of intentional segregation, and in Seattle, which has an equally long history of struggling to overcome residential segregation — are inevitably and properly cognizant of the racial implications of their actions. *See Swann*, 402 U.S. at 20-21 (reciprocal influence of school location and neighborhood racial composition). And in many ways, their job requires them to be. *See supra* note 3.

For this reason, the mere fact that race is considered among other factors in assigning students to schools, even directly, should not itself trigger strict scrutiny's search for an overarching constitutionally compelling motive and an analysis of competing models with the goal of identifying an alternative procedure in which race is either disregarded or

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[13] Results of surveys in Jefferson County reveal overwhelming support for an assignment plan that both provides the opportunity for choice and ensures that all of the district's schools are racially integrated. *See McFarland*, 330 F. Supp. 2d at 854 n.41; *Meredith* J.A. at 106-07. That the Seattle respondents have maintained a school integration plan voluntarily for more than four decades and now twice appeared before this Court to defend their policies speaks volumes of the depth of commitment to the goal of operating integrated schools of successive school boards elected over a period of decades. *PICS*, 426 F.3d at 1166.

given less consideration. This ought be especially true where that alternative may significantly impede the realization of the many other purposes of student assignment.

In the end, this Court need not involve itself in the difficult task of judging the extent to which every possible consideration of race — artificially separated from the truly complex web of pedagogical goals and motivations that drive student assignment policies — is compelling or indispensable to the whole of its assignment plan. *See Adarand*, 515 U.S. at 223 (requiring, in the context of affirmative action, "a most searching examination"). The Equal Protection Clause does not require that level of unwarranted intrusion into the educational and democratic process here. Rather, the Court should take a more holistic, unencumbered view of the challenged policies, recognizing the many interests that they properly serve. Rational basis review, not strict scrutiny, permits it to do so.

While such a standard would honor the traditions of local control and deference this Court has long valued, it would not leave the actions of school officials unchecked. The muscular rational basis test Judge Kozinski described and we propose is familiar to the Court and capable of safeguarding against violations of the Fourteenth Amendment. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *see also Johnson*, 543 U.S. at 547 (Thomas, J., dissenting) ("[T]his Court has long had 'confidence that . . . a reasonableness standard is not toothless.'") (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)).

Under this standard, federal courts would be able to "consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it," requiring a sufficient connection between the two but declining to

speculate about other possible justifications. *See PICS*, 426 F.3d at 1194 (Kozinski, J., concurring); *see also Romer*, 517 U.S. at 635 (closely examining stated rationales for Colorado's constitutional amendment and results that would flow from its implementation to conclude that it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else").

Thus, as applied here, it would require a thorough inquiry into both the school systems' objectives and the extent to which the features of the plans actually operate to further those objectives. It would be fully adequate to avoid the evils that strict scrutiny is intended to "smoke out," *Croson*, 488 U.S. at 488, and to avoid pretextual claims of benign intentions or efforts to disadvantage one group at the expense of another. Yet, it would do so without excessively deterring school districts from undertaking to achieve and operate diverse, integrated schools and programs that have long received the approbation of this Court, recognizing that voluntary school integration is "far from the original evils at which the Fourteenth Amendment was addressed," *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring).

CONCLUSION

As a nation, we honor *Brown v. Board of Education* as one of our most important constitutional decisions. In post-"unitary status" and "*de facto*" segregated public school systems, all that is left of *Brown* is voluntary integration.

These cases present the question whether it will be constitutional to consciously preserve and pursue the soul of desegregated education enshrined in *Brown* and its progeny. The Orwellian argument that voluntary integration efforts constitute racial discrimination in violation of the Fourteenth

Amendment's Equal Protection Clause, if validated by this Court, would be an unwarranted and tragic reversal of historic proportions. Nothing in law or in logic requires or supports such a course of action.

This Court should apply a rigorous rational basis review of respondents' challenged voluntary integration plans and affirm the judgments below.

Respectfully submitted,

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'09 9L

Nos. 05-908, 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,
v.
SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,
v.
JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writ of Certiorari To The United States Courts of Appeal For The Sixth and Ninth Circuits

BRIEF AMICUS CURIAE OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND NATIONAL BASKETBALL RETIRED PLAYERS ASSOCIATION IN SUPPORT OF THE RESPONDENTS

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I. INTEREST OF AMICUS CURIAE[1]

A. The NCAA's Interest.

The National Collegiate Athletic Association ("NCAA") is an association of over 1000 institutions, conferences, and organizations that governs the athletics programs of many colleges and universities in the United States. The NCAA is the largest collegiate athletic organization in the world. The NCAA is dedicated to the pursuit of excellence in both academics and athletics, and the highest levels of integrity and sportsmanship.

The NCAA is equally committed to enhancing opportunities for racial and ethnic minorities and women. In furtherance of this commitment, the NCAA -- through its member institutions, conferences and national office staff -- seeks to promote an inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds. The NCAA further seeks to strengthen the role that intercollegiate athletics plays in the higher education mission and to enhance the sense of community and strengthen the identity of member institutions.

Racial integration at the compulsory school level is critical to promoting the core values of the NCAA. The NCAA relies on primary and secondary schools to develop students qualified to succeed at the college level, both as students and as athletes. In the absence of voluntary

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[1] Letters of consent by all parties to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than Amici Curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

integration programs such as those at issue in this case, the NCAA believes that the quality and performance of student-athletes at its member schools will fail to attain the highest level of achievement and may even decline. In particular, the NCAA's experience over the last 50 years indicates that student-athletes admitted from racially integrated compulsory schools exude a greater level of teamwork, racial tolerance, and achievement, both on and off the sports field.

B. The NBRPA's Interest.

The National Basketball Retired Players Association ("NBRPA," and collectively with the NCAA, "*Amici Curiae*") is a 501(c)(3) charitable organization consisting of retired professional basketball players from the National Basketball Association ("NBA"), the American Basketball Association ("ABA"), and the Harlem Globetrotters. The NBRPA's mission is to promote goodwill utilizing the game of basketball and to provide community leadership and responsibility through its variety of charitable and educational initiatives. The NBRPA has a membership of approximately 700 retired players of diverse racial and ethnic backgrounds with careers spanning from the NBA's inception in 1947 until as recently as 2006.

The NBRPA, as a signatory, supports the NCAA in this amicus brief to further underscore the enormous impact school integration has had, from K-12 through college, on its membership. The overwhelming majority of NBRPA's members are former student-athletes who attended and played for NCAA member institutions. A significant number of the NBRPA members attended racially diverse K-12 schools at one time or another.

II. SUMMARY OF ARGUMENT

The NCAA and NBRPA file as *amici curiae* in this case to emphasize the enormous positive impact of integration upon (i) the academic and professional success of student-athletes and (ii) the attitudes of student-athletes and millions of viewers of college sports towards persons of other racial and ethnic backgrounds. Based on decades of experience, the NCAA and NBRPA believe that exposure of student-athletes to persons of other races prior to college substantially improves their academic and professional success and leads to enhanced teamwork and positive interracial relations among teammates. Because of the media spotlight cast upon intercollegiate sports, student-athletes serve as role models to a very large segment of the American people. Accordingly, it is critical that these student-athletes exemplify the type of positive interracial relations and experiences that characterize a unified yet diverse citizenry.

Research has demonstrated that college students who come from integrated primary and secondary school settings have greater academic and professional success than college students whose first experience with diversity is at the college level. Moreover, students from integrated primary and secondary schools engage in more diverse extra-curricular activities and interact more genuinely with peers from different racial groups. Conversely, studies show that *de facto* segregation at the pre-college level is self-perpetuating in college and beyond.

In addition to its positive impact on individual student-athletes, integration in college sports has had an overwhelmingly positive impact on American society as a whole. Over the last sixty years, perhaps no medium has done more to foster racial tolerance and cross-racial

interaction in America than the athletic arena. Prior to the desegregation of either the military or of public education, and before African-Americans had full legal access to voting, racial barriers had begun to erode in American sports. The collective American conscience was profoundly affected when Jackie Robinson became the first African-American athlete to play major league baseball since the Jim Crow era. Likewise, the victory of Texas Western College's all-African-American starting lineup over the all-white lineup of the University of Kentucky in the 1966 NCAA Basketball Championship led to the nearly immediate desegregation of college athletic programs throughout the country.

The impact of these events is unquestionably magnified by the popularity and visibility of college sports on television, radio, and other media. Seen and admired by millions, college athletes are compelling and highly visible role models to the American public and, in particular, to American youth. College sporting events provide a fishbowl for the general public to observe genuine relationships between individuals of diverse ethnic and racial backgrounds. The far-reaching influence of college sports carries a great public responsibility -- namely, that college athletes of different races demonstrate interracial teamwork and positive attitudes towards each other.

Voluntary integration programs at the compulsory level help to ingrain positive attitudes in children about persons of other races. These programs enable student-athletes to enter college with a familiarity with other races developed during their most formative years. As a result, these programs make an irreplaceable contribution to the goal of *Amici Curiae* in cultivating successful student-athletes who set an example of genuine integration.

III. HISTORICAL BACKGROUND REGARDING INTEGRATION IN SPORTS

The treatment of minorities in sports has mirrored the racial views of popular society. In the decades following the Civil War, African-Americans were explicitly excluded from organized sports leagues. *See* Timothy Davis, *The Myth of the SuperSpade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 624-33 (1995). Segregation laws were strictly enforced in professional athletic programs and events for athletes and spectators alike. On college campuses, opportunities to compete in sports were limited by admissions policies and informal segregation policies. African-Americans were rarely admitted to college, and even if they succeeded in gaining admittance to the predominantly white colleges, the college athletics programs were limited to white students. Thus, even in states and institutions that did not have formal segregation laws or regulations, African-Americans were denied the opportunity to participate in college sports. Accordingly, African-Americans were relegated to competing against other African-American athletes in Negro leagues or historically black colleges. *Id.*

In 1947, Jackie Robinson became the first African-American athlete to play major league baseball since the Jim Crow era. R. Reese, Abstract, *The Socio-Political Context of the Integration of Sport in America*, 4 J. OF AFR. MEN (1999). "One could argue that Jackie Robinson coming to the plate in Brooklyn on April 15, 1947 was the most visible, and therefore in some ways most important, moment in recent American civil rights history." Kenneth L. Shropshire, Symposium, *Sports Law as a Reflection of Society's Laws and Values: Where Have You Gone, Jackie Robinson? Integration in America in the 21st Century*, 38 S. TEX. L.

REV. 1043, 1043 (1997). Indeed, Jackie Robinson's courage broke the color barrier and ultimately led to the integration of all professional sports.

During the 1950s to 1960s, the civil rights movement continued to gain momentum and open doors for African-American student-athletes. With the landmark decision of *Brown v. Board of Education* in 1954, African-American students gained entrance to previously all-white colleges and universities. "Darryl Hill of the University of Maryland broke the Atlantic Coast Conference's color line in 1963. In 1965, basketbal' player James Cash became the first black basketball player in the Southwestern Conference. The Southeastern Conference [began]... the integration process... [when] the University of Kentucky football team signed Nat Northington and Greg Page in 1966." R. Reese, Abstract, *The Socio-Political Context of the Integration of Sport in America*, 4 J. OF AFR. MEN (1999). School desegregation ushered in a significant change to the racial make-up of both college and professional sports. For example, "in 1948 - 10% of college basketball teams had a black member. By 1966 - 45% of college basketball teams had a black member." Forrest Berghorn & Norman Yetman, Black Americans in Sport: The Changing Pattern of Collegiate Basketball (1976) (unpublished paper, University of Kansas). In the professional arena, previously all-white leagues began to accurately reflect the percentage of Africa-Americans in the population. By the early 1960s, the percentage of African-Americans playing in the NBA, NFL, and MLB equaled the proportion of African-Americans in the US population. *See* Race and Sports, http://www.science-.smith.edu/exer_sci/ESS200/Raceh/Raceh.htm (last visited Oct. 6, 2006).

The 1966 NCAA Basketball Championship also had a profound effect on the attitudes of Americans towards persons of other races. That game, in which the Texas Western College Miners used a starting lineup of all African-American players and went on to defeat the heavily favored University of Kentucky Wildcats, has been called the *Brown v. Board of Education* of sports. In a press conference leading up to the game, it was rumored that Kentucky coach Adolph Rupp said five African-American players could not defeat five white players. In response, Texas Western coach Don Haskins made the decision to put only African-American players in the game. After Texas Western defeated Kentucky, the landscape of intercollegiate sports began to change. "One consequence of the game was that the Southeastern Conference integrated immediately. Barely a month after the game, all-white Vanderbilt signed its first black player." Josh Centor, *Championing Diversity*, THE NCAA NEWS, Sept. 11, 2006, (quoting David Lattin, *Slam Dunk to Glory* (2006)), *available at* http://www.ncaa.org-/wps/portal (last visited Oct. 6, 2006).

The impact of civil rights legislation and the introduction of affirmative action in the 1960's and 1970's not only led to participation and acceptance of African-Americans in college and professional sports, but also created opportunities for people of color to become coaches and athletic directors. Indeed, opportunities expanded exponentially for African-Americans as head college basketball coaches, such as John Thompson and Nolan Richardson, both of whom led their respective teams to multiple winning seasons and national championships.

IV. ARGUMENT

A. Participation In An Integrated Compulsory School Environment Provides Invaluable Benefits To College Student-Athletes.

Compulsory school sports programs prepare student-athletes to interact positively with teammates of other races and ethnic backgrounds. These lessons are particularly important because the early education years are crucial for the formation of the child's own racial identity and attitudes towards persons of other races. Moreover, racial perspectives formed during the compulsory school years tend to be perpetuated during college and later life.

1. An Integrated Classroom Instills Student-Athletes With Racial Tolerance And Understanding.

College sports programs benefit from student-athletes' exposure at the compulsory school level to students of different races and ethnic backgrounds. Desegregation studies have generally found that students in racially diverse schools will have more positive attitudes and achieve stronger social ties with students from other racial groups as opposed to students from less diverse schools. *See* Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 835 (James A. Banks ed., 2d ed. 2004); Jeffrey F. Milem, *Influence of Precollege Factors on Students' Predispositions Regarding Diversity Activities in College*, 44 J. OF C. STUDENT DEV. 611, 611-24 (2003) (citing J. H. Braddock, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact Hypothesis*, 53 SOC. OF EDUC. 178, 178-86 (1980); J.

H. Braddock & J. M. McPartland, *Assessing School Desegregation Effects: New Directions in Research*, 3 RESEARCH IN SOCIOLOGY OF EDUCATION AND SOCIALIZATION 259-82 (1982)). Such research concludes that both white and nonwhite students in racially diverse schools demonstrate less racial bias than those in less integrated schools. J. H. Braddock & J. M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. OF BLACK STUD. 267, 285 (1989); Maureen T. Hallinan & Stevens S. Smith, *The Effects of Classroom Racial Composition on Students' Interracial Friendliness*, 48 SOC. PSYCHOL. Q. 3, 13-14 (1985); A. S. Wells & R. L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531, 552 (1994). The studies have also found that an increase in interracial contact among students creates more interracial sociability and friendship. Maureen T. Hallinan & Stevens S. Smith, *The Effect of Classroom Composition on Students' Interracial Friendliness*, 48 SOC. PSYCHOL. Q. 3, 13 (1985). By contrast, data shows that both white and African-American students in segregated schools are more likely to dislike persons of the opposite race than students in integrated schools. *See* Susanne E. Dutton et al., *Racial Identity of Children in Integrated, Predominately White, and Black Schools*, 138 J. SOC. PSYCHOL. 41, 50 (1998).

A recent comprehensive review of over 200 empirical studies highlighted the importance of "face-to-face contact" between children of different races. In their review, Thomas

Pettigrew[2] and Linda Tropp[3] emphasized the significant correlation between in-person social interaction among children from multiple cultures and reduced acceptance of racial stereotypes. Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 831-32 (James A. Banks ed., 2d ed. 2004) (citing T. F. Pettigrew & L. Tropp, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings*, REDUCING PREJUDICE AND DISCRIMINATION 93-114 (S. Oskamp ed., 2000)).

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[2] Thomas Pettigrew is a professor of social psychology at the University of California, Santa Cruz. He received a Ph.D. from Harvard University in 1956 and taught at Harvard from 1957-1980. During 2000-2001, he held the title of "Senior Fellow" at the Research Institute for the Comparative Study of Race and Ethnicity at Stanford University. From 1967-68 he was president of the Society for the Psychological Study of Social Issues. The Society later awarded him with the prestigious Gordon Allport Intergroup Research and Kurt Lewin Awards. He also won The American Sociological Association's Sydney Spivack Award for Race Relations Research in 1979, and in 2002, he won the Distinguished Scientist Award from the Society for Experimental Social Psychology. Dr. Pettigrew's work has been cited in numerous social science studies on race relations.

[3] Linda R. Tropp is currently an assistant professor of psychology at Boston College. She received her Ph.D. from the University of California, Santa Cruz. Dr. Tropp's work focuses on the affect of interracial social contact on members of minority and majority groups, and the reactions of historically oppressed groups to prejudice and disadvantage. Her publications include research on social identity and identification with social groups, psychological and behavioral responses to prejudice and disadvantage, intergroup contact from the perspectives of minority and majority groups, and acculturation and identity negotiation among members of minority groups.

Likewise, a 1996 examination of desegregation effects determined that interracial contact facilitated students' ability to relate to and respect members from peer groups comprised of other races. *See* Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 832 (James A. Banks ed., 2d ed. 2004) (citing L. Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Settings*, 101 AM. J. OF PSYCHOL. 1306, 1306-32 (1996)) ("[I]n-home interviews with 1,124 African American and White adult residents of the Detroit metropolitan area show that for both groups, early school desegregation experiences are positively related to casual interracial contacts and to close interracial friendships.").

Perhaps most importantly, studies have frequently shown that children and adults themselves attach great value to cross-racial interaction. A collection of interviews with over 500 high school graduates, teachers, advocates, and policymakers revealed that "the vast majority of graduates across racial and ethnic lines greatly valued the daily cross-racial interaction in their high schools. They found it to be one of the most meaningful experiences of their lives, the best – and sometimes only – opportunity to meet and interact regularly with people of different backgrounds." Brief for The Civil Rights Project at Harvard University as Amicus Curiae Supporting Respondents, *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005) (No. 03-2415).

2. Integrated Sports Programs Have Tremendous Potential To Unify Racial Groups And Promote Cross-Racial Understanding.

As Justice Powell has noted, "'[a] great deal of learning occurs informally *** through interactions among students *** of different races *** who are able, directly or indirectly, to learn from their differences. *** For many [students] ***, the unplanned casual encounters with roommates, fellow sufferers in organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 n.48 (1978) (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY, Sept. 26, 1977, at 7, 9).

School sports programs at the compulsory level have tremendous potential to unify racial groups and promote cross-racial understanding. Numerous studies have found that sports provide key social contexts for students of different backgrounds to interact "(1) as equals, (2) in a cooperative way, and (3) with shared goals." Jomills Henry Braddock II et al., *Intercultural Contact and Race Relations Among American Youth*, TOWARD A COMMON DESTINY 249 (Willis D. Hawley & Anthony W. Jackson eds., 1995); *see also* Tony N. Brown et al., *There's No Race on the Playing Field*, 27 J. OF SPORTS & SOC. ISSUES 162, 170 (2003) (explaining that participation in integrated sports programs has a unifying effect); James S. Jackson et al., *Athletic Identity, Racial Attitudes, and Aggression in First-Year Black and White Intercollegiate Athletes*, PARADOXES OF YOUTH AND SPORTS 162 (Margaret Gatz et al., eds., 2002)

(citing G. Allport, THE NATURE OF PREJUDICE (1954); T. F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. OF PSYCHOL. 63, 63-85 (1998)). Indeed, some of the most striking advances in eradicating racial segregation have been made in the field of sports. T. F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. OF PSYCHOL. 63, 63-85 (1998) ("The athletic arena is a domain that requires positive group-based interactions in order for team members to experience success, and in fact is one of the few realms in which all of the essential conditions for reducing prejudice are met. Specifically, the contact occurs between individuals with equalized status in the situation, the contact entails purposeful activity toward common goals fostering interdependence, the contact is cooperative, and the contact is socially sanctioned.").

In addition, greater contact by white student-athletes with African-American student-athletes during high school leads to more positive views toward African-Americans at the collegiate level. James S. Jackson et al., *Athletic Identity, Racial Attitudes, and Aggression in First-Year Black and White Intercollegiate Athletes*, PARADOXES OF YOUTH AND SPORTS 167 (Margaret Gatz et al., eds., 2002). According to Jomills Henry Braddock II,[4] "[e]xtracurricular activities can offer unique and important opportunities for positive cross-

[4] Jomills Henry Braddock is a professor of sociology at the University of Miami and served as the chair of the University's Department of Sociology from 1992 to 1999. He received his Ph.D. in sociology from Florida State University. Dr. Braddock has authored and collaborated on numerous studies analyzing the effects of racial integration in sports programs and early education. Dr. Braddock is currently serving as the director of the Center for Research on Sport in Society and has previously served two terms on the National Educational Research Policy and Priorities Board.

race contacts among students if the various clubs and teams recruit from all groups and permit leadership roles to be held by students of diverse backgrounds." Jomills Henry Braddock II et al., *Intercultural Contact and Race Relations Among American Youth*, TOWARD A COMMON DESTINY 247-48 (Willis D. Hawley & Anthony W. Jackson eds., 1995).

3. The Early School Years Help Crystallize The Child's Own Racial Identity And Attitudes Towards Persons Of Other Races.

The early school years are crucial for the formation of the child's own racial identity as well as an understanding of prejudice and fairness. "[W]hen integration occurs at earlier ages..., children are still in the process of forming their understanding and attitudes about race, unlike adults or even college-aged students who have spent many years internalizing racial attitudes from our still-segregated society." THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY ET AL., LOOKING TO THE FUTURE: VOLUNTARY K-12 INTEGRATION (2005).

"[D]irect student experience with racial diversity corresponds to increased cultural awareness and commitment to promoting racial understanding. This exposure comes at a critical time in students' lives: the [classroom] in essence serves as a controlled microcosm previewing the larger society and working world into which the students will graduate." Jonathan R. Alger, *The Educational Value of Diversity*, 83 ACADEME: BULLETIN OF THE AAUP 20, 20-23 (1997). At between five and eight years old, children begin to form perceptions about their own identity and the differences between themselves and others. Caryl M. Stern-LaRosa, *Talking to your Child about Hatred and Prejudice*,

ANTI-DEFAMATION LEAGUE, 2001, http://www.adl.org-/issue_education/hateprejudice/Prejudice3.asp (last visited Oct. 6, 2006). By the time children reach eight to twelve years old, they are capable of internalizing and applying social stereotypes and prejudices in their life choices. *Id.* Thus, the need for exposure to other races is urgent in elementary and secondary schools, as the benefits of cross-racial interaction are most profound at younger ages. *See* Susanne E. Dutton et al., *Racial Identity of Children in Integrated, Predominately White, and Black Schools*, 138 J. SOC. PSYCHOL. 41, 42 (1998).

Social science studies further indicate that children in integrated schools are more likely to form deeper attachments to peers from other racial groups than are children in non-integrated schools. Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 832 (James A. Banks ed., 2d ed. 2004) (citing J. W. Schofield & W. A. Sagar, *Peer Interaction Patterns in an Integrated Middle School*, 40 SOCIOMETRY 130, 130-39 (1977)). In forming these social bonds, "students of different races may discover that their political beliefs or extracurricular interests provide as much or more common ground as does race. No textbook or computer can substitute for the direct personal interaction that leads to this type of self-discovery and growth." Jonathan R. Alger, *The Educational Value of Diversity*, 83 ACADEME: BULLETIN OF THE AAUP 20, 20-23 (1997); *see also* Walter G. Stephan & John C. Brigham, *Intergroup Contact: Introduction*, 41 J. SOC. ISSUES 1, 1-2 (1985) (finding that interracial and cross-cultural contacts at a young age diminish prejudice and promote greater understanding primarily when they occur among individuals

of equal status); *Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363, 365-66 (1999) (explaining that schools, not businesses, are best suited to offer a forum for cross-cultural contact among a society of equals, free of hierarchy).

4. Racial Perspectives Formed During The Compulsory School Years Tend To Be Perpetuated At The Higher Education Level And Thereafter.

Multiple studies have revealed that racial segregation is self perpetuating for both minorities and majorities. Segregation experienced in elementary through high school impedes students from forming cross-racial friendships in college. According to a study authored by Jeffrey Milem,[5] students demonstrated that they were less likely to segregate themselves by race if their school extracurricular activities, such as sports programs, were integrated. Jeffrey F. Milem, *Influence of Precollege Factors on Students' Predispositions Regarding Diversity Activities in College*, 44 J. of C. Student Dev. 611, 611-24 (2003).

It has long been established in the social science community that children attending desegregated schools are more likely to associate with people of all races in their

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[5] Jeffrey F. Milem is an associate professor at the University of Maryland and graduate program director for the higher education administration program in the Department of Education Policy and Leadership in the College of Education. He received his Ph.D. in higher education from the University of California, Los Angeles. Dr. Milem is widely recognized as an expert in the area of racial dynamics in higher education, and has been commissioned to do research by the Institute of Medicine of the National Academies, the Harvard Civil Rights Project, the American Council on Education, and the American Educational Research Association's Panel on Racial Dynamics in Higher Education.

future professional careers, and are less likely to segregate themselves by race at the collegiate level. "The earliest empirical documentation of the perpetuation of segregation showed that African Americans who attended desegregated schools were more likely to function in desegregated environments in later life." Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 833 (James A. Banks ed., 2d ed. 2004) (citing R. L. Crain, *Making Desegregation Work: Extracurricular Activities*, 13 THE URB. REV. 121, 121-27 (1981); R. L. Crain et al., MAKING DESEGREGATION WORK: HOW SCHOOLS CREATE SOCIAL CLIMATES (1982)).These studies concluded that adults with a desegregated background tended to live in more racially diverse neighborhoods, have racially diverse friends, and have children who attended desegregated schools. *Id.*

In particular, a comprehensive study on the recent pattern of school resegregation examined the long-term benefits of racially and ethnically diverse schools. In a collaborative effort with the NAACP and The Center for the Study of Race and Law at the University of Virginia School of Law, researchers at Harvard University's Civil Rights Project cited evidence indicating that students who attended desegregated schools were more likely to lead integrated lives as adults, in settings such as higher education, housing, and the workplace. THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY ET AL., LOOKING TO THE FUTURE: VOLUNTARY K-12 INTEGRATION 17 (2005). The Civil Rights Project cites research conducted by Amy Wells and Robert Crain who, after reviewing twenty-one studies, concluded that there is indeed a relationship between school and workplace segregation. *Id.* at 16. On the whole, social scientists with expertise in education agree that attending heterogeneous

schools leads "to a greater ability to work with and understand people of backgrounds different than one's own, and to more fully participate in a rapidly changing democratic society." *Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363, 365-66 (1999).

The need for integration at the compulsory school level is crucial because segregation in students' pre-college environment is escalating to the point where college may provide students with the first and only opportunity to connect with peers of other races. *See id.*; *see also* Brief for General Motors as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger et al.*, 539 U.S. 306 (2003) (No. 02-241); *Gratz v. Bollinger et al.*, 539 U.S. 244 (2003) (No. 02-516). "One of the costs of segregation, paid by children of all races, is that young people are insulated from interracial contact. Neither whites, nor blacks, nor Hispanics, nor Asians come into daily contact with a mix of people that fully reflects the growing diversity of the region." JOHN R. LOGAN ET AL., LEWIS MUMFORD CENTER FOR COMPARATIVE URBAN AND REGIONAL RESEARCH UNIVERSITY AT ALBANY, SEGREGATION IN NEIGHBORHOODS AND SCHOOLS: IMPACTS ON MINORITY CHILDREN IN THE BOSTON REGION (September 1, 2003).

B. In Their Capacity As Role Models, Student-Athletes Must Exemplify The Type Of Positive Interracial Relations And Experiences That Characterize A Unified Yet Diverse Citizenry.

Participation in an integrated compulsory school classroom environment helps to develop collegiate athletes into positive role models by instilling racial tolerance and understanding. In light of the influence of collegiate athletes

upon millions of fans, the positive effects of racial integration are modeled and instilled into the American public as a whole.

In today's society, those who excel in collegiate athletics are admired and even idolized by an enormous fan base. People of all ages and from all walks of life yearn for the skills and abilities of their favorite players, and pay close attention to what student-athletes do both in and out of the game.

Given the popularity and visibility of intercollegiate sports, the actions and achievements of college athletes on and off the field are replayed and broadcast to millions of viewers each day. These athletes are constantly on television, in print media, and on internet websites. It is therefore critical that college athletes exemplify the type of positive interracial relations and experiences that characterize a unified yet diverse citizenry.

The far-reaching influence of college sports carries a great public responsibility -- namely, that college athletes of different races exemplify interracial teamwork and positive attitudes. As discussed at length above, these positive attitudes are best learned and cultivated through integration and exposure at the compulsory school level. *See* Jonathan R. Alger, *The Educational Value of Diversity*, 83 ACADEME: BULLETIN OF THE AAUP 20, 20-23 (1997) (explaining that direct student experience with racial diversity corresponds to increased cultural awareness and commitment to promoting racial understanding). Indeed, public schools play an integral role as socializing institutions in transmitting society's culture and values to its young, as well as preparing them with appropriate knowledge and skills for leading

productive and fulfilling adult lives. Jomills Henry Braddock II et al., *Intercultural Contact and Race Relations Among American Youth*, TOWARD A COMMON DESTINY 243 (Willis D. Hawley & Anthony W. Jackson eds., 1995).

It is therefore essential that our nation's future college athletes attend racially diverse compulsory schools to ensure that they are exposed to racially diverse peers and have the necessary contact and experience with other races to become good role models both on and off the field.

C. Integration At The Compulsory School Level Has Had, And Continues To Have, An Enormously Positive Impact On The Academic And Professional Success Of Student-Athletes.

Integration at the compulsory school level has had, and continues to have, an enormously positive impact on the individual success of student-athletes in the classroom and the workplace. Indeed, multiple studies demonstrate that the academic and professional success of student-athletes at the collegiate level is greatly enhanced when such students come from an integrated compulsory school system.

1. Academic Performance Is Positively Impacted by Racial Integration.

Over the past decade, numerous studies performed at the district, state, and national level have found that students who attend racially diverse elementary and secondary schools achieve higher academic success than similar students who attend schools that are predominantly one race.

Racially integrated schools provide a better academic setting for all students, and can lead in particular to increased

achievement among minority students. THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY ET AL., LOOKING TO THE FUTURE: Voluntary K-12 Integration 16 (2005). Differences among students allow them to "stimulate one another to reexamine even their most deeply held assumptions about themselves and their world," teaching them to view issues from multiple perspectives. *Regents of University of California v. Bakke*, 438 U.S. 265, 313 n.48 (1978) (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY, Sept. 26, 1977, at 7, 9).

For example, a comprehensive study of school segregation and student achievement in North Carolina's Charlotte-Mecklenburg school district found that "the proportion of elementary education spent in racially identifiable African American schools had direct negative effects of end-of-course test scores and high school track placement." Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 830 (James A. Banks ed., 2d ed. 2004). In addition, the study also found that segregation at the elementary school level "has indirect effects through sixth-grade standardized test scores and high school track placement on later academic outcomes like Scholastic Aptitude Test (SAT) scores and high school grade point average (GPA)." *Id.* (citing R.A. Mickelson, *Subverting Swann: Tracking and Second Generation Segregation in Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215, 215-252 (2001)).

At the state level, a 1996 analysis of data from Louisiana concluded that "holding constant family, individual, and school-level influences on achievement, both African American and White students scored lower in

schools with high concentrations of minority students and that African American students' achievement increased as the proportion of their schoolmates who were White increased." Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 830 (James A. Banks ed., 2d ed. 2004) (citing C. Bankston & C. Caldas, *Majority African American Schools and Social Injustice: The Influence of De Facto Segregation on Academic Achievement*, 75 SOCIAL FORCES 535, 535-552 (1996)).

On the national level, a 1999 study analyzing standardized test scores in math and reading found that "both African-American and white students who attended desegregated schools achieved higher results than students who attended schools that were predominantly one race." Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 831 (James A. Banks ed., 2d ed. 2004) (citing J. Schiff et al., Organizational Context for Student Achievement: The Case of Student Racial Composition (April 1999) (unpublished paper, presented at the meeting of the American Educational Research Association)).

Finally, a 2006 study conducted by the University of Central Florida on college graduation rates revealed that student-athletes, who were exposed to a more diverse and racially integrated environment, had a higher graduation rate than the general student body. *See* New Study Reveals Marked Improvements for the Graduation Rates for African-American Student-Athletes (April 6, 2006), http://www.-bus.ucf.edu/sport/public/downloads/NSAD_2006_Study_-Grad_Rate_Improvements.pdf (last visited Oct. 6, 2006).

Specifically, the study determined that student-athletes had a 62% graduation rate versus the general student population's 59% rate. Even more striking, the divergence between graduation rates of African-American student-athletes and general African-American students was 52% compared to 43%. Richard Lapchick, director of the Institute for Diversity and Ethics in Sport at the University of Central Florida, attributes the significant increase in graduation rates for African-American athletes in part to participation in integrated athletic programs. *Id.*

Based upon the results of these studies, it is undeniable that children who attend racially diverse schools generally achieve higher academic success than those who attend schools with more homogenous student bodies. *See* Jeffrey F. Milem, *Influence of Precollege Factors on Students' Predispositions Regarding Diversity Activities in College*, 44 J. OF C. STUDENT DEV. 611, 611-24 (2003).

2. Racial Integration Increases Opportunities For Success.

In addition to greater academic achievement, college students who come from integrated pre-college settings have far greater professional success than college students whose first experience with diversity is at the college level.

Recent studies demonstrate that racial diversity in compulsory schools positively contributes to "(1) the development and persistence of plans by African American students to enter professional and nontraditional occupations where they are underrepresented; (2) employer preferences for hiring African Americans from desegregated schools over African Americans (similarly qualified) from segregated schools; and (3) being employed in ethnically

diverse work environments." Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 834 (James A. Banks ed., 2d ed. 2004).

Not only has racial integration at the compulsory school level been found to improve a student's ability to deal with colleagues, customers, employees, and partners of diverse backgrounds in business, but it also increases "the pool of contacts and informants from whom African Americans can obtain information about available jobs." Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 834 (James A. Banks ed., 2d ed. 2004). In addition, studies indicate that students from racially integrated elementary and secondary schools are more likely to work in desegregated offices than those students who attend schools that are predominantly one race. Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. OF NEGRO EDU. 394, 397 (1994) (citing J. H. Braddock et al., Desegregated Schools and Desegregated Work Environments (1984) (unpublished paper, presented at the American Educational Research Association Annual Meeting)).

D. The Court Has Recognized Promotion Of Racial Diversity As A Compelling State Interest.

A conclusion that voluntary integration programs serve a compelling state interest is consistent with, and all but compelled by, this Court's jurisprudence. The Court has consistently recognized that racial diversity in the classroom

is a compelling state interest. Indeed, as early as the Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483, 492 (1954),[6] which focused on the "[e]ffect of segregation itself on public education," racial diversity, in an educational context, has been viewed as a compelling state interest. Because "[e]ducation is perhaps the most important function of state and local governments," and "[i]t is a principal instrument in awakening the [student] to cultural values," the goal of achieving racial diversity is viewed approvingly through the compelling state interest prism. *Id.* at 493.

Building on *Brown*, the Court's later opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978), clearly established that "[t]he contribution of diversity is substantial" such that a state has a compelling interest in allowing race and ethnic origin to be factors in shaping an admissions program. *Bakke* embodies the Court's laudable view that "[t]he attainment of a diverse student body...is a constitutionally permissible goal" in the educational context. *Id.* at 313.

Thereafter, the Court has repeatedly and consistently reaffirmed that there is a compelling state interest in promoting racial diversity in the classroom. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part) (noting that "the promotion of racial

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[6] Notably, the *Brown* court relied on prior decisions which recognized the importance of racial diversity in education. *See Brown*, 347 U.S. at 493, *citing Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (observing that learning "[c]annot be effective in isolation" from diverse individuals); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950) (finding that African-American student was entitled to equality and "[t]o engage in discussions and exchange views with other students").

diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest"); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 460, 472-74 (1982) (holding that state law which permitted local school boards to assign students away from neighborhood schools for virtually all purposes required by their educational policies *except racial desegregation* violated the equal protection clause); *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971) (invalidating state law proscription against student assignments made on basis of race as such law deprives school boards of the one tool absolutely essential to fulfillment of constitutional obligation to eliminate school segregation).

Thus, the Court has recognized that properly designed voluntary integration plans that utilize racial considerations can meet the high burden of addressing a compelling governmental interest. *See, e.g., North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43, 45-46 (1971); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 460, 472-474 (1982) (striking down measure that would have restricted a school district's power to address *de facto* segregation for the purpose of augmenting education and concluding that, "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.")

This line of reasoning remains uninterrupted through the present. As recently as the Court's decision in *Grutter v. Bollinger*, 539 U.S. 206 (2003), the Court found that diversity in education was sufficiently compelling to permit the use of racial classifications that would be otherwise impermissible under the Fourteenth Amendment.

E. The Court Should Defer To The Seattle And Louisville School Districts' Determination That Increasing Racial Diversity In Their Schools Is A Compelling Interest.

As an association of institutions, conferences, and organizations that governs the athletics programs of many colleges and universities in the United States, the NCAA urges the Court to follow its tradition of deferring to the judgment of local government entities like the Seattle and Louisville school districts as to the best manner to educate its students, including determining the constituency of its student bodies. As this Court has recognized, it is essential that school districts be allowed the discretion they need to foster a racially integrated environment. School districts must have the discretion to design assignment policies and programs that will prepare students to be tolerant citizens in a racially diverse society. In light of these complex educational policy issues, the NCAA believes, and the Court's prior decisions make clear, that local government authorities, and not the courts, are the best entities to make these policy decisions. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

In *Grutter*, the Court deferred to the academic judgment of law school officials that diversity did indeed produce numerous benefits. *Grutter v. Bollinger*, 539 U.S. at 328-29. It did so in light of the Court's traditional deference "to a university's academic decisions," which "includes the selection of its student body." *Id.* (citation omitted). The Court thus accepted the law school's assertion that achieving a diverse student body was "at the heart" of its proper institutional mission and presumed that the law school was acting in good faith to accomplish that mission. *Id.* at 329.

Public schools should be afforded similar deference based on the tradition of local control. In numerous desegregation decisions, the Court has recognized that the tradition of local control is "deeply rooted," "vital," and worthy of the Court's respect. *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'") (citation omitted); *see also Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991) (emphasizing the importance of local control over criteria for terminating desegregation decrees).

The history of desegregation litigation strongly supports judicial deference to local school administrators' judgment. "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (holding, *inter alia*, that limited use of mathematical ratios of white to African-American students, not as an inflexible requirement, but as starting point in shaping a remedy, was within a court's equitable remedial discretion).

Indeed, in *Bustop, Inc. v. Bd. Of Educ.*, 439 U.S. 1380, 1381 (1978), the companion case to *Swann*, Justice Rehnquist, among the strongest critics of both school desegregation cases and race-conscious government action, declined to interfere with a desegregation order entered by the California Supreme Court, stating that "[w]hile I have the gravest doubts that the Supreme Court of California was

required by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action."

Following *Swann* and *Bustop*, the Supreme Court in *Milliken v. Bradley* stated that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). The Court further observed that "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.* at 742 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)).

Preparing our nation's students to function effectively in society and to thrive in sports, at work or anywhere else, is such an important goal that it must be addressed by those entities best equipped to develop and execute an appropriate plan. Accordingly, school administrators must be free to assess the individual needs of their particular schools.

V. CONCLUSION

As demonstrated above, racial integration at the compulsory school level has conferred, and continues to confer, significant benefits on the academic and professional success of intercollegiate student-athletes. Moreover, because student-athletes serve as role models for a very large segment of the American people, it is critical that they exemplify the type of positive interracial relations and experiences that characterize a unified yet diverse citizenry.

For these reasons, the Sixth and Ninth Circuit Courts of Appeals' decisions that racial diversity is a compelling state interest should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondent.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals For the Ninth and Sixth Circuits

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,[1] on behalf of the National Education Association ("NEA"), 43 of its affiliated state education associations,[2] and its affiliated local education associations in Seattle, Washington, and Jefferson County, Kentucky (the Seattle Education Association and the Jefferson County Teachers Association, respectively); the American Federation of Labor–Congress of Industrial Organizations ("AFL-CIO"), and its affiliated national union, the American Federation of Teachers ("AFT"); and People For the American Way Foundation ("People For").

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

[2] The state education associations that join in this brief are the Alabama Education Association, NEA-Alaska, Arizona Education Association, Arkansas Education Association, California Teachers Association, Colorado Education Association, Connecticut Education Association, Delaware State Education Association, Federal Education Association, Florida Education Association, Georgia Association of Educators, Hawaii State Teachers Association, Idaho Education Association, Illinois Education Association, Kansas NEA, Kentucky Education Association, Louisiana Association of Educators, Maine Education Association, Maryland State Teachers Association, Michigan Education Association, Education Minnesota, Missouri NEA, Nebraska State Education Association, Nevada State Education Association, NEA-New Hampshire, New Jersey Education Association, NEA-New Mexico, North Carolina Association of Educators, North Dakota Education Association, Ohio Education Association, Oklahoma Education Association, Oregon Education Association, Pennsylvania State Education Association, National Education Association Rhode Island, South Dakota Education Association, Tennessee Education Association, Texas State Teachers Association, Vermont-NEA, Virginia Education Association, Washington Education Association, West Virginia Education Association, Wisconsin Education Association Council, and Wyoming Education Association.

NEA is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA operates through a network of affiliated organizations at the state and local levels, including the state and local education associations that have joined in this brief. One of NEA's core principles is that "great public schools are a basic right for every child." To implement this principle, the NEA Representative Assembly, which is NEA's highest governing body, has adopted a resolution declaring that a "racially diverse student population is essential for all elementary/secondary schools" because it "promote[s] racial acceptance, improve[s] academic performance, and foster[s] a robust exchange of ideas." These are likewise the views of the NEA affiliates that have joined in this brief.

AFL-CIO is the largest organization of working men and women in the United States, consisting of 53 national and international unions representing nine million members. Many of these members, including those of the AFL-CIO's affiliate AFT, teach or perform other essential services in public elementary and secondary schools. The AFT, for example, represents over 1.3 million members, the majority of whom work in our nation's urban public schools. Dating back to the Court's historic desegregation decision in *Brown v. Board of Education*, 347 US 483 (1954), in which the AFT filed an amicus curiae brief supporting the plaintiffs, the AFL-CIO and AFT have had an enduring commitment to educational equality for all, regardless of race. That interest continues in the present cases in which core questions of integration, and educational and economic opportunity are presented.

The AFL-CIO and AFT also recognize that virtually every graduate of our public schools will enter the workplace as an owner, manager, supervisor, union member and/or employee. In the workplace, these graduates will be expected to honor a set of fundamental public policies, including the command

that they not discriminate on the basis of race. The experience of the AFL-CIO and the AFT teaches that the unique opportunities to interact with people from other races in the public schools that are fostered by the policies at issue in this case, have substantial, positive impact on students, making them better citizens in our democracy and in the workplace, as well as more productive members of society. Specifically, the challenged policies reduce employment discrimination and equip America's workers to flourish in an increasingly diverse society and global economy.

People For is a nonpartisan, education-oriented, citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has more than 700,000 members and supporters nationwide. People For continues to seek to combat discrimination and its effects and to promote quality public education, including classroom diversity, through educational programs and participation in important litigation such as these cases.

INTRODUCTION

Amici believe that racially integrated public elementary/secondary schools not only help to overcome our nation's deplorable legacy of slavery, segregation, and discrimination, but also—and more to the point in the present context—enable such schools to fulfill their dual mission of instilling in all students "the values on which our society rests," *Ambach v. Norwich*, 441 U.S. 68, 76 (1979), and providing them with the skills and knowledge necessary to realize their full potential. *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972).

Because of the changing demographics of American society, the ability of an individual to function in a racially diverse environment is increasingly important. By the time the children who are entering first grade this year graduate from high school, fully 38.7% of our population will be of

African-American, American Indian, Asian, Latino, Native Hawaiian, or multiracial descent (an increase from 30.6% in 2000).[3] These demographic shifts reflect an ongoing trend in which "[t]he country as a whole and the workforce in particular is becoming more, not less [racially] diverse."[4]

At the same time that American society is becoming more racially diverse, the nation's public elementary/secondary schools are becoming more racially segregated. In the 2003-04 school year, the average white student attended a public school in which white students made up 78% of the student body, even though white students constituted 58% of the overall public school student population.[5] In that same year, the average black student attended a public school in which black students made up 53% of the student body, even though black students constituted just 17% of the overall public school student population, and the average latino student attended a public school in which latino students made up 55% of the student body, even though latino students constituted just 19% of the overall public school student population.[6] The fact of the matter is that our nation's public

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[3] *See* U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin* (Aug. 26, 2004) (*available at* http://www.census.gov/ipc/www/usinterimproj).

[4] Julie F. Mead, *Conscious Use of Race As a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 Mich. J. Race & L. 63, 134-35 (2002).

[5] Gary Orfield & Chungmei Lee, *Racial Transformation & The Changing Nature of Segregation* 8-9 (Jan. 2006).

[6] *Id.* The segregated status of a significant portion of the nation's public elementary/secondary schools is even starker. In the 2003-04 school year, 79% of black students in the Northeast attended majority-minority schools (*i.e.*, schools in which non-white minorities made up more than half of the student body), and 76% of black students in the West attended such schools. *Id.* at 10. During that same school year, 81% of latino students in the West attended majority-minority schools, and 78% of latino students in the South attended such schools. *Id.* at 10-

elementary/secondary schools are more segregated today than they were two decades ago, and the trend toward increased segregation is projected to continue.[7]

Confronted with this disturbing reality, respondent school districts, in an effort to achieve racially integrated elementary/secondary public schools, adopted student assignment plans that, to a limited degree, take race into account. This Court repeatedly has taken the position that the decision to adopt such a plan is within the "broad power" school districts have "to formulate and implement educational policy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (explaining that a school district could, pursuant to its broad discretionary powers, "conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of [black] to white students reflecting the proportion for the district as a whole").[8]

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11. Minorities are disproportionately concentrated in majority-minority schools in other sections of the country as well. *Id.* In fact, fully 38% of blacks and 39% of latinos nationwide attended schools in 2003-04 in which over 90% of the students were minorities. *Id.*

[7] *See e.g.*, Erica Frankenberg et al., *A Multiracial Society With Segregated Schools: Are We Losing the Dream?* 4-6 (Jan. 2003) (reporting that school segregation in some areas has increased to levels not seen in three decades and explaining that "[t]he persisting high levels of residential segregation for blacks and increasing levels for [l]atinos, as reported in the 2000 Census indicate that desegregated education will not happen without plans to make it happen."); James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 Ohio St. L.J. 327 (2006) ("Levels of segregation by race and income are remarkably high, and they are rising rather than falling.").

[8] *See also North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements"); *Bustop, Inc. v. Board of Educ. of L.A.*, 439 U.S. 1380, 1383 (1978) (Rehnquist, J., denying stay) (explaining that stay of desegregation order was inappropriate because

Amici respectfully urge this Court to reaffirm that position in the cases that are now before it, and hold that a school district may take race into account in making student assignments if the school district determines that doing so is necessary to fulfill its mission. As we show in this brief, such a ruling would acknowledge the uniquely important role that public education plays in preparing students to function effectively in a multi-racial, democratic society, accord with the deference this Court has long given to the educational policy judgments of school districts as to how best to carry out their mission, and comport with the wealth of empirical evidence regarding the societal and educational benefits that are obtained by students who attend racially integrated schools.[9]

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there was "very little doubt" that the order, issued on state constitutional grounds, was constitutionally permissible even if not constitutionally required); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part) (explaining that "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation . . . Nothing in this opinion is meant to discourage school boards from exceeding minimum constitutional standards in promoting the values of an integrated school experience.").

[9] Such a holding would, moreover, be consistent with this Court's recognition in *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), and *Regents of the University of Cal. v. Bakke*, 438 U.S. 265, 311-13 (1978), that ensuring diversity – including racial diversity – can serve a compelling governmental interest in the educational context. While neither the Seattle School District No. 1 nor the Jefferson County School District are universities, able to carefully craft a small select student body from a pool of applicants, that fact alone does not end the inquiry, as petitioners and their supporting *amici* appear to suggest. The same types of considerations that led this Court to recognize racial diversity as a compelling governmental interest in the higher education context, compel the conclusion that ensuring racial diversity in public elementary/secondary schools—the educational institutions that instruct almost all of our nation's children during their formative years– serves an even more compelling governmental interest. *See infra* at 17 (explaining the benefits of early interracial contact).

Before turning to this showing, however, we pause to address an important threshold issue—*viz.* whether the constitutionality *vel non* of respondent school districts' race-conscious student assignment plans should be determined on the basis of strict scrutiny or some type of lesser scrutiny. Although, for the reasons briefly set forth in the margin, *amici* believe that such student assignment plans should be subjected to lesser scrutiny,[10] we defer to respondents and their other supporting *amici* for extended argument on this issue. For present purposes, *amici* assume that strict scrutiny is the appropriate legal test. Proceeding on that assumption, we focus in this brief on the first prong of that test,[11] and explain why this Court should hold that the educational policy judgment of a school district to take race into account in making student assignments in order to achieve racially

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[10] Because these plans apply equally to all students regardless of their race, deprive no one of a free and equal education, and deprive no one of a particular job or career, they impose extremely limited, if any, burdens on individuals, which justifies subjecting the plans to less than strict scrutiny. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1193-94 (9th Cir. 2005) (Kozinski, J., concurring); *Comfort v. Lynn*, 418 F.3d 1, 27-29 (1st Cir.) (Boudin, C.J., concurring), *cert. denied*, 126 S. Ct. 798 (2005). As Justice Powell observed in *Bakke*, 438 U.S. at 301 n.39, the situation of a student "bused from his neighborhood school to a comparable school," is "wholly dissimilar" to that of a higher education applicant who is denied admission to a school without being offered admission to a comparable school and who thereby is potentially denied entrance to his chosen field or profession. Unlike the higher education applicant, petitioners are merely being assigned to a different but comparable school to the one they would prefer, but have no right, to attend. *See Certification from the U.S. Ct. of Appeals in Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 72 P.3d 151, 156 (Wa. 2003); *McFarland v. Jefferson Cty. Pub. Schs.*, 330 F. Supp. 2d 834, 860 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005). *Cf. Bustop, Inc.*, 439 U.S. at 1383.

[11] We again defer to respondents and their other supporting *amici* as to the "narrow tailoring" prong of the strict scrutiny test.

integrated public elementary/secondary schools serves a compelling governmental interest.

SUMMARY OF ARGUMENT

Racial classifications continue to carry great weight in our society—dividing opportunities inequitably and distorting perceptions with stereotypes and prejudice. Confronted with this reality, respondent school districts decided that taking race into account in making student assignments in order to achieve racially integrated public elementary/secondary schools would allow them to fulfill their dual mission of instilling in all children "the values on which our society rests," *Ambach v. Norwich*, 441 U.S. 68, 76 (1969), and providing them with the skills and knowledge necessary to realize their full potential. *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972). This Court repeatedly has recognized that school districts have "broad power" "to formulate and implement educational policy," and that a plan that takes race into account in making student assignment decisions may be constitutionally permissible even if not constitutionally required. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). The educational policy judgment made by respondent school districts in the instant cases should be accorded the deference that this Court has long given to the educational policy judgments of school districts as to how best to fulfill their mission. **(PART I)**

The education policy judgment of respondent school districts that racially integrated public elementary/secondary schools would allow them to fulfill their mission finds ample support in empirical evidence. This evidence indicates that such schools provide significant societal and educational benefits to students of all races. Specifically:

1. Although racially integrated schools are not the only way to reduce stereotypes and prejudice, such schools have been found to be more effective in promoting tolerance and cross-racial understanding than

any other pedagogical method—including a multicultural curriculum;

2. Racially integrated schools offer enduring benefits to a multiracial, democratic society and its citizens. Students who learn to interact with students of other races in school are far more likely to function effectively in a racially diverse environment and to promote cross-racial understanding in later life than are students who do not have such interactions; and

3. Interactions among students of different races—with different vantage points, skills, and values—are of great consequence not only to the students' development as citizens in a multiracial, democratic society, but also to their intellectual development. The impact of encountering and dealing with racial diversity as part of their education is positively linked to growth in cognitive and academic skills of both racial minority and white students. These educational benefits are realized not only while children are in school, but in their subsequent lives as well. **(PART II)**

ARGUMENT

I. A SCHOOL DISTRICT'S EDUCATIONAL POLICY JUDGMENT THAT TAKING RACE INTO ACCOUNT IN MAKING STUDENT ASSIGNMENTS IN ORDER TO ACHIEVE RACIALLY INTEGRATED PUBLIC ELEMENTARY/SECONDARY SCHOOLS, WILL ALLOW IT TO FULFILL ITS MISSION, SHOULD BE ACCORDED JUDICIAL DEFERENCE

As this Court repeatedly has recognized, public elementary/secondary schools serve as the critical foundation for our democratic society, providing students with the education "necessary . . . to participate effectively and intelligently in our political system," *Yoder*, 406 U.S. at 225, and teaching them how to be "self-reliant and self-sufficient participants in society." *Id.* at 221. The public schools not only instill in the

49 million students who attend them "the values on which our society rests," *Ambach*, 441 U.S. at 76, but they provide those students with the skills and knowledge necessary to realize their full potential by "expand[ing] their knowledge, broaden[ing] their sensibilities, kindl[ing] their imagination, foster-[ing] a spirit of free inquiry, and increas[ing] their human understanding and tolerance." *Yoder*, 406 U.S. at 239.[12]

If a school district concludes that it cannot accomplish these two important interrelated objectives without racially integrated public elementary/secondary schools, and that it cannot achieve such schools without taking race into account in making student assignments, the federal courts should defer to that educational policy judgment. Doing so would acknowledge that, under our federal system, the responsibility for providing public education rests primarily with states and school districts, and would accord with this Court's long-standing practice of giving deference to the educational policy judgment of school districts as to how best to fulfill their mission.

This Court's recognition that school districts have "broad power" "to formulate and implement educational policy"—including an educational policy that takes race into account in making student assignments in order to achieve racially integrated public elementary/secondary schools—rests on a firm foundation. *Swann*, 402 U.S. at 16. *See also supra* n.8.[13] Under our federal system, providing public education

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[12] Roughly nine out of every ten students are enrolled in public elementary/secondary schools. U.S. Dep't of Educ., NCES, *Projections of Education Statistics to 2015* 40 (NCES 2006-084). Just less than half of those students—22 million—will receive their entire formal education in these schools; they will not complete any higher degree. U.S. Census Bureau, *Selected Social Characteristics in the United States: 2005* (*available at* http://factfinder.census.gov).

[13] *See also* the array of lower court precedents upholding the constitutionality of voluntary school desegregation efforts, *e.g.*, *Lynn*, 418 F.3d at 16, 21; *Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 626 F.2d

has always been primarily the responsibility of states and school districts—constituting "perhaps the most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). *See also United States v. Lopez*, 514 U.S. 549, 564 (1995) (recognizing that "education [is an area] where States historically have been sovereign"); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) (explaining that "no single tradition in public education is more deeply rooted than local control over the operation of schools.").

The educational systems that states and school districts have developed under this federal system are complex and varied. While every state constitution obligates the state legislature to provide a public education system,[14] and state

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1165, 1166 (4th Cir. 1980); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 717-21 (2d Cir. 1979); *Offermann v. Nitkowski*, 378 F.2d 22, 24 (2d Cir. 1967); *Martin v. School Dist. of Phila.*, No. CIV.A. 95-5650, 1995 WL 564344 (E.D. Pa. Sept. 21, 1995); *Tometz v. Board of Educ., Waukegan City Schs. Dist. No. 61*, 237 N.E.2d 498, 501 (Ill. 1968) (collecting other cases upholding voluntary school integration efforts). *Cf. Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 749 (2d Cir. 2000) (school district could have a compelling interest in reducing racial isolation and *de facto* segregation in its schools).

[14] *See* Ala. Const. art. XIV, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, §§ 1, 6; Colo. Const. art. IX, §2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2d, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. VIII, pt. 1, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5, § 2; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. LXXXIII; N.J. Const. art. VIII, § 4, ¶ 1; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, § 1; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const.

and local revenues provide the vast bulk of public education funding,[15] the resulting state educational systems vary widely in their legal obligations, governance, and policies.[16] State constitutions, for example, contain markedly different language regarding the type of public education that must be provided by the state, which has been interpreted to markedly different ends.[17] Most to the point for present purposes, some states have interpreted their constitutional obligation to provide a public education system to encompass the duty to provide an integrated system by remedying not just *de jure*, but also *de facto*, racial segregation in the schools.[18]

When states and school districts make the educational policy judgment that racially integrated public elementary/ secondary schools are necessary for them to fulfill their

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art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

[15] Thomas Corcoran & Margaret Goertz, *The Governance of Public Education, in* THE PUBLIC SCHOOLS 33-34 (Susan Fohrman & Marvin Lazerson, eds., 2005) (explaining that the federal government provides less than 10% of the funding for public education, and has "limited control over the structure and content of [that] education").

[16] *Id.* at 37-38, 40-41 (detailing the differing state curriculum, graduation requirements, governance and funding structures).

[17] *See* Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 Harv. J. on Legis. 307 (1991) (describing different types of state constitutional language); Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. Rev. 2241, 2242-43, 2261 n.117 (2003) (describing different types of state constitutional language and varied interpretations).

[18] *See Sheff v. O'Neill*, 678 A.2d 1267, 1285 (Conn. 1996) (holding that extreme racial isolation in the public schools, even if resulting from *de facto* segregation, violates the education clause of the Connecticut Constitution); *Jackson v. Pasadena City School Dist.*, 382 P.2d 878, 881 (Cal. 1963) (holding that "the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause").

mission, it is appropriate under our federal system for the federal courts to defer to that judgment. As this Court has advised, "federal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.'" Such matters generally fall within "the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)). Putting that presumption into practice, this Court has upheld various state and school district actions against constitutional challenges, even though the challenged conduct would have been unconstitutional if it had occurred outside the school context.[19]

The same reasoning has led this Court to direct federal courts to terminate school desegregation decrees "at the earliest practicable date" in order to return schools "to the control of local authorities," and thereby "restore their true accountability in our governmental system." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992). *See also Missouri v. Jenkins*, 515 U.S. 70, 100 (1995); *Board of Educ. of Okla. v. Dowell*, 498 U.S. 237, 250 (1991). In doing so, this Court has made clear that the termination of such desegregation decrees does not mean "that the potential for discrimination and racial hostility" no longer exists, but that each state and school district should decide how to "ensure that such forces do not shape or control the policies of its school systems." *Freeman*, 503 U.S. at 490.

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[19] *See New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (explaining "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject"); *Hazelwood Sch. Dist. v. Kulmeier*, 484 U.S. 260, 266 (1988) (reiterating that "the First Amendment rights of students in the public schools . . . must be 'applied in light of the special characteristics of the school environment.'") (quoting *Tinker*, 393 U.S. at 506).

These precedents counsel that when states and school districts decide, as a matter of educational policy, that racially integrated schools are a key component of the education that they seek to provide, the federal courts should be reluctant to second-guess that decision. In the words of this Court, "[e]ducation . . . presents a myriad of 'intractable economic, social, and even philosophical problems.'" *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973). "The very complexity of the problems" involved "suggests that 'there will be more than one constitutionally permissible method of solving them.'" *Id.* at 42:

> In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions. [*Id.* at 43.][20]

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[20] To be sure, this presumption against interference with state and school district decisionmaking is not the same First Amendment consideration that led this Court in *Grutter* and *Bakke* to defer to the educational policy judgments of university administrators. *See Grutter*, 539 U.S. at 328; *Bakke*, 438 U.S. at 311-13. But the presumption provides, if anything, an even more compelling reason for deference in the elementary/secondary public school context inasmuch as "no single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken*, 418 U.S. at 741.

Moreover, petitioners and their supporting *amici* err in describing public elementary/secondary schools as mere institutions for "inculcating" societal norms in which First Amendment interests have no application. Like colleges and universities, schools are "marketplaces of ideas" in which students learn not just from their teachers, but from each other as well. *Tinker*, 393 U.S. at 512 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). As such, schools, like colleges and universities, are entitled to deference in the judgments they make to establish and maintain a vibrant marketplace of ideas.

II. A SUBSTANTIAL BODY OF EMPIRICAL EVIDENCE DEMONSTRATES THAT RACIALLY INTEGRATED PUBLIC ELEMENTARY/SECONDARY SCHOOLS SERVE A COMPELLING GOVERNMENTAL INTEREST BY PROVIDING SIGNIFICANT SOCIETAL AND EDUCATIONAL BENEFITS TO STUDENTS OF ALL RACES

In concluding that they could not adequately fulfill their mission without racially integrated public elementary/secondary schools, respondent school districts were on very firm ground. A substantial body of empirical evidence demonstrates that such schools provide significant societal and educational benefits to students of all races—and, accordingly, serve a compelling governmental interest. We survey that empirical evidence below.

A. The Societal Benefits of Racially Integrated Schools

Because public elementary/secondary schools "are an important socializing institution, imparting those shared values through which social order and stability are maintained," *Plyler v. Doe*, 457 U.S. 202, 222 n.20 (1982), racially integrated schools provide children of all races with the opportunity to interact with one another on equal terms. Such contact "teach[es] members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage" and provides "minority children" with the opportunity to "learn to function in—and [be] fully accepted by—the larger community." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 473 (1982).

In contrast, when "children attend racially and ethnically isolated schools, these 'shared values' are jeopardized." *Sheff v. O'Neill*, 678 A.2d 1267, 1285 (Conn. 1996). "If children of different races and economic and social groups have no opportunity to know each other and to live together in school,

they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society." *Jenkins v. Morris Township Sch. Dist.*, 279 A.2d 619, 627 (N.J. 1971).

The commonsense assessment that interracial contact reduces racial stereotypes and prejudice, reflected in these decisions, is supported by substantial empirical evidence.

1. The theory that interracial contact reduces racial stereotypes and prejudice was articulated by Gordon W. Allport in his seminal work, *The Nature of Prejudice*. Allport posited that racial isolation breeds stereotypes and prejudice, and that "equal status contact between majority and minority groups in the pursuit of common goals" is a critical ingredient in improving relations between members of those groups, especially if such contact "is of a sort that leads to the perception of common interests and common humanity between members of the two groups."[21]

Subsequent empirical research has repeatedly and consistently confirmed that interracial contact combats stereotypes and prejudice, and makes individuals more comfortable relating to members of other racial groups.[22] This

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[21] Gordon W. Allport, *The Nature of Prejudice* 281 (Addison-Wesley Publishing Co., 1954).

[22] *See* Christopher G. Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 Soc. Sci. Q. 385, 386, 388, 395 (June 1994) (reviewing "considerable evidence [amassed over four decades] that contact has salutary effects" and reporting, based on survey of 2,107 adults, that blacks with close white friends had much "more favorable views of whites and race relations than those who lack such friends"); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 Soc. Forces 781, 784, 788, 790 (Mar. 1993) (reporting, based on survey of 1,546 adults, that blacks with at least one white friend believed whites to be less hostile than blacks with no white friends and that whites "who live in less racially integrated areas also perceive blacks as somewhat more hostile"); Mary R. Jackman & Marie Crane, *"Some of my best friends are black . . .": Interracial Friendship and Whites' Racial Attitudes*, 50 Pub. Opinion Q. 459, 464, 470 (1986)

research makes plain, however, that the conditions of contact are critical to its impact.

In the first place, contact that occurs during key periods of personal development—most importantly during a child's formative years—and that frequently recurs, is far more effective at promoting tolerance and cross-racial understanding than intermittent contact among persons whose social beliefs and identities are fully formed. That is so because "[t]he early school years are crucial for the formation of the child's own racial identity as well as an understanding of prejudice and fairness." [23] Once the destructive "habit" of "racial stereotyping" is learned, it is difficult to break, making it "more difficult to teach racial tolerance to college-age students" than to public elementary/secondary school students.[24]

So too, contact with a number of different people of another race is more effective in breaking down racist attitudes than contact with just a few individuals of another race, because it forces people to "decategorize" those with whom they are dealing and to treat them as individuals rather than simply as members of a particular racial group.[25] While

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(reporting, based on survey of 1,914 adults, that whites' preference for "whites over blacks in basic feelings of warmth and closeness and in personal social predispositions in the workplace and neighborhood does decline quite markedly [with interracial contact]").

[23] Susanne E. Dutton et al., *Racial Identity of Children in Integrated, Predominantly White, and Black Schools*, 138 J. Soc. Psychol. 41, 42 (1998). Even casual interracial contact among children "is a stronger predictor [of] the odds of having at least one [interracial] friendship" as an adult, than later contact. Ellison & Powers, *supra* note 22, at 392.

[24] *See Comfort v. Lynn*, 283 F. Supp. 2d 328, 356 (D. Mass. 2003), *aff'd*, 418 F.3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (2005).

[25] Marilynn B. Brewer & Norman Miller, *Contact and Cooperation When Do They Work?*, *in* ELIMINATING RACISM: PROFILES IN CONTROVERSY 315, 318-20 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988) (decategorization works when frequent interactions with individuals of another group eliminate the "meaning and utility" of treating those indi-

there clearly is no "magic number" of students of each racial subgroup required, to realize the greatest benefits of contact a school's population should be within the range of the demographic breakdown of the school district as a whole, so as to prevent students in minority groups from becoming isolated and shut out of the school's mainstream.[26]

Finally, contact must be among individuals of equal status—*e.g.*, between friends, teammates or classmates—lest contact serve simply to reinforce rather than reduce racist attitudes and prejudices.[27]

Given these findings, it is not surprising that interracial cooperative contact among students of different races in public elementary/secondary schools—our "most powerful agency for promoting cohesion among a heterogeneous democratic people," *McCollum v. Board of Educ.*, 333 U.S. 203, 216 (1948)—has repeatedly been linked with increased

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viduals primarily as members of another group). *See also* Jackman & Crane, *supra* note 22, at 468-71 (finding that whites who had both black acquaintances and friends displayed markedly less racist attitudes than whites with none or only one black acquaintance or friend).

[26] *Lynn*, 283 F. Supp. 2d at 357 (expert testimony that the gains from promoting school racial diversity "occur along a continuum; as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is reduced and racial harmony and understanding increases").

[27] *See, e.g.*, Charles S. Bullock III, *Contact Theory and Racial Tolerance Among High School Students*, 86 Sch. Rev. 187, 194, 206-07, 210-12 (Feb. 1978) (reporting, based on survey of 5,800 southern high school students, that white students' tolerance of black students increased with their number of black friends and number of contacts with black students in and outside of school; "having even a few friends [of another race] is related to substantially greater tolerance"); Janet Ward Schofield, *Black and White In School Trust, Tension, or Tolerance?* 157, 176-81 (Teachers College Press, 1989) (reporting that middle school integration alone generated "a definite, but relatively modest, improvement in relations between black and white students" but that cooperative activities among black and white students generated more significant improvements).

levels of tolerance for children of other races,[28] and increased likelihood, "approach[ing] . . . that [which] would have been anticipated in a truly color-blind society," that children of different races will become and remain friends.[29]

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[28] Sandra Koslin et al., *Classroom Racial Balance and Students' Interracial Attitudes*, 45 Soc. Educ. 386, 389, 405 (Fall 1972) (reporting a "clear[] relat[ion]" between integration and the racial attitudes of third graders as evidenced "by lower levels of racial tension and less racial polarization" in more integrated schools); Carole G. Goldstein et al., *Racial Attitudes in Young Children as a Function of Interracial Contact in the Public Schools*, 49 Am. Orthopsychiatric Ass'n 89, 90, 94 (Jan. 1979) (reporting, based on study of 1st graders, that "[w]hite children in interracial classrooms displayed a significant shift toward increased acceptance of blacks"); Richard R. Scott & James M. McPartland, *Desegregation as National Policy: Correlates of Racial Attitudes*, 19 Am. Educ. Res. J. 397, 402, 412 (Fall 1982) (reporting, based on survey of 2,300 middle and highschool students, that desegregation "is positively associated with racial tolerance for both whites and blacks").

[29] Robert E. Slavin, *Effects of Biracial Learning Teams on Cross-Racial Friendships*, 71 J. Educ. Psychol. 381, 386 (1979). *See also* Brewer & Miller, *supra* note 25 at 320 (noting "extensive literature documenting the positive effects of cooperative learning on improved interethnic acceptance within desegregated classrooms"); Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. Soc. Issues 45, 53, 59 (1985) (hereinafter *Slavin II*) (concluding, based on review of nineteen studies, "that when students work in ethnically mixed cooperative learning groups, they gain in cross-ethnic friendships" and "the effects . . . are strong and long-lasting"); David W. Johnson & Roger T. Johnson, *Effects of Cooperative, Competitive and Individualistic Learning Experiences on Cross-Ethnic Interaction and Friendships*, 118 J. Soc. Psychol. 47, 54 (1982) (reporting, based on study of 4th graders, that cooperative learning in racially diverse classrooms "result[ed] in greater cross-ethnic liking that lasts for months"); Elliot Aronson & Diane Bridgeman, *Jigsaw Groups and the Desegregated Classroom: In Pursuit of Common Goals*, 5 Personality & Soc. Psychol. Bull. 438, 441 (1979) (reporting that cooperative learning in racially diverse classrooms resulted in "significant increases in [children's] liking for their groupmates both within and across ethnic boundaries").

The foregoing evidence reflects the reality that "[s]tereotypes do not as easily take hold of children who interact early and often with children of other racial and ethnic groups. The personal connections forged between students of disparate racial backgrounds challenge race-based assumptions they might otherwise develop about one another."[30]

Illustrating that point in stark terms, three recent studies demonstrate a marked difference between the racial preconceptions of students educated in racially integrated schools versus those educated in racially homogenous schools.[31] In each study, first and fourth graders were shown pictures of two children (one black and one white) in an ambiguous situation in which one could, but need not, attribute negative intentions to one of the children depicted (*e.g.*, a child standing behind a swing could be viewed as having pushed the child in front of him to the ground or could be viewed as simply standing next to that child). The studies found that when white, black, latino, and asian children, who attended racially integrated schools, were asked what happened in these pictures their responses displayed no "implicit intergroup biases"; evidencing neither an "effect for the race of the transgressor" in the picture nor for the race of the study participant.[32] In contrast, white students who attended

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[30] *Lynn*, 283 F. Supp. 2d at 356 (expert testimony on this point).

[31] *See* Nancy Geyelin Margie et al., *Minority Children's Intergroup Attitudes About Peer Relationships*, 23 Brit. J. of Developmental Psychol. 251-69 (2005); Heidi McGlothlin et al., *European-American Children's Intergroup Attitudes About Peer Relationships*, 23 Brit. J. of Developmental Psychol. 227-49 (2005) ("*McGlothlin I*"); Heidi McGlothlin & Melanie Killen, *Intergroup Attitudes of European American Children Attending Ethnically Homogenous Schools*, 77 Child Dev. 1375-86 (Sept. 2006) ("*McGlothlin II*").

[32] Margie et al., *supra* note 31, at 255-57; *McGlothlin I*, *supra* note 31, at 235. The two studies did report some differences, however, in the children's views. Even though minority children believed that both the white and the black children depicted had engaged in the same behavior,

schools in which over 85% of the students were white "displayed racial bias in their interpretations of [the same] ambiguous interracial encounters," and that bias increased with age.[33]

The fact of the matter is that one-on-one contact has been found to be more effective in promoting racial tolerance and cross-race interaction than any other pedagogical method—including a multicultural curriculum[34]—confirming the view that "[w]ithout meaningful social contact, talk of tolerance and cooperation is nothing but an abstraction." *Lynn*, 283 F.

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they were more likely to view the conduct more negatively in one of the situations depicted (involving a child picking up money that another child appeared to have dropped) if a white rather than black child was shown picking up the money. Margie et al., *supra* at 258. White children, on the other hand, even though displaying no bias in their descriptions of the behavior, were less likely to view the black children depicted as potential friends. *McGlothlin I*, *supra* at 236.

[33] *McGlothlin II*, *supra* note 31, at 1377, 1383. Similarly, a 1998 study reported that white fourth graders in a predominantly white school were more likely than white fourth graders in integrated schools to choose a picture of a black child as representing the child—among an array of pictures of children—that they disliked most. Dutton, et al., *supra* note 23, 43-45, 47-48, 53. A similar racial aversion was found among black fourth graders in a predominantly black school, who more often picked the picture of the white child as the child they disliked most, than did black fourth graders in integrated schools. *Id.*

[34] *See* William J. Genova & Herbert J. Walberg, *A Practioners' Guide for Achieving Student Integration in City High Schools* 30, 32 (1980) (finding, based on survey of 1,484 high school juniors, that "opportunities . . . to get to know students from other racial and ethnic groups" were more strongly correlated to students' willingness to interact with individuals of other races than the students' exposure to a multicultural curriculum); Yehuda Amir, *The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations*, *in* TOWARDS THE ELIMINATION OF RACISM 245, 266, 281 (Phyllis A. Katz ed., 1976) (reporting that direct interpersonal contact with blacks was more effective in changing white attitudes than participating in an educational program, and that a multicultural curriculum, standing alone, had little impact).

Supp. 2d at 334. Where school districts are allowed to take the steps necessary to ensure that students of different races have a meaningful opportunity to interact in the schools, a remarkable transformation can take place, replacing racial stereotypes, hostility and tension with "racial and ethnic tolerance" and "an emerging sense of community that crosses racial barriers." *Id.* at 376.[35] Such schools allow for the formation of "close, reciprocated [interracial] friendship choices, the kind of friendships that should be [the] most difficult to change,"[36] and which social scientists have long viewed "as one of most potent agents for ethnic change."[37]

As the foregoing review of the empirical evidence indicates, cooperative interracial contact reduces racial stereotypes and prejudice by teaching students that individuals hold a multitude of different viewpoints, experiences and attitudes, which cannot be meaningfully captured by reducing individuals to racial categories. By providing students with the opportunity to individualize others with whom they interact, schools also provide students with the opportunity to identify the concerns they share in common with students of other races.

In the end, this process—far from resulting in the racial balkanization that petitioners and their supporting *amici* evoke—leads to precisely the opposite result. As one researcher explained, cooperative interaction between different groups "induces the members [of different groups] to conceive of themselves as one (superordinate) group rather than as two separate groups, thereby transforming their

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[35] *See also Lynn*, 283 F. Supp.2d at 357 n.53 (developmental psychologist's testimony that she was "really surprised by the high level of positive [interracial] interaction among children" after implementation of voluntary integration plan and was "astound[ed]" that the resulting relationships carried over into informal settings such as the school cafeteria).

[36] *Slavin II*, *supra* note 29, at 55.

[37] Amir, *supra* note 34, at 272.

categorized representations from *us* and *them* to a more inclusive *we*."[38]

2. These consequences of racial diversity in our public elementary/secondary schools offer enduring benefits to our multiracial, democratic society and its citizens. "As adults [students who learn to interact with individuals of other races in elementary/secondary school] more frequently live[] in desegregated neighborhoods, ha[ve] children who attend[] desegregated schools, and ha[ve] close friends of the other race[s] than d[o] adults ... who had attended segregated schools."[39] They are also more likely as adults to interact and work with individuals of other races than are students educated in racially homogeneous schools.[40]

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[38] Samuel L. Gaertner et al., *How Does Cooperation Reduce Intergroup Bias?*, 59 J. Personality & Soc. Psychol. 692, 693 (1990) (emphasis in original). *See also* Samuel L. Gaertner et al., *The Contact Hypothesis: The Role of a Common Ingroup Identity on Reducing Intergroup Bias*, 25 Small Group Res. 224, 242 (May 1994).

[39] Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes That Perpetuate Racial Segregation*, 19 J. Black Stud. 267, 269, 273, 276 (1989) (reporting, based on national survey of 12,686 individuals, positive link between attending integrated schools and working in integrated environments in later life). *See also* Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Educ. Res. 531, 552 (Winter 1994) (concluding that "desegregated black [elementary and secondary school] students are more likely to have desegregated social and professional networks in later life," to work in desegregated environments and to work in private-sector white-collar and professional jobs); William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. Negro Educ. 255, 256 (1997) (finding that increased school racial diversity "has a strong, statistically significant, and positive effect on the likelihood that Blacks will have White coworkers and that Whites will have Black coworkers").

[40] *See, e.g.*, Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 Am. J. Soc. 1306, 1322-23 (Mar. 1996); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 Int'l J. Intercultural

Several comprehensive studies of the racial attitudes of high school students, who were educated in integrated schools, support these conclusions. These studies demonstrate that racially integrated schools and classrooms produce students who have very high levels of comfort in dealing and working with individuals of other races in later life—which they attribute in large part to their school experiences.[41] For example, a survey of 242 high school graduates from the Class of 1980, reports that the graduates—even twenty years after the fact—viewed as "critically important" to their ability to interact cross-racially without fear or harmful precon-

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Rel. 1, 11, 14 (1996); Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. Negro Educ. 394, 397-400 (1994).

[41] *See* Jennifer Jellison Holme et al., *Learning Through Experience: What Graduates Gained by Attending Desegregated High Schools*, 38 Equity & Excellence in Educ. 14-15, 18-20 (2005) (reporting, based on survey of 242 adults twenty years after they graduated from racially diverse high schools, that "nearly all said that their high school experience left them more prepared for life in a racially diverse society than they otherwise would be," with "an increased sense of comfort in interracial settings" than their peers who had attended racially homogeneous schools); Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville*, *in* DIVERSITY CHALLENGED EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111, 118, 121, 124-25, 130, 132 (Gary Orfield ed., 2001) ("*KY Survey*") (reporting, based on survey of 1,164 high school juniors in racially diverse schools, that 94.9% of black students and 92.6% of white students reported being "comfortable" or "very comfortable" working with students of other races, that over 85% of both black and white students believed they were both prepared and likely to work in racially diverse job settings; and that over 90% of the students said they would be comfortable working for a supervisor of another race); The Civil Rights Project-Harvard University, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District* 1, 4-7 (Jan. 2002) ("*MA Survey*") (reporting, based on survey of 379 seniors at racially diverse high school, similarly high levels of comfort and preparation to work in racially diverse settings).

ceptions, their "daily exposure to people of other racial groups in their early years in K-12 education—at a time when they were forming their beliefs about the world."[42]

In sum, students who attend racially integrated public elementary/secondary schools are far more likely in later life to function effectively in a variety of contexts—including, of particular importance to the *amici* unions, as members of a racially diverse and non-discriminatory workforce. Racially integrated public elementary/secondary schools produce these long-range benefits because they break the cycle of segregation in neighborhoods, schools, social networks, and occupations. Equally to the point, this evidence demonstrates that by closing the door on racial diversity in the schools, we open the door to further racial prejudice and discrimination by perpetuating the racial isolation that breeds such prejudice and discrimination.

B. The Educational Benefits of Racially Integrated Schools

Teaching students to individualize the persons with whom they are dealing and identify common ground is of great consequence not only to the students' development as citizens in a multiracial democratic society, but also to their intellectual development and academic success.

1. Social scientists have reported that heterogeneous groups—including groups that differ only in the participants' races—are better at creative problem-solving than homogeneous groups, due to the benefits of interactions between individuals with different vantage points, skills, and/or values.[43] That research reflects the fact that due to the

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[42] Holme et al., *supra* note 41, at 23.

[43] *See* Poppy Lauretta McLeod, et al., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Res. 248, 250 (May 1996) (summarizing "consistent empirical support" for the conclusion that heterogeneous groups—including groups that are only racially diverse—generate more creative and feasible solutions than homogeneous groups).

continuing corrosive effect of racism in our society, people of different races often have very different life experiences and viewpoints. Reflecting that reality, high school students who are asked whether or not racial integration has enhanced their educational experience respond in the affirmative in overwhelming numbers.[44]

Other research provides further evidence of the cognitive benefits of interracial interactions in the educational context. For example, in one study, 250 high school students were asked to view a short film showing two boys (one black and one white) engaged in various activities—some positive, some negative and some ambiguous. The students were asked to describe what the boys had done and predict what each would do in various situations. White students who had had the opportunity for more interracial classroom contact

> (1) described [the boys] in ways that were more differentiated, more integrated, and more multivalent; (2) made prediction of the future behavior of [the boys] that were less absolute; (3) inferred the presence of attributes in [the boys] with less certainty; and (4) were less likely to perceive [the black boy] as submissive and [the white boy] as domin[a]nt.[45]

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[44] Over 80% of the students surveyed in Louisville, Kentucky and Cambridge, Massachusetts, believed that their experiences in racially integrated high schools "ha[d] helped [them] to work more effectively with and to get along better with members of other races and ethnic groups." *See KY Survey*, *supra* note 41, at 132; *MA Survey*, *supra* note 41, at 7. Students also gave strong responses to open-ended questions regarding the value to them of attending a racially integrated school. *See, e.g.*, *MA Survey*, at 6 (student saying he had "learned a lot about how to deal with people who are different, respect them and be interested in their culture and heritage and learn from them. Living and working with people from different race and ethnic group has become ordinary to me—it is not a big deal, and I think this will help me . . . throughout my life.").

[45] Bert Meltzer, *The Influence of the Duration of Interracial Classroom Contact on the Development of Interpersonal Cognitive Skills* 133-34

The white students' greater ability to describe the film participants in meaningful, individualized ways applied not only to their description of the black boy but to their description of the white boy as well, "suggest[ing] that interracial contact had a facilitating effect on the development of interpersonal cognitive skills in general."[46]

These studies corroborate the evidence credited by the court below in the Seattle School District No. 1 case, linking racial diversity in schools to "improved critical thinking skills—the ability to both understand and challenge views which are different from [one's] own." *Parents v. Seattle Sch. Dist. No. 1*, 426 F.3d at 1174.

2. Further support for the proposition that racial integration yields educational benefits is found in the voluminous social science literature analyzing the impact of school desegregation on student performance. Although not every study in this area has reached the same conclusion, once one accounts for methodological differences a broad consensus emerges that school desegregation has resulted in tangible and lasting improvements in black student academic achievement. As one of the definitive reviews of the literature concludes, desegregation has been positively linked to increases in black student achievement levels, generating gains on average of .3 of a grade year in student performance at the elementary/secondary school level, and gains on average of .57 of a grade year at the kindergarten level.[47]

More recent studies also have demonstrated positive links between black students' test achievement and their schools'

(Doctoral Dissertation, Clark University) (Ann Arbor Mich: University Microfilms 1969, No. 69-20, 406).

[46] *Id.* at 133.

[47] *See* Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, *in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 103, 107, 111, 113 (Christine H. Rossell & Willis D. Hawley eds., 1983) (reassessing results of 93 separate studies).

racial diversity,[48] as well as between school desegregation and promotion and dropout rates, particularly for minority students.[49] Additional evidence to the same effect is

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[48] *See* Eric A. Hanushek et al., *New Evidence about Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* 23-24 (Oct. 2004) (reporting "very strong evidence" that "mathematics achievement growth" in Texas during the 1990's was adversely affected by increasing school racial segregation and that reversing that trend by increasing school integration could close "over one-quarter of the seventh grade achievement gap between blacks and whites"); Kathryn Borman et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 Am. Educ. Res. J. 605, 615-16, 620, 626 (Fall 2004) (analysis of students' scores on 1999 FCAT (Florida's standardized test) finding that "[b]oth the racial composition of a school and whether a school was [b]lack segregated (relative to the school district's racial composition) predicted the percentage of students passing the FCAT" and reporting that lower passing rates for black students were linked to attendance at more segregated schools); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools* 7 (Aug. 15, 2002) (reporting that "the more time both black and white students spent in desegregated elementary schools, the better their academic achievement [was]" on standardized tests); Carl Bankston III & Stephen J. Caldas, *Majority African American Schools and Social Injustice: The Influence of De Facto Segregation on Academic Achievement*, 75 Soc. Forces 535, 544, 548 (Dec. 1996) (reporting that attending more segregated schools was linked, for black students, to lower performance on the Louisiana graduation test even after controlling for socioeconomic status); Bernadette Gray-Little & Robert A. Carels, *The Effect of Racial Dissonance on Academic Self-Esteem and Achievement in Elementary, Junior High, and High School Students*, 7 J. Res. on Adolescence 109, 125-26 (1997) (finding that black and white 11th graders had the highest achievement levels at racially balanced schools).

[49] Majority minority schools are "five times more likely to have weak promotion power (promote 50% or fewer freshman to senior status on time) than a majority white school." Robert Balfanz & Nettie Legters, *Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts?* v, 5 (Sept. 2004) (showing that a school's promoting power decreases as the percentage of minority students in the majority-minority school increases). *See also* Christopher B. Swanson, *Who Graduates?*

provided by school districts that have pursued voluntary integration efforts. In Lynn, Massachusetts, for example, the voluntary integration plan has resulted in "higher [school] attendance rates, declining suspension rates, a safer environment, and improved standardized test scores."[50]

There is also a small but robust group of studies linking black student enrollment in predominantly white schools to significant gains in those students' long-term educational achievement. Black students enrolled in predominantly white high schools are more likely than black students enrolled in predominantly black high schools to graduate, more likely than those students to go on to higher education, and more likely when they do so to pursue higher-paying occupations that traditionally have been dominated by whites.[51]

Who Doesn't? A Statistical Portrait of Public High School Graduation Class of 2001 32-33 (Feb. 2004) (finding lower graduation rates for both black and white students in school districts with higher levels of racial segregation); Gary Orfield et al., *Losing Our Future: How Minority Youth Are Being Left Behind by the Graduation Rate Crisis* 6 (2004) (reporting that "whether a student attends a school district with a high concentration of minority students and has little exposure to white students" are "strong predictor[s]" of failure to graduate); Jonathan Guryan, *Desegregation and Black Dropout Rates* 17-18 (Oct. 2003) (reporting that school desegregation efforts from 1970-80 were linked to declining black drop-out rates even after controlling for socioeconomic status).

[50] *Lynn*, 418 F.3d at 14. Those results have also "stab[ilized the] enrollment of white students" in the district. *Lynn*, 283 F. Supp. 2d at 376.

[51] *See* Wells & Crain, *supra* note 39, at 535 (summarizing results of 21 studies and concluding that school desegregation increases black students' occupational aspirations, *id.* at 540, likelihood of going to college (at least for students in the north), *id.* at 542, likelihood of majoring in nontraditional fields, *id.* at 542-43, and likelihood of entering white collar and professional jobs, *id.* at 552); Robert Crain & Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment*, 24-30 (N.I.E. July 1985) (reporting that black students educated in racially diverse environment were more likely to pursue nontraditional careers); Braddock & McPartland, *supra* note 39, at 271 (concluding that "[e]arlier desegregated schooling has a sizable *direct*

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The sum of the matter is this: because racially integrated public elementary/secondary schools provide significant societal and educational benefits, federal courts should allow school districts some room to consider race in making student assignments when those school districts determine that doing so is necessary to achieve and/or maintain such schools. This is not an "illegitimate use[] of race," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), but is amply justified by the compelling governmental interest in educating all of our children to function effectively in a multiracial, democratic society and realize their full intellectual and academic potential.[52]

CONCLUSION

The judgments of the courts of appeals should be affirmed.

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effect on [b]lack attendance at desegregated two-year and four-year colleges in the South and on Black attendance at desegregated two-year colleges in the North" (emphasis in original)); Robert L. Crain & Rita E. Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performance*, 51 Soc. Educ. 81, 98-99 (1978) (reporting that black students who graduated from predominantly white schools in the North in 1972 were 7% more likely to go to college and nearly twice as likely to stay in college than black students who did not).

[52] We pause to make one final point. Given the extent to which the No Child Left Behind Act focuses on the performance of racial subgroups as the key measure of how well public elementary/secondary schools perform, *see* 20 U.S.C. §§ 6311, 6316, the United States' insistence here that school districts be precluded altogether from taking race into account in making student assignment decisions rings particularly hollow. States and school districts should not be graded by the federal government based on how various racial subgroups in their schools perform, and then be prohibited from taking the very actions—achieving and/or maintaining racially integrated elementary/secondary schools—that they believe are necessary to close the racial achievement gaps highlighted by the NCLB.

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No. 05-908 and 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE NATIONAL PARENT TEACHER ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE**

The National Parent Teacher Association ("PTA") is a non-profit organization consisting of parent and teacher members of 26,000 local PTAs from every state in the nation. Our mission is to support and speak on behalf of children and youth in the schools, in the community, and before governmental bodies and other organizations that make decisions affecting children, to assist parents in developing skills necessary to raise children, and to encourage parent and public involvement in the public schools of this nation.

Originally known as the National Congress of Mothers, the PTA was founded in 1897 with the following mission:

"The National Congress of Mothers, irrespective of creed, color, or condition, stands for all parenthood, childhood, homehood. Its platform is the universe, its organization, the human race."[1]

While the National Congress of Mothers was always inclusive and open to members regardless of race, black parents and teachers in states with segregated school systems had a distinct set of concerns.

In the early years of the 20th century, black mothers and teachers began organizing local units of a Congress of Colored Parents and Teachers. In 1926, these units joined to form the National Congress of Colored Parents and Teachers ("NCCPT"). The two organizations often worked together, recognizing the commonalities of their missions of improving education for all children. During the years

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* Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party in these cases authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation.

[1] NATIONAL PTA, THE PTA STORY: A CENTURY OF COMMITMENT TO CHILDREN 12 (1997).

following the Supreme Court's decision in *Brown v. Board of Education*, and the passage of the 1964 Civil Rights Act, local PTA units began to merge with local NCCPT units in areas in which integration proceeded peaceably. By the mid 1960s, the National PTA and NCCPT began to discuss a formal merger of the two organizations, which at last took place in 1970.

In the 1980s, the PTA recognized the need to direct its efforts toward an even more varied group of families. The PTA began translating its documents into Spanish, placing articles about its activities in Spanish-language newspapers around the country, and creating Spanish-language videos to complement its English videos.

As parents and teachers, we care deeply about ensuring that all of our children receive a sound education. Our nation's public schools have long played the critical roles of conveying crucial skills such as literacy and mathematics, while also transmitting to our children the democratic values upon which our nation was founded. The PTA has long recognized that our democracy and our communities suffer if our children do not learn together and if we as parents and teachers are not united across race and ethnicity within the schools.

During the more than a century since its inception, the PTA has championed the importance of equal opportunity for all children. The PTA has consistently worked to promote the welfare of all children and youth in home, school, community and places of worship, to raise the standards of home life, and to secure adequate laws for the care and protection of children and youth. The PTA has worked to develop relationships that link the home and school so that parents and teachers may cooperate intelligently in the

education of children and youth. In addition, the PTA has sought to develop between educators and the general public efforts to secure for all children and youth the optimal physical, mental, social, and spiritual education. As one PTA mother wrote in a recent issue of the PTA's National Magazine, "[i]f we are to truly prepare our children to live and succeed in this country, we must capitalize on our nation's greatest strength—its diversity."[2]

The PTA submits this brief *amicus curiae* in support of Respondents Seattle School District and Jefferson County Board of Education, urging this Court to affirm school districts' discretion to take racially conscious actions when necessary to ensure that students are educated in multiracial settings.

INTRODUCTION AND SUMMARY OF ARGUMENT

As parents and teachers, we aspire to raise and educate our children to succeed in an increasingly globalized and rapidly changing world. In our daily experience raising and teaching children, it has become abundantly clear that to prepare children to participate in today's complex society, education must include learning with children from multiple racial and ethnic backgrounds. In a multiracial setting, all children are provided the best opportunity to master necessary academic skills, to engage in critical thinking, to achieve comfort with members of other races and ethnic groups, and to aspire to their highest potential. Students educated in multiracial settings are also more likely to exhibit racial tolerance and to feel comfort with racial groups

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[2] Carol M. Stern, *For A Stronger PTA, Put Diversity in the Details*, OUR CHILDREN, Aug./Sept. 2006, http://www.pta.org/pr_magazine_article_details_1156455404328.html.

different than their own. For more than a century, the PTA has aspired to these goals for the children of this nation.

Ideally, every neighborhood school would provide such a multiracial setting. However, many of our cities, towns and suburbs remain racially isolated. Our experience has shown that school districts are often required to pay attention to the racial composition of each school to ensure that schools do not become racially homogenous. Once a school is seen as a "white" school or a "black" school or is otherwise racially or ethnically identifiable, parents and students from other racial groups often consider themselves unwelcome and the pattern of racial isolation becomes institutionalized. The PTA considers it imperative that this Court reject a holding that would withhold from local school boards and districts the tools necessary to prevent the development of racially isolated schools.

The student assignment plans in Seattle, Washington ("Seattle") and Jefferson County, Kentucky ("Jefferson County") at issue here are a reflection of the will of those communities. While not every parent may agree with the assignment plans in place, it is our experience that no educational decision garners universal support. Here, however, the school boards have determined that the student assignment plans further the broader needs and interests of the children and parents that make up those communities.

The cases at bar involve local school districts' decisions to ensure that students in public schools from kindergarten through high school obtain the benefits of education in a multiracial setting. These cases do not involve the division of scarce resources such as jobs, contracts, or admission to elite institutions. Rather, they reflect local government's attempts to provide an excellent education to *all* students.

The local governments' actions here are consistent with our nation's long struggle to overcome the ills of racial division. Indeed, in the PTA's view, these cases concern the fundamental values of equal opportunity to education, local control and the benefits of education in a multiracial setting

In our experience as parents and teachers, education in a multiracial setting is a compelling governmental interest for two distinct but interrelated reasons. First, for all of our children, learning and playing with children of different races and ethnicities during primary and secondary school is critical to inculcating tolerance, facilitating comfort with members of other racial and ethnic groups, and enhancing critical thinking. Second, children from minority groups, particularly those from impoverished backgrounds, who are educated in diverse schools are better able to access opportunities in higher education and our economy. In order to accomplish this compelling interest, school districts must in some circumstances be able to take race into account. Voluntarily chosen race-conscious student admissions plans reflect the will of parents and communities and result in engaged parents and strong PTAs. For these reasons, the parents and teachers who comprise the PTA contend that the government has a compelling interest in ensuring that students are educated in a multiracial context and that school districts may need to take race into account to achieve this worthy end.

ARGUMENT

I. School Districts Have a Compelling Interest in Providing Students an Education in a Multi-Racial Setting.

Beginning with *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), this Court has affirmed the critical role of

education in our democracy. As this Court so eloquently stated in *Plyler v. Doe*, 457 U.S. 202, 221 (1982), education sustains "our political and cultural heritage." 457 U.S. at 221. Of course, *Brown* principally stands for the proposition that state mandated racial segregation in education is unconstitutional because it "may affect . . . hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. More recently, in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), the Court reaffirmed the "educational benefits that flow from a diverse student body in the higher education context."

This Court has also long championed the principle of local autonomy in the context of education. As this Court stated in *Milliken v. Bradley*, 418 U.S. 717 (1974), "no single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." 418 U.S. at 741-42. Seattle and Jefferson County concluded that the interests of the children were best served by school admissions plans that included as one factor among many the value of integrated learning.

Respect for local decision-making does not mean, of course, that school district decisions are not subject to constitutional mandates. *Milliken*, 418 U.S. at 744. This Court previously held that in the context of higher education, educational institutions must establish a compelling government interest if race is considered as a factor. *Grutter*, 539 U.S. at 326. For the reasons stated below, primary and secondary schools also have a "compelling interest" in seeking to obtain the benefits that flow from a racially diverse educational environment.

In *Grutter*, this Court ruled that the University of Michigan Law School "has a compelling interest in attaining a diverse student body." 539 U.S. at 328. In reaching that conclusion, this Court found that the benefits of racial diversity within the educational institution were many. Those benefits included: the fact that racial diversity "promotes 'cross-racial understanding'"; 539 U.S. at 330, that racial diversity enhances students' ability to participate in and strengthen vital American institutions such as the military, business and the government; 539 U.S. at 330, and finally that racial diversity within educational institutions creates a representative leadership class necessary to the perpetuation of American democracy. *Grutter*, 539 U.S. at 330-331.

To be sure, these benefits of racial diversity were identified at the graduate school level. But in our experience, these same benefits are even more crucial during a child's early years of development. The PTA's century of commitment to excellence in primary and secondary education stems from the recognition that the education a child receives from kindergarten through high school sets the stage for later learning and achievement. Accordingly, even those benefits identified in *Grutter* as occurring in the adult years are affected by earlier education experiences.

These years present an important opportunity to prevent racial prejudices from developing, for "[a]t the earliest stages of education, the shadow of racism has had less time to

hover."[3] Indeed, cognitive psychologists have found that early education is when children begin to notice differences and construct classifications.[4] Children are easily influenced by societal stereotyping both in the development of their own identity and their attitudes toward others.[5] Around ages ten or eleven (typically 4th and 5th grade), children begin to develop a full understanding of racial differences as "knowledge of racial classifications evolves from a vague, undifferentiated awareness of skin color differences to knowledge of physical-biological attributes associated with racial membership and eventually to a social understanding

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[3] Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 216 (2005).

[4] According to Drs. John Dovidio and Melanie Killen, racial awareness begins at an early age. *Comfort v Lynn Sch. Comm.*, 263 F. Supp.2d 209, 236 (2003). In her expert testimony in *Comfort*,

> "Dr. Killen testified that because racial (and certain ethnic) differences are observable, children key on them early in their social development. Differences that are visibly apparent to young children have deeper resonance with them. As a consequence of this early attendance to observable difference, stereotypes about race and (visible) ethnicity set in early and are extremely difficult to correct in adolescence and adulthood. Dr. Dovidio agreed that children attend more readily to racial distinctions than other differences."

263 F. Supp.2d at 68-69. *See, e.g.*, Phyllis Katz, *Development of Children's Racial Awareness and Intergroup Attitudes*, in *Current Topics in Early Childhood Education* 17-54 (Phyllis Katz, ed.) (Vol. 4, 1982).

[5] *Id.*

of racial categorization."[6] During these latter years, stereotypes can become deeply entrenched and difficult to dislodge.[7]

Our perceptions as parents and teachers are consonant with the findings of cognitive psychologists. Children initially notice racial difference the way they notice hair or eye color. Many white parents note with interest their very young children's refusal to refer to themselves as "white," because of course, their skin is not "white" the way a white crayon is white. Black parents find their children equally perplexed by references to them as "black" since often their skin is a shade of brown. However, as children grow older, they begin to ascribe weightier significance to differences associated with race or ethnicity unless in an environment where this impulse is addressed and curbed. Among the most effective means of eliminating or preventing the entrenchment of stereotypes and prejudices is a multiracial

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[6] Marguerite N. Alejandro-Wright, *The Child's Conception of Racial Classification: A Socio-Cognitive Developmental Model,* in BEGINNINGS: THE SOCIAL AND AFFECTIVE DEVELOPMENT OF BLACK CHILDREN 185, 186 (Walter Recharde Allen et al. eds.) (1985).

[7] *See generally*, Rebecca Bigler & L. S. Liben, *A Developmental Intergroup Theory of Social Stereotypes and Prejudice* at 39-89 in ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR, (R. V. Kail, ed.) (Vol. 34, 2006) (positing that racial separation is a causal factor in stereotyping because merely seeing people sorted by some human attribute leads children to believe that the groups differ). *See also* FRANCES E. ABOUD, CHILDREN AND PREJUDICE (1988).

school setting where children from multiple races and ethnicities are welcome and valued.[8]

This Court has also recognized in *Brown*, 347 U.S. at 483, and beyond the multitude of harms associated with racially separate education for children. In the years following *Brown*, federal courts at every level wrestled with the challenge of eliminating segregation while not wholly usurping local control and community support for schools. *See, e.g., Milliken*, 418 U.S. at 741; *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437 (1980).

The Court's traditional support for locally conceived responses to local problems in the context of K-12 education is akin to the Court's respect for universities in making academic decisions. *Grutter*, 539 U.S. at 328. The salient difference in the two contexts is that universities are engaged in a merit-based admissions process in which they are apportioning a scarce resource. School districts by contrast welcome all children and are attempting to create the best possible schools for all. In other words, universities are dividing a pie with too few pieces and school districts are trying to bake the best possible pie for everyone. Under either respondents' policy, no student is denied admission to a school within their district.

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[8] *See generally* Frances E. Aboud & Sheri Levy, *Intervention to Reduce Prejudice and Discrimination in Children and Adolescents*, in REDUCING PREJUDICE AND DISCRIMINATION (2000).

To survive strict scrutiny, the school authorities' burden is first to show that, as in the higher education context, education in a multiracial setting provides critical educational benefits, and then to show that the plan established is narrowly tailored. Education has long been defined more broadly than merely skills acquisition. Public schools inculcate the values of our democratic political system and prepare our children to become citizens in our democracy. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). As parents and educators, we expect our schools both to provide our children rigorous academic programs as well as the multitude of skills necessary to conduct themselves as productive citizens and to avail themselves of employment opportunities in the modern economy. These latter goals require, in addition to mastery of academic subject matters, that our children not hold debilitating stereotypes about themselves or people different from themselves.[9]

In Seattle and Jefferson County, the local governments adopted voluntary student assignment plans that sought to ensure that students are educated in a multiracial setting. In the sections that follow, we describe the specific educational benefits that flow from education in such a setting.

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[9] Brief for 65 Leading Corporations as *Amici Curiae* Supporting Respondents, *Grutter v. Bollinger, Gratz v. Bollinger* at 7 (*citing* JEAN-MARIE MARTINO, DIVERSITY: AN IMPERATIVE FOR BUSINESS SUCCESS (1999)).

A. Children Educated in a Diverse Setting Are Best Able to Work and Play with People from Other Races and Ethnicities

Our challenge now is to move above and beyond our separate, divisive experiences and build a shared experience, the experience of working together not as black persons and white persons but as human beings.[10]

When the National PTA merged with the National Congress of Colored Parents and Teachers in 1970, the PTA's commitment to the significance of people of all races working together going forward was evident. Even as early as the 1950s, however, the PTA pledged in its Nine-Point Program to "Expand the emphasis upon the interdependence of peoples and the values of better world understanding." As parents and educators in today's society, we know that for all students, when students learn with students of other races and ethnicities, there is a dramatic increase in cross-racial understanding and a reduction in racial prejudice. These are critical educational objectives for our schools. As parents and teachers, we consider these lessons necessary both to prepare our children to be responsible citizens[11] and also to succeed in our diverse economy.[12]

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[10] National PTA President Pearl Price, Remarks on the Unification with the National Congress of Colored Parents and Teachers, in THE PTA STORY: A CENTURY OF COMMITMENT TO CHILDREN at 117.

[11] Cross-racial friendships can be powerful motivators for civic courage. Indeed, personal ties between gentiles and Jews, including whether they were childhood friends or schoolmates, rather than political or religious affiliation, were found to be significant factors distinguishing rescuers

Not surprisingly, when a school setting contains students from multiple racial groups, all students regardless of race feel higher degrees of comfort with members of racial groups different than their own.[13] Such school settings provide students with a rich set of experiences through which to analyze prevailing racial and ethnic stereotypes and tend to lead to a dramatic decrease in discriminatory attitudes and prejudices.[14]

School encompasses far more than the classroom. Children learn many important life lessons working through conflicts on the playground, sharing after-school activities, and helping with bake-sales and other events that support our schools. When a school contains a wide array of students from different backgrounds, it becomes more difficult to hold caricatured views of any racial or ethnic group. Students can be eloquent in describing this phenomenon. Wells et al. interviewed many such students in their forthcoming book. A white Shaker Height High graduate, who now helps run an

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and non-rescuers of Jews during the Holocaust. David P. Gushee in MANY PATHS TO RIGHTEOUSNESS: AN ASSESSMENT OF RESEARCH ON WHY RIGHTEOUS GENTILES HELPED JEWS (2001).

[12] *See generally* ALEC GALLUP, THE PHI DELTA KAPPA GALLUP POLL OF TEACHERS' ATTITUDES TOWARDS THE PUBLIC SCHOOLS (1985).

[13] *See generally* Michael Kurlaender & John T. Yun, *Measuring School Racial Composition and Student Outcomes in a Multiracial Society*, AM. J. EDUC. (forthcoming); Thomas Pettigrew & Linda Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 751-83 (2006).

[14] *See generally* Melanie Killen & Clark McKown, *How Integrative Approaches to Intergroup Attitudes Advance the Field*, 26 J. APPLIED PSYCHOL. 612 (2005).

international business with this father and siblings, "noted that he thinks that people's prejudices gets broken down once someone 'blows the model' of what a black person or a Hispanic person is "supposed to be like."[15] Helping students dislodge their prejudices is a necessary first step to achieving cross-racial understanding.

White children are most likely to experience these benefits from multiracial educational settings. White families live in the most racially isolated settings, living and playing only with other whites, while members of minority groups more often live in neighborhoods with other minority groups.[16] Those of us who are with children every day see vividly that white children who are in contact with children from other racial and ethnic groups are able to form friendships across race and to work cooperatively with students of other races and ethnicities.

Our perceptions are confirmed by the work of social scientists.[17] As the powerful survey and interview data from

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[15] WELLS, A.S.; HOLME, J.J.; REVILLA, A.J. & ATANDA, A.K. BOTH SIDES NOW: THE STORY OF DESEGREGATION'S GRADUATES Cambridge, MA: Harvard University Press. (in press) [hereafter BOTH SIDES NOW].

[16] *See generally* Michael Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest? Evidence from Louisville*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & Michael Kurlaender, eds.) (2001); PAMELA PERRY, SHADES OF WHITE: WHITE KIDS AND RACIAL IDENTITIES IN HIGH SCHOOL (2001).

[17] John T. Yun, & Michal K. Kurleander, *School Racial Composition and Student Educational Aspirations: A Question of Equity in a Multiracial Society*, 9 J. EDUC. FOR STUDENTS PLACED AT RISK, No. 2, 143-168 (2004).

the brief submitted by *amici* Wells et al. demonstrates, white students who experience interracial contact value those experiences and consider them helpful in preparing them to live and work in multiracial communities.[18] Many white graduates of diverse high schools say that "because they attended diverse high schools, as adults they were more at ease in interactions with people of different backgrounds and more willing to engage in conversations with people of color than many other whites they know."[19]

Children from minority groups are similarly more comfortable forming friendships and working comfortably with children of other races, particularly white children, when they are educated in multiracial settings. As Wells et al. recounted: "African American interviewees also noted that their experiences made them feel less intimidated by, fearful of, or subservient toward white people."[20] Feeling confident and strong is obviously necessary for true cross-racial friendships and work relationships.[21]

Parents and teachers see first hand that multiracial and ethnic education settings help students of all races develop

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[18] Brief for Amy Stuart Wells et al. as *Amici Curiae* Supporting Respondents, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, #1, (No. 05-906); *Meredith v. Jefferson County Bd. of Educ.* (No. 05-915).

[19] BOTH SIDES NOW (Chapter Six).

[20] *See* Wells, Holme, Revilla and Atanda (forthcoming, spring 2007) and Holme et al. (2004).

[21] *See generally* JANET WARD SCHOFIELD, BLACK AND WHITE IN SCHOOL: TRUST, TENSION OR TOLERANCE? (1989) (showing that behavior changed over time as kids became more comfortable with members of other racial groups and were less likely to avoid them).

higher level critical thinking and cognitive skills.[22] These experiences allow children to challenge stereotypes in the mass media and elsewhere and to read literature more critically. Educational psychologists have found that exposure to "discrepant" experiences enhances students' critical thinking and cognitive skills because students are required to think beyond their intuitive assumptions.[23]

B. Multiracial Education Promotes Higher Aspirations for Minority Children

Unless we can look into the face of a little child and say, "I believe that child is capable of doing something better than what he is doing now," there is no hope for the child in his ability to work out a safe democracy for the future.[24]

Helping children realize their fullest potential while in school and when they leave school to enter adulthood has always been intrinsic to the educational endeavor. For black and Latino students, education in a multiracial setting has the additional benefits of familiarizing them with the mores of the dominant culture and leading to richer opportunities to advancement and higher career aspirations. Minority

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[22] Ellen Goldring and Claire Smrekar, *Magnet Schools and the Pursuit of Racial Balance*, EDUC. & URBAN SOC'Y, Nov. 2000, at 17, 33.

[23] Willis D. Hawley, *Designing Schools that Use Student Diversity to Enhance Learning of All Students*, in CAN WE MAKE A RAINBOW? FROM SEGREGATION TO INTEGRATION (Erica Frankenberg and Gary Orfield eds., University of Virginia Press forthcoming 2007).

[24] Clara Gay, Outgoing President of the Nat'l Congress of Colored Parents and Teachers, Remarks at the Nat'l Congress of Colored Parents and Teachers Convention (June 22, 1970), in PTA STORY: A CENTURY OF COMMITMENT TO CHILDREN at 117.

students who attend racially diverse schools are more likely to complete high school, attend college, and connect with a diverse peer network.[25] In addition, minorities who graduate from racially diverse schools are likely to earn higher degrees and major in more "nontraditional" occupations than graduates of racially isolated schools.[26]

Multiple studies of minority students who attend racially diverse schools show that such students are more likely to obtain white-collar jobs, to feel prepared for leadership positions in private and public contexts, and to have higher earnings than their counterparts who attended racially isolated schools.[27] It is not the PTA's position that the presence of white children is necessary for minority students to learn, rather, that the social networks and opportunities more readily available to white children are most likely to be available to minority children if they learn and play together.

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[25] *See, e.g.,* Walter G. Stephan, *School Desegregation: Short and Long Term Effects*, in OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA 100-118 (Harry J. Knople, Robert J. Norrell & Ronald W. Rogers eds., University of Alabama Press 1991).

[26] *See* Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RESEARCH No. 4 531-555 (1994).

[27] *See, e.g.,* Orley Ashenfelter, William J. Collins, & Albert Yoon, *Evaluating the Role of Brown v. Board of Education in School Equalization, Desegregation, and the Income of African Americans*, (Nat'l Bureau of Econ. Research, Working Paper No. 11394, 2005) available at https://www.nber.org/papers/w11394; AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS (Yale University PRESS (1997); SUSAN EATON, THE OTHER BOSTON BUSING STORY (Yale University Press 2001).

II. Race Conscious Admissions Plans in Some Communities May be Necessary to Assure Multiracial Education

> *The time has come for parents, the community and the government – local, state and federal – to support public schools, and their teachers, aggressively. It is our job in this generation to assure the doors to opportunity through education remain wide open for all children.*'[28]

While the National PTA will leave it to others to evaluate the specifics of the Seattle and Jefferson County student assignment plans for purposes of evaluating whether such plans are narrowly tailored, the PTA urges the Court to consider the importance of discretion to local school districts and communities in determining precisely how to balance the many competing needs of the community. In many communities, in light of the residential demographics,[29] neighborhood schools will necessarily be racially isolated. Accordingly, school districts seeking the benefits of education in multi-racial settings may need to take race into account in establishing their admissions policies.

The PTA celebrates the link between schools and communities and acknowledges their interdependence. We cannot create strong public schools without parent and community support. Because of the significance of parental

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[28] Ann Kahn, Past PTA President, Challenge in the 1980s, in PTA STORY: A CENTURY OF COMMITMENT TO CHILDREN at 117.

[29] http://www.census.gov/hhes/www/housing/housing_patterns/ch1.html

and community support, the PTA considers voluntarily adopted race conscious school admissions plans to play a dramatically different role in schools and communities than those adopted by court order. While both seek a salutary end -- multi-racial education -- a voluntary plan does so as part of local governance with community support.

During the years in which the Court sought to implement the promise of *Brown*, this Court struggled with the competing tension between local control and the overriding importance of eliminating state-imposed segregation. As Justice Stewart stated in *Wright v. Council of the City of Emporia*, "'[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.'" *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972). In dissent, former Chief Justice Rehnquist agreed, that '[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.'" 407 U.S. at 469. In *San Antonio v. Rodriguez*, 411 U.S. 1 (1973), this Court stated that "A vital aspect of local control 'is the opportunity it offers for participation in the decision making process that determines how...local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.'" 411 U.S. at 50.

These lessons are well remembered here. Parents in school districts that have chosen voluntary race conscious admissions plans support those programs. Indeed, the survey conducted by the University of Kentucky Research Center

concerning the Jefferson County plan found that 77% of all parents agreed that school assignments should ensure that children attend school with children of other races. JA-107.

These programs also reflect a careful balance between other community-supported values, such as attending neighborhood schools, and racial inclusion. This sort of balancing is best done at the local level – where parents and educators can have a voice.

For those parents who feel strongly that education in a multiracial setting is important for their children, a court decision to the contrary may lead them to disengage from their schools. Just as in the earlier stage of this country's response to court-ordered school decision making led some parents to private schools, so too might such a decision in this case. Educators in both public and private primary and secondary schools value the benefits of integrated learning.[30]

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[30] Both religious and secular primary and secondary schools recognize the value of a multi-racial education. The National Association of Independent Schools notes its "deep commitment to diversity and multicultural education." National Association of Independent Schools, Creating Community Out of Diversity, http://www.nais.org/equity/index.cfm?Itemnumber=147336. In a recent article in the Catholic Herald, Dr. Timothy J. McNiff, diocesan superintendent of schools, told of efforts of "Catholic schools in the Arlington Diocese . . . to grow and reach out to minority students in an unprecedented way." http://www.catholicherald.com/articles/06articles/schools0706.html. The Dalton School, a well-known independent school in New York City, explains its commitment to a racially and integrated education thusly:

It would be ironic indeed if parents were forced to send their children to private schools to obtain these benefits.

As parents and teachers of the PTA, we aspire to build strong schools and communities to ensure that all of our children have the brightest possible future. We are firmly convinced that a multi-racial student body is critical to these goals.

CONCLUSION

For the foregoing reasons, this Court should conclude that the Government has a compelling interest in ensuring that students in the years between kindergarten and high school graduation are educated in a multiracial setting and

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> To live and function successfully in our world, a great education must include learning with children and from teachers whose backgrounds, beliefs, and perspectives reflect that variety. While it is important for each child to understand his or her own background and historical roots, we must not isolate ourselves from the more diverse culture in which we will increasingly live. To do so would be to shortchange our children.

Another well-known private school, Sidwell Friends in Washington D.C., states that it "believes that diverse perspectives and meaningful inquiry fuel academic excellence and promote personal growth. Each of its three divisions stresses empathy, equity and social justice in age appropriate ways." About Sidwell Friends School: Diversity, http://www.sidwell.edu/about_sfs/diversity.asp (last visited Oct. 8, 2006).

that modest voluntarily adopted race conscious admissions plans may be necessary to achieve this compelling interest.

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Parents Involved in Community Schools, *Petitioner*,
v.
Seattle School District No. 1 et al., *Respondents*.
and
Crystal Meredith, *Petitioner*,
v.
Jefferson County Board of Education et al., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals
for the Ninth and Sixth Circuits, Respectively

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are eight organizations that share a deep commitment to ensuring that all children receive a high-quality education that fully prepares them to succeed as productive citizens in our society. As part of that commitment, *amici* strongly support the efforts of local school boards to take measures that seek to foster the educational benefits of a racially diverse learning environment in elementary and secondary public education. A complete list of the *amici*, along with their specific statements of interest, is set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

Local control of elementary and secondary education through local school boards is deeply engrained in our nation's history. In light of this long tradition, this Court generally has deferred to the judgments of local school boards and granted them broad discretion to chart education policy for the communities they serve. In maintaining that position of deference, this Court repeatedly has stressed that local control spurs innovation, democratic accountability, and, ultimately, sound education policy.

That same deferential stance also is warranted for race-conscious student assignment policies adopted by local school boards to foster the benefits of a racially diverse learning environment in elementary and secondary public education. Such policies are in step with this Court's school desegregation precedents, which afford latitude to local

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of the brief.

school boards to undertake voluntary efforts to overcome the pervasive *de facto* public school segregation that is attributable to demographic trends. These efforts to integrate our pubic schools are worlds apart from constitutionally forbidden systems of deliberate racial separation and stigmatization. And they are markedly distinct from race-conscious measures in other contexts that have been subjected to strict judicial scrutiny in this Court's affirmative action precedents.

Even if it were to apply here, strict scrutiny should accommodate a level of deference to the determination of local school boards, which is anchored in a strong empirical foundation, that a racially diverse learning environment has a profoundly positive impact on all students. The United States' *amicus* briefs in these cases mischaracterize the student assignment policies at issue as nothing but racial balancing. In adopting such policies, local school boards across the country are not seeking diversity for diversity's sake. Rather, they are striving to achieve the concrete educational and lifelong benefits that flow from racially diverse schools.

The United States' version of the narrow tailoring component of strict scrutiny has no moorings in this Court's precedents. It would effectively handcuff local school boards and divest them of essentially all discretion to develop and implement measures, suited to the particular needs and circumstances of their communities, to reduce the racial isolation of public schools by seeking the benefits of a racially diverse learning environment. In the end, the United States' approach to narrow tailoring would give judges carte blanche to override the judgments of local school boards and thereby compromise the innovation, accountability, and sound education policy that this Court consistently has said flows from local control of public education through the nation's school boards.

ARGUMENT

I. The Tradition of Local Control of Public Education Gives Local School Boards Wide Discretion to Adopt Student Assignment Policies That Seek to Foster the Benefits of a Racially Diverse Learning Environment in Grades K-12.

A. Local Control of Public Education Confers on School Boards the Primary Responsibility for Charting the Nation's Education Policies in Grades K-12.

Time and again, this Court has admonished that the operation of the nation's elementary and secondary public schools (covering kindergarten through twelfth grade, or K-12) is committed principally to local school boards. Indeed, "[n]o single tradition in public education is more deeply rooted than local control." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974); *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("[O]ur cases have . . . firmly recognized that local autonomy of school districts is a vital national tradition.").

This Court also has long emphasized "the importance of education to our democratic society." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' . . . .") (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). Local control of public education thus squarely places on local school boards a profound and challenging responsibility: "educati[ng] . . . the youth of our country during their most formative and impressionable years." *Bd. of Educ. v. Pico*, 457 U.S. 853, 894 (1982) (Powell, J., dissenting).

In carrying out that vital function, local school boards must necessarily address a panoply of education policy issues.

As Justice Powell (himself a former local school board president) observed, local school boards are tasked with both "long-range planning as well as the daily operations of the public school system." *Keyes v. Sch. Dist. No. 1, Denver*, 413 U.S. 189, 227 (1973) (Powell, J., concurring in part and dissenting in part). This expansive charter thus calls on local school boards to confront matters that run the gamut from establishing a curriculum to making schools safe and secure, and from hiring superintendents and other administrators to enhancing student achievement in classrooms and on standardized tests. *See generally* Frederick M. Hess, School Boards at the Dawn of the 21st Century (2002), http://www.nsba.org/site/docs/1200/1143.pdf.[2]

In recognition of the primacy of local control, this Court consistently has stated that local school boards have wide discretion in charting education policy for their communities. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). Accordingly, the Court typically has reviewed legal challenges to school board actions with substantial deference.

B. Local Control of Public Education Through School Boards Promotes Innovation, Accountability, and Sound Education Policy.

In maintaining its posture of deference to local school boards, this Court has identified three core, salutary effects of local control over public education: innovation, accountability, and sound education policy.

1. Local Control and Innovation

This Court repeatedly has stated that local control of public education encourages innovation. *See, e.g., Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991); *San Antonio*

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[2] Given this wide range of duties, it is not surprising that membership on a local school board entails an extensive commitment of time and energy, especially in larger school districts. *See* Hess at 17.

Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973). A local school board knows firsthand the community that it serves: its members are, by and large, part of that community. That school board members work in the communities in which they live makes it "fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board." *Pico*, 457 U.S. at 894 (Powell, J., dissenting). And precisely because they are so near to the center of educational gravity, local school boards are uniquely positioned to craft policies that are suited to the needs and interests of their particular communities.

Experimentation by local school boards with respect to educational policy is especially valuable in light of the wide variety of differences among communities in the nation. In short, education policy is not a monolith in America, and one-size-fits-all prescriptions are rare. *See* Nat'l Working Comm'n on Choice in K-12 Educ., School Choice: Doing It The Right Way Makes A Difference, 14-15 (2003), http://www.brookings.edu/gs/brown/20031116schoolchoicereport.pdf [hereinafter School Choice].

Chief Judge Boudin made that very observation in *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005), which, like the instant cases, involved a challenge to a local school board's student assignment policy that sought to achieve the benefits of a racially diverse learning environment. In that case, Chief Judge Boudin stressed that, when it comes to educational matters, a distinct "advantage[] of our federal regime is that different communities [can] try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs." *Comfort*, 418 F.3d at 28 (Boudin, C.J., concurring). Applying that principle, Chief Judge Boudin voted to sustain the Lynn school board's "local experiment," which, he said, "pursu[ed] plausible goals by novel means that are not squarely condemned by past Supreme Court precedent." *Id.* at 29.

To be sure, the federal government has a say in education policy. But it is generally accepted that federal authorities, including members of the judiciary, are simply not as well-situated as local school boards to decide what is best for a public school district at a particular point in time. Judge Kozinski placed great weight on this proposition in voting to uphold the Seattle school board's student assignment policy at issue here. Specifically, Judge Kozinski emphasized that school board members, "who are much closer to ground zero than [judges] are[,] . . . understand the realities of the situation far better than we can, no matter how many depositions and expert reports we may read in the quiet of our chambers." Parents Involved in Community Schools, Petitioners' Appendix 69a [hereinafter PICS Pet. App.]. Judge Kozinski's refrain of judicial restraint, so as to spur innovation in education through local control, is echoed in this Court's precedents rejecting constitutional challenges to local education policy. *See, e.g.*, *Rodriguez*, 411 U.S. at 43 ("[T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.").

The experimentation that is bred by local control of public education is manifested here in the form of Respondents' school choice plans, which strive to achieve the benefits of a racially diverse educational environment through innovative assignment policies that provide a degree of choice of schools within the district, commensurate with the particular needs and concerns of the entire communities served by the boards. Under these policies, parents and their children can select their neighborhood school, yet are not confined to that option. Policies that maximize choice, and at the same time seek to integrate the schools, are increasingly commonplace. Indeed, a number of larger school districts now "offer parents relatively unconstrained choices among

public schools within the district," School Choice at 14, with Seattle furnishing "one of the most comprehensive open choice plans in the country," *id.* at 15.

2. Local Control and Accountability

This Court has touted the democratic accountability that is fostered by local control of education. *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); *Dowell*, 498 U.S. at 248. There are two key aspects to the accountability of local school boards. First, local school boards are answerable to their communities through the electoral process. Second, community input plays a significant role in the decisionmaking of local school boards.

The vast majority of local school boards—ninety-three percent according to a recent survey—is popularly elected by voters in local school districts. Hess at 32. Furthermore, local school board members periodically are required to face the voters; more than ninety percent of members serve terms of no more than four years. *Id.* at 28. Like all elected officials, therefore, local school board members must be responsive to constituent concerns if they wish to be reelected. But perhaps more than any other politically accountable body, local school boards are "uniquely . . . democratic institutions." *Pico*, 457 U.S. at 894 (Powell, J., dissenting). This is because a school board's most important constituents are parents whose children attend the local public schools governed by the board.

> In most public schools in the United States the *parents* have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people."

Id. at 891 (Burger, C.J., dissenting). In light of this special relationship between local school boards and their constituents, it is hardly a stretch to conceive of "local control of education [as] democracy in a microcosm." *Id.*

Local school board elections themselves are arguably more democratic than legislative elections in a key respect—the rate of successful challenges to incumbents. In fact, a higher percentage of incumbents is unseated in local school board races than in United States congressional races. Hess at 36. The accountability of local school boards through contested elections counsels against aggressive judicial intrusion into the management of public schools. Such precipitous action "would deprive the people of control of schools through their elected representatives." *Milliken*, 418 U.S. at 744.

Local control over education policy promotes democratic accountability not just by rendering school board members answerable to constituents at the polls, but also by encouraging parental involvement in setting local education policy. Indeed, local control "has long been thought essential . . . to the maintenance of community concern and support for public schools." *Milliken*, 418 U.S. at 741.

This engagement between a local school board and its community "takes many forms" throughout the country today. *See* Michael A. Resnick, Nat'l Sch. Bds. Ass'n, Communities Count: A School Board Guide to Public Engagement 2 (2000). Some school boards conduct focus and study groups with parents; others hold large public meetings; and still others actively communicate with constituents through electronic mail, public-access cable television, or other technologies. *Id.* at 15-18. *See generally* Anne Wright & Judith Brody Saks, Nat'l Sch. Bds. Ass'n, The Community Connection: Case Studies in Public Engagement (2000) (profiling the community involvement strategies implemented in fifteen different school districts). Overall, there is no uniform method by which local school boards engage with

the public. But the goal of public engagement by local school boards is the same everywhere: to forge ties with the community the school board serves, in a collaborative effort to enhance the quality of public education there.[3]

The democratic accountability that flows from local control of public education is very much in evidence in Jefferson County and Seattle.[4] School board members in

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[3] Local school boards are particularly accountable to parents with respect to student achievement. *See* Hess at 9, 14, n.7. This accountability is measured, in part, by reference to the standards of the federal No Child Left Behind Act ("NCLBA"), Pub. L. No. 107-110, 115 Stat. 1425 (2001). That statute requires states, local school districts, and individual schools to assess student achievement for all students at various grade levels across a range of subjects. It also requires incremental improvement in test scores at a certain rate to ensure "adequate yearly progress." Pub. L. No. 107-110, § 1111, 115 Stat. at 1445-46. What steps local school districts take to achieve "adequate yearly progress" is largely a matter of local control under the NCLBA, unless the steps taken fail to produce results. Notably, the NCLBA requires states to measure the achievement of "students from major racial and ethnic groups." Pub. L. No. 107-110, § 1111(b)(2)(C)(v)(II)(bb), 115 Stat. at 1446. As local school districts strive to raise the test scores of particular racial groups in order to meet their states' achievement goals, they need the flexibility to develop and implement solutions, including student assignment plans, that are most likely to work given the particular circumstances in their communities. All told, Petitioners fail to acknowledge the significant accountability of local school districts for the achievement of all students and the importance of local control in meeting these obligations.

[4] The policies adopted by the Board of Education in Jefferson County can be found in Bd. of Educ. of Jefferson County, Policy Manual § BBB (2004), *available at* http://www.jefferson.k12.ky.us/Departments/GeneralCounsel/boardpolicy0702.pdf [hereinafter Policy Manual]. The policies and bylaws adopted by the Seattle School District No. 1 are indexed online: Seattle Sch. Dist. No. 1, Board Policies and Procedures, *available at*

Jefferson County are elected by voters to terms of four years. Ky. Rev. Stat. § 160.200(1) (2006); Policy Manual § BBB. The same is true in Seattle. Policies and Procedures, Bylaw B03.00 (Aug. 2005). In Jefferson County, the school board holds twenty-one meetings a year that are open to the public and broadcast on a local cable television channel. *See* Jefferson County Public Schools, Board of Education, About Us, http://www.jefferson.k12.ky.us/Board/BOE.html#Anchor-When-35882 (last visited Oct. 8, 2006). Similarly, the Seattle school board generally meets twice a month in sessions open to the public. *See* Seattle Public Schools, School Board Meeting Schedule, http://www.seattleschools.org/area/board/schedule.xml (last visited Oct. 8, 2006); *see also* Policies and Procedures, Bylaw B40.00 (Aug. 2005); Policies and Procedures, E06.01 (Feb. 2003). In Jefferson County, any member of the public may register to address the school board at the open meetings. Policy Manual § BDDH. Meeting agendas are available to the public before each meeting, Policy Manual § BDDC, and the board makes the minutes of past meetings available to the public, Ky. Rev. Stat. § 160.270(2) (2006). Meeting minutes record each vote taken by the board and identifies yeas, nays, and absences by the name of each board member. Policy Manual § BDDG. Much is the same in Seattle. There too, an agenda must be made available to the public prior to each board meeting, and any member of the public may address the school board during the "Public Testimony" portion of the meeting. Policies and Procedures, E06.01 (Feb. 2003). And board resolutions and meeting minutes, complete with a record of board members' votes, are available online. Seattle Public Schools, School Board, http://www.seattleschools.org/area/board/index.xml (last visited Oct. 8, 2006).

More fundamentally, the accountability that is attendant to local control is underscored by the very student assignment

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http://www.seattleschools.org/area/policies/index.dxml [hereinafter Policies and Procedures].

policies at issue. In Jefferson County, public participation has shaped the school board's efforts to move from a system of *de jure* racial segregation in the public schools to a racially integrated system. In 1984, for example, community engagement led the school board to develop policies intended to foster racial balance in the schools in the face of demographic trends that contributed to racial imbalance. *See Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 766 (W.D. Ky. 1999). In the same vein, public engagement subsequently enabled the school board to arrive at a community consensus and formulate a "managed choice" school assignment plan in 1996. *Id.* at 767; Meredith, Petitioner's Appendix C-15. And the current plan is responsive to a formal opinion survey and five public forums conducted by the Jefferson County school board. J.A. 106-08.

Likewise, the Seattle school board has engaged with the public in developing and implementing a series of different student assignment plans designed to combat the effect of residential segregation patterns on the racial make-up of the city's schools. *See* PICS Pet. App. 269a-70a. At one stage, for instance, the school board implemented a policy of mandatory busing. That action met with "widespread dissatisfaction," *id.* 270a, and led voters in the city to attempt to recall board members who voted for the plan. The recall effort failed by a narrow margin. *Seattle Sch. Dist. No. 1 v. Washington*, 473 F. Supp. 996, 1006 (W.D. Wash. 1979). The public debate did not cease with that campaign. Instead, citizen participation through the years has led the school board to consider and experiment with student assignment plans in an attempt to balance the goal of racially diverse schools with the public's concerns about displacing parental choice. The board's current student assignment policy, which offers parents and students a broad choice of which school to attend, reflects the fruits of the board's consistent engagement with its constituents over time. *See* PICS Pet. App. 270a.

3. Local Control and Sound Policy

The innovation and accountability that come with local control of public schools are generally thought to produce sound educational policies. *See Milliken*, 418 U.S. at 742 (local control encourages "a healthy competition for educational excellence.") (internal quotation marks omitted). The facility of local school boards to make more prudent decisions for their communities than geographically distant officials (state or federal) may be rooted in the fact that unlike other government bodies, school boards concentrate on education, and education alone. *Pico*, 457 U.S. at 894 (Powell, J., dissenting). This intense focus on one general subject area enables local school boards to develop a breadth of particularized knowledge and to apply that knowledge to the circumstances on the ground in their communities.

The expertise that the Jefferson County Board of Education brings to bear on education issues is illustrative. The superintendent, who serves as the chief executive officer of the school board, must have a minimum of ten years of experience as an educator. Policy Manual § CBA. Board members themselves must undergo a substantial amount of training. Members who have been on the board for three or fewer years must participate in twelve hours of training each year. Ky. Rev. Stat. § 160.180(5)(a) (2006). For board members with four to seven years of experience, eight hours of training is required annually. *Id.* at § 160.180(5)(b). And for board members with eight or more years of experience, four hours of training is required annually. *Id.* at § 160.180(5)(c). In addition, a premium is placed on board member attendance at conventions and workshops where ideas on education policy are exchanged, and on board member review of professional journals and papers. Policy Manual § BHB.

The extensive training that the Jefferson County school board members receive is mirrored in local school boards nationwide. A recent survey found that most local school

board members are highly trained in a number of substantive areas, particularly in the subjects of board member roles and responsibilities and board member accountability. *See* Hess at 18.

In the end, local school board polices are not blind experiments in social engineering. In crafting solutions to the problems they encounter, local school boards engage in a complex decisionmaking process. They evaluate academic research and weigh all sides of an issue in an effort to ensure that there is a strong empirical foundation for their judgments. They give substantial consideration to community values and interests. And they carefully deliberate over the best approach to the problem at hand before making a final determination.

Local school boards are not infallible. As a nation, however, we continue to trust local school boards to develop sensible education policies, designed to meet the particularized needs and concerns of their communities.

C. Student Assignment Policies That Use Racial Criteria to Foster the Educational Benefits of a Racially Diverse Learning Environment Are Matters of Local Control of Public Education Committed to the Discretion of Local School Boards.

The assignment of students to schools is a quintessential matter of local control that generally should be left to the discretion of local school boards. This is also true of student assignment policies, like those at issue here, that consider race to a limited extent in the assignment equation to achieve the educational benefits of a racially diverse learning environment in K-12 public education. Our view on this score is informed by this Court's desegregation precedents, which indicate that the exercise of local control over public education gives school boards latitude to adopt voluntary measures to foster racial integration and thereby create a more racially diverse learning environment.

From the outset of its cases involving the desegregation of public schools that were segregated by the force of state and local law (including in *Brown* itself), this Court stressed that "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Dowell*, 498 U.S. at 247; *see also id.* ("*Brown* considered the 'complexities arising from the *transition* to a system of public education freed of racial discrimination' . . . .") (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (*Brown II*)) (emphasis added in original). Even where courts stepped in and oversaw the pace of compliance with *Brown*'s desegregation mandate, the goal always was a return to local control. *Freeman*, 503 U.S. at 489-90.

With the passage of time, it has become increasingly less likely that racial imbalances in public schools in formerly *de jure* segregated systems can be attributed to the vestiges of an old, unconstitutional regime, as opposed to demographic trends. *Id.* at 496. In delineating the constitutional standard for student assignment policies for those school districts, this Court stated that "[o]nce the racial imbalance due to the *de jure* violation has been remedied, the school district is under no *duty* to remedy imbalance that is caused by demographic factors." *Id.* at 494 (emphasis added).

But while the Court has held that the Constitution imposes no obligation on local school boards to cure racial imbalances that are not vestiges of *de jure* segregated systems, it also has suggested that local school boards have the discretion—in the exercise of local control over public education—to decide *voluntarily* to adopt student assignment policies that seek to achieve, through greater racial integration in the schools, the educational benefits of a diverse learning environment. In other words, the Constitution acts primarily as a desegregation floor, rather than a desegregation ceiling.

Justice Powell articulated this principle in a case involving a school district in a non-*de jure* state that nevertheless was found to have intentionally segregated some

of its schools in contravention of *Brown*. He said that boards in such districts should, on their own accord, be "free to develop and initiate . . . plans to promote school desegregation" that would "exceed[] minimal constitutional standards in promoting the values of an integrated school experience." *Keyes*, 413 U.S. at 242 (Powell, J., concurring in part and dissenting in part); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . ."); *N.C. Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[A]s a matter of educational policy school officials may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."). Nothing in this Court's most recent school desegregation decisions, *Dowell* and *Freeman*, saps the authority of local school boards in formerly *de jure* systems to undertake voluntary efforts to integrate the schools. Indeed, with their strong commitment to local control of public education, those cases signal that local school boards have leeway to seek voluntarily the benefits of racial diversity through student assignment policies.

Because *de jure* segregation was the rule in Kentucky schools prior to *Brown*, the student assignment policies of Respondent Jefferson County Board of Education were, for many years, enmeshed in questions of compliance with the desegregation requirements of *Brown*. Court-ordered school desegregation in Jefferson County eventually was dissolved in light of this Court's decisions in *Freeman* and *Dowell*. *See Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 376-77 (W.D. Ky. 2000). But after the termination of judicial oversight, the Jefferson County Board of Education

did not call a halt to integration. To the contrary, it determined that integration went hand-in-hand with a quality education, and, in step with this Court's school desegregation rulings, it voluntarily adopted, in an exercise of local control, a student assignment plan that seeks to promote a racially diverse learning environment. Meredith Pet. App. C-16 to C-17.

Elsewhere in the country, student assignment issues have been intertwined with efforts to integrate the public schools in districts, like Seattle's, where *de jure* segregation was not practiced, but where *de facto* segregation of the schools pervaded because of residential segregation patterns that were reinforced by policies that assigned students to neighborhood schools. Here too, the Court has said—and in a case involving Respondent Seattle School District No. 1 no less—that local control over public education generally leaves it to local officials to decide whether, on their own volition, to adopt student assignment polices targeted at overcoming *de facto* segregation of the public schools. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982); *see also Bd. of Educ. v. Harris*, 444 U.S. 130, 141-42 (1979) (noting congressional efforts to encourage voluntary measures to integrate public school systems that were *de facto* segregated).

This theme of voluntary school integration, through local control of public education, to overcome *de facto* segregation in non-*de jure* systems resonates in Chief Judge Boudin's concurrence in *Comfort*. That case came out of Lynn, Massachusetts, which, like Seattle, is a city without a history of *de jure* racial segregation of the public schools. But, as was true in Seattle, the public schools in Lynn were *de facto* racially segregated on account of residential segregation. *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring) ("The problem is that in Lynn, as in many other cities, minorities and whites often live in different neighborhoods."). Like Seattle, Lynn sought, through a student assignment policy, "to preserve local schools as an option without having the

housing pattern of *de facto* segregation projected into the school system." *Id.* In voting to uphold the policy, Chief Judge Boudin stated that its ultimate wisdom was a matter of local control for the Lynn school board, and the voters in Lynn to whom the board answers, not the courts. *See id.* at 28.

This Court did, of course, override the paeans to local control of education policy made initially by the local school boards in defense of racial segregation of public schools, *Brown*, 347 U.S. at 493, and then later by local school boards in defense of "freedom of choice" student assignments plans, which the Court saw as subterfuges to maintain a dual education system. *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968). But the student assignment policies at issue here are a far cry from the local school board actions struck down in *Brown* and *Green*.

The overarching purpose of dual education systems was flat-out separation of the races. *See Swann*, 402 U.S. at 6 (*de jure* racial segregation reflected "a government policy to separate pupils in schools solely on the basis of race."). In dividing students along racial lines, local school boards also stigmatized black children, who were relegated to separate and inherently unequal public schools. *Brown*, 347 U.S. at 494-95; *see also United States v. Fordice*, 505 U.S. 717, 754 (1992) (Scalia, J., concurring in part and dissenting in part) ("The constitutional evil . . . in *Brown I* was that blacks were told to go to one set of schools, whites to another. What made this 'even-handed' racial partitioning offensive to equal protection was its implicit stigmatization of minority students . . . ."") (internal quotation marks omitted). And this system created and perpetuated noxious racial stereotypes. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

The student assignment policies adopted by local school boards to produce a racially diverse learning environment are the antithesis of the system of *de jure* racial segregation once administered by local school boards. These policies seek to

sow racial unity, not to breed racial fissures. They seek to eradicate the stigma of racial inferiority, not to spawn it. They seek to break down racial stereotypes, not to build them. And they seek to celebrate our nation's racial diversity, not to condemn it.

Moreover, while they sometimes do take race into account in the student assignment process, such policies are markedly different from the race-conscious measures in higher education, public contracting, public employment, and legislative redistricting that this Court heretofore has addressed in its affirmative action precedents beginning with *Bakke*.[5] Judge Kozinski succinctly captured these distinctions in his opinion concurring in the Ninth Circuit decision sustaining Seattle's race-conscious student assignment policies against constitutional attack. He wrote that, unlike the race-conscious measures that this Court previously has considered, under the Seattle student assignment policies:

> There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over another. That a student [may be] denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability.

PICS Pet. App. 65a. All told, Judge Kozinski stated, the Seattle student assignment policy merely "gives the American melting pot a healthy stir without benefitting or burdening any particular group." *Id.* at 70a. And in that way, he recognized, the policy lacks the trappings of the race-conscious measures that have been subjected to strict judicial scrutiny in affirmative action cases. *Id. at* 63a-65a. Accordingly, in Judge Kozinski's view, the policy should not be examined under strict scrutiny, but rather, under a more

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[5] *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

lenient standard that cabins the power of courts to upset decisions reached through local control of public education. *Id.* at 65a-66a.

We agree with Judge Kozinski with respect to the standard of review, and therefore urge this Court to refrain from reflexively applying strict scrutiny simply because the student assignment policies at issue here consider race to a limited extent. But, even if it is applied, strict scrutiny should not be fatal to these policies. As the Court stressed in *Grutter*:

> Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

Grutter, 539 U.S. at 327. With that principle firmly in mind, the Court in *Grutter* stated that strict scrutiny could accommodate "a degree of deference to a university's academic decisions," *id.* at 328, deference that was grounded in traditional judicial respect for the "educational autonomy" of a university to pursue its "institutional mission," *id.* at 329. The Court concluded in *Grutter* that "attaining a diverse student body is at the heart" of that mission, and thus held that universities have a compelling interest in achieving that diversity. *Id.* at 329.

Context counts in these cases as well. Traditional judicial respect for local control of public education by local school boards provides the backdrop for the constitutional challenge to the consideration of race in the Seattle and Jefferson County student assignment policies. As in the higher education context in *Grutter*, application of strict scrutiny in the context of K-12 public education should not

preclude this Court from reviewing those policies with an appropriate level of deference to the considered judgment of the local school boards that the policies are essential to their institutional mission: to provide a quality public education to all children by equipping them to be successful and productive adults in our diverse nation.

The United States contends that the deference afforded to higher education institutions in *Grutter* is unwarranted in the elementary and secondary education context because, according to the United States, Respondents have not made judgments about the pedagogical rationale for diversity, but rather, seek diversity solely to achieve racial balance in the schools. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 15-16 & n.5, *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, No. 05-908 (2006) [hereinafter U.S. Br., *PICS*]; Brief for the United States as *Amicus Curiae* Supporting Petitioner at 13-15, *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (2006) [hereinafter U.S. Br., *Meredith*]. That is incorrect. After careful study and analysis of the matter, scores of local school boards across the country (including Respondents) have concluded that a racially diverse learning environment provides demonstrably better educational opportunities for all students, and that consigning students (either minority or nonminority) to racially segregated schools tends to have negative lifelong consequences for them. In reaching that conclusion, local school boards have evaluated and tapped into an impressive body of scholarship.[6] In sum, the nation's

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[6] This social science evidence, described in detail in the briefs of Respondents, is not discussed here. We do note one important new study that demonstrates the positive correlation between student achievement and school choice plans that seek to promote a racially diverse learning environment. *See* Douglas N. Harris, Lost Learning, Forgotten Promises: A National Analysis of School Racial Segregation, Student Achievement, and "Controlled Choice"

local school boards are not seeking diversity for diversity's sake (which would be tantamount to racial balancing). Transcending the mere achievement of diversity itself, they seek to provide the concrete and tangible educational benefits of a racially diverse learning environment.

II. The United States' Treatment of the Narrow Tailoring Test Is Not Supported by This Court's Precedents and Would Compromise Local Control of Public Education.

If strict scrutiny is applied here, Respondents' student assignment policies satisfy that standard's requirement that race-conscious measures be narrowly tailored to accomplish their purpose. Respondents make this case in their briefs, and we do not repeat those arguments here. Our focus instead is on the United States' treatment of the narrow tailoring test, which is at odds with this Court's precedents and would strip local school boards of virtually all discretion to use race-conscious measures when necessary to achieve the benefits of a racially diverse learning environment in K-12 education.

First, the United States' discussion of the "race-neutral alternatives" element of the narrow tailoring test is incomplete. It ignores the tenet that "[n]arrow tailoring does not require exhaustion of *every conceivable* race-neutral alternative." *Grutter*, 539 U.S. at 339 (emphasis added). Rather, it requires only "serious, good faith consideration of *workable* race-neutral alternatives." *Id.* (emphasis added); *see also Billish v. Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.), *cert. denied*, 510 U.S. 908 (1993). The United States advances some race-neutral measures that it says Respondents should have considered and tried. The United States does not show, however, that those measures would have been workable given the particular circumstances of Seattle and Jefferson County. Furthermore, the United

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Plans (forthcoming Nov. 2006), *available at* http://www.americanprogress.org.

States does not dispute that, alongside race-conscious means, Respondents have considered, implemented, and still use a host of race-neutral means to achieve their interest in a racially diverse learning environment. The United States cites no legal authority and offers no reason precluding local school boards from employing a combination of race-neutral and race-conscious action to achieve that interest.[7]

The United States' invocation of the federal Magnet Schools Assistance Program (MSAP) as a "potential race-neutral alternative[] available to school districts" is misplaced. *See* U.S. Br., *PICS* at 25; *see also* U.S. Br., *Meredith* at 22 n.8. As the United States admits, Seattle participated in the MSAP from 1998 through 2001, and has established magnet schools. U.S. Br., *PICS* at 27 n.9. Magnet schools also are a staple of Jefferson County's school choice policy. Meredith Pet. App. C-20 to C-22. That both Seattle and Jefferson County incorporate magnet schools in their school choice tool kits does not, however, mean that the MSAP is the be-all and end-all towards reaching the goal of a racially diverse learning environment. The MSAP is just one option a local school board has at its disposal. The United States Department of Education itself concedes that the MSAP has resulted in only "modest progress" in achieving racial integration in public schools. Policy & Program Studies Serv., U.S. Dep't of Educ., Doc. No. 2003-15, Evaluation of the Magnet Schools Assistance Program, 1998 Grantees: Final Report VI-2 (2003), *available at* http://www.ed.gov/rschstat/eval/choice/magneteval/finalreport.pdf. The Department further concedes that one possible

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[7] The United States claims that the fact that the Seattle school board has not considered race in student assignments for several years shows that it is unnecessary to use race in Seattle. But that fact is a narrow-tailoring plus, not a minus, for it highlights that the school board is, consistent with this Court's precedents, using race only as "a last resort." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring).

explanation for the program's limited success may be the constraints it places on the ability of participating school districts to use race in making student assignments. *See id.* at VI-12 to -13. Whatever the explanation, the MSAP is not the race-neutral panacea that the United States portrays it to be. In fact, the MSAP is not even wholly race-neutral: as the United States notes, the program permits participants to consider race in student placements in a narrowly tailored manner "to accomplish the objective of reducing, eliminating, or preventing minority group isolation." U.S. Br., *PICS* at 27 (internal quotation marks omitted).

Second, the United States argues that the use of race in Respondents' student assignment policies is "driven by the numbers," and hence amounts to rigid racial quotas that *per se* cannot be narrowly tailored. U.S. Br., *PICS* at 21; U.S. Br., *Meredith* at 20. Here, the United States wrongly conflates "attention to numbers," which is permissible, *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323), with the adoption of numerical quotas, which is impermissible. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are reserved" on the basis of race, and which "must be attained, or which cannot be exceeded . . . ." *Grutter*, 593 U.S. at 335 (internal quotation marks omitted). As shown in Respondents' briefs, their student assignment policies do not fit this definition of a quota because they seek to attain a level of racial diversity that falls within a numeric range, rather than one that lands at a fixed number. The United States asserts that it "makes no difference" that Respondents assign students "in accordance with a fixed numeric range, rather than a single fixed number." U.S. Br., *PICS* at 22; U.S. Br., *Meredith* at 20. *Grutter* directly undermines that proposition.[8]

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[8] The United States ignores *Grutter* here. In support of its assertion, the United States cites Justice Douglas's dissent in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and a single appellate

There, the Court stated that annual variations in the percentage of minorities admitted to the University of Michigan Law School from 13.5% to 21.1% reflected "a range inconsistent with a quota." 539 U.S. at 336. As set forth in Respondents' briefs, their numerical benchmarks accept an even greater statistical deviation than the figures in *Grutter*.

Third, the United States contends that Respondents' student assignment policies fail the durational limitation element of the narrow tailoring test because they do not have a definite end date. U.S. Br., *PICS* at 28-29; U.S. Br., *Meredith* at 23-24. In *Grutter*, however, this Court held that the absence of a fixed end-date for race-conscious admissions policies in higher education is not necessary. Rather, it suffices that those policies are subject to periodic review that ensures that they will be modified over time, and, eventually, will not be used if no longer needed. *Grutter*, 539 U.S. at 342. Respondents' student assignment policies meet that standard because they have undergone frequent review and refinement through the years. Likewise, school boards throughout the country regularly review student assignment policies as a matter of course to ensure that they meet the changing needs and expectations of the community.

The United States' objection to the lack of a specific end-date for the use of race in the Jefferson County student assignment policy rings particularly hollow. As recently as 2000, Jefferson County was under a constitutional mandate to maintain race-conscious student assignment policies to remedy the vestiges of *de jure* racial segregation in the school system. Indeed, at that time, the United States opposed lifting that constitutional obligation, arguing that the vestiges of the dual system had not yet been eradicated. U.S. Br., *Meredith* at 2 n.1. It is rather perverse for the United States to claim

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court decision, *Fishermen's Dock Coop., Inc. v. Brown*, 75 F.3d 164 (4th Cir. 1996).

now that policies that were constitutionally required not long ago are constitutionally forbidden today just because the school district cannot forecast with exactitude the precise date in the future when its goal of achieving the benefits of a racially diverse learning environment can be achieved without some consideration of race in the student assignment process.

In all, the United States would convert the narrow tailoring test into a judicial trump card that invariably would override the judgments of local school boards. The upshot is that local school boards would be shackled in their pursuit of the benefits of a racially diverse learning environment, and the innovation, accountability, and educational excellence that are fostered by local control of public education would be undermined. Ironically, this would occur when school boards are being held more accountable than ever for the academic achievement of students in every racial subgroup. While the narrow tailoring test ensures that the means chosen closely fit the stated goal of race-conscious action, *Croson*, 488 U.S. at 493 (plurality opinion), it is not a mechanism by which courts get to second-guess politically accountable officials at every conceivable turn. This Court has not applied the narrow tailoring test in that fashion in other contexts. *See Grutter*, 539 U.S. at 326 ("Strict scrutiny is not 'strict in theory, but fatal in fact.'") (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995)); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion) (The least restrictive means component of strict scrutiny in First Amendment cases should be applied "without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."). To do so here in the context of elementary and secondary education would compromise local control of public education through the nation's school boards.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals in these cases should be affirmed.

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APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

Amici curiae include the following organizations:

The National School Boards Association is a non-profit federation that represents the nation's 95,000 school members who govern the 14,772 local districts across the United States.

The American Association of School Administrators represents the more than 13,000 public school administrators nationwide who seek to provide quality public education in their communities.

The National Association of Secondary School Principals represents middle and high school principals, assistant principals, and other school leaders nationwide, and seeks to give its members a voice on significant education issues.

The National Association of Elementary School Principals represents elementary school (K-8) and middle school principals nationwide and advocates on their behalf on key education issues.

The National Association of State Boards of Education is a non-profit organization that works to strengthen state leadership in educational policymaking, promote excellence in the education of all students, advocate equality of access to educational opportunity, and assure continued citizen support for public education.

The Horace Mann League of the United States of America strives to foster and strengthen American public schools and increase the esteem in which they are held since they serve as the cornerstone of our democracy..

The Association of School Business Officials International is a professional association that provides programs and services to promote the highest standards of public school business management practices, professional growth, and the effective use of educational resources.

Phi Delta Kappa International is a professional association for educators that promotes quality education, in

particular publicly supported education, as essential to the development and maintenance of a democratic way of life.

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Nos. 05-908 & 05-915

In the Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS, PETITIONER,
v.
SEATTLE SCHOOL DISTRICT NO. 1, ET AL.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD, PETITIONER,
v.
JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

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STATEMENT OF INTEREST

Amici are organizations with roots in the Latino community and whose missions include serving the interests of the Latino community. Some, like the Mexican American Legal Defense and Educational Fund (MALDEF), are national in scope, while others are local organizations. These Latino groups have concluded that decreasing racial isolation and promoting diversity in elementary and secondary education is important to the advancement and success of the Latino community. Accordingly, each has a strong interest in these proceedings. The individual statements of interest of all *amici* appear in the Appendix.

This brief urges the Court to affirm the decisions of the United States Court of Appeals for the Sixth Circuit in *McFarland ex rel. McFarland v. Jefferson County Public Schools*, 416 F.3d 513 (6th Cir. 2005), *reh'g denied*, No. 04-5897, 2005 U.S. App. LEXIS 22940 (6th Cir. Oct. 21, 2005), *cert. denied*, 126 S. Ct. 2351 (2006), and the United States Court of Appeals for the Ninth Circuit in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (*en banc*), *cert. denied*, 126 S. Ct. 2351 (2006).[1]

[1] The parties have filed letters consenting to the filing of this brief with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT[2]

Our nation's guiding vision of equal opportunity rests upon the premise that any one of us can succeed with enough effort, dedication, and natural talent. This Court has long acknowledged the role of American public education in equipping youth with the tools to realize this vision. Effective public schools prepare their charges to function in the workplace and to meaningfully participate in civic and democratic life. In popular and deeply-rooted conceptions of our nation's public schools, they are the key to achieving the American dream.

For Latinos, the nation's largest and most youthful minority group, the promise of public education remains elusive, and the path to the American dream remains obscured by barriers. Prominent among these barriers has been deep and persistent school segregation – a defining, if largely unrecognized, feature of the Latino educational experience both before and since this Court's unanimous ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954). Despite *Brown* and its progeny, Latino students have never experienced an overall decline in racial isolation; at ever-growing rates, they languish in segregated settings with drastically limited opportunities. For Latino schoolchildren, decreasing this racial isolation holds the promise of improved academic opportunities and attainment, as well as greater civic and political engagement – all significant and important goals as the Latino community grows into its role as the largest minority group in the nation's more diverse racial landscape.

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[2] Counsel wishes to acknowledge the important contributions of Alexandra O'Rourke and Allen O'Rourke, students at Harvard Law School, to the preparation of this brief.

Indeed, America's racial landscape looks far different today than it did when this Court issued its ruling in *Brown*. The Latino population has climbed dramatically, both overall and, even more strikingly, as a share of the nation's primary and secondary school enrollment. Today, one in five children in our public schools is Latino. Combating Latinos' growing racial isolation has become critical not only to their success, but also to the success of our increasingly multiracial society, of which Latinos now comprise a substantial segment. Educational settings that promote contact and interaction between children of different races can better prepare those children to live and work in this ever-more diverse society by instilling values of tolerance and cross-racial understanding. In this way, integrated schools yield benefits that are reaped not only by minority students, but also by their classmates and the broader community.

As public school administrators grapple with demographic changes, including increased Latino, immigrant, and English Language Learner enrollment, they must retain the flexibility to respond to new, more complicated paradigms.[3] Local school officials are well positioned to evaluate these newly-complex dynamics in determining how best to carry out their pedagogical and civic objectives. Voluntary integration programs are flexible and effective tools for districts, teachers, and parents that are committed to counteracting racial isolation in their schools and realizing *Brown*'s promise of equal and integrated education – a goal that has so far eluded the Latino community.

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[3] The term "English Language Learner" ("ELL") is used interchangeably with and refers to the same group of students as the term "Limited English Proficient" ("LEP").

ARGUMENT

I. THE LATINO EDUCATIONAL EXPERIENCE HAS BEEN MARKED BY PERSISTENT *DE JURE* AND *DE FACTO* SEGREGATION

Segregation, both official and unofficial, has long been a feature of Latino public education. As early as 1900 and through the 1950s and 1960s, districts intentionally channeled students into substandard "Mexican" and "migratory" schools throughout the Southwest. Although the Puerto Rican and Dominican communities of the Northeast sprung from an entirely different historical experience than the Mexican-American communities of the Southwest, they endured similar segregation and barriers to educational equity.[4] Despite these realities, the Latino experience has been largely absent from academic, legal and popular discourses on racial isolation in public schools, and Latino students largely excluded from serious efforts to root out segregation. This neglect has coincided with a dramatic rise in Latino public school enrollment, resulting in an unremitting trend of racial isolation for Latino students. Latinos are now more segregated and more concentrated in high-poverty schools than any other minority group.

[4] Albert Camarillo, *The Compelling Need for Diversity in Higher Education* Expert Report submitted on behalf of the University of Michigan: 5 Mich. J. Race & L. 339, 350 (1999) (noting that Puerto Rican and Dominican students "faced a reality of separation and exclusion . . . that paralleled that of their ethnic kin in the Southwest").

A. Throughout the Early Part of the 20th Century, Latino Students in the Southwest Were Channeled into Segregated "Mexican Schools"

In the first part of the last century, as the Latino and immigrant populations swelled in the Southwestern region of the country, segregated "Mexican" and "migratory" schools for Latino children began to emerge.[5] Proponents of segregation commonly argued that separate schools were necessary to impart upon Latino schoolchildren "American culture" and values.[6] Such justifications could not conceal the pervasive judgments that Latino students were inferior to their white peers and that their presence would undermine white students' educational experience. School officials often expressed such views with bracing candor: one California superintendent, in defending segregated Mexican schools, commented that "[s]ome Mexicans are very bright, but you can't compare their brightest with the average white children. They are an inferior race."[7]

Some school districts segregated Latino students based on what they termed "language handicaps," others broadly targeted those with Mexican or "Latinized" surnames,[8] and still others implemented compulsory "entrance

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[5] Kristi L. Bowman, Note, *The New Face of School Desegregation*, 50 Duke L.J. 1751, 1769 n.117 (2001).

[6] Eduardo Luna, *How the Black/White Paradigm Renders Mexicans/Mexican Americans and Discrimination Against Them Invisible*, 14 La Raza L.J. 225, 239 (2003).

[7] Bowman, *supra* note 5, at 1770.

[8] Christopher Arriola, Comment, *Knocking on the Schoolhouse Door: Mendez v. Westminister, Equal Protection, Public Education and Mexican Americans in the 1940's*, 8 La Raza L.J. 166, 179 (1995).

exams" designed to identify Latino students.[9] Much of the Southwest's school segregation stemmed from patterns of residential segregation of Latinos into "Mexican Towns," but often such patterns resulted from intentional gerrymandering. One survey of school superintendents found that "[w]hile many claimed that there was no segregation in their schools, some admitted that the drawing-up of district boundary lines was deliberately made to enclose areas predominantly Latin."[10] By 1931, more than 80 percent of school districts with large Latino populations were officially segregated, and many of the remaining 20 percent were unofficially segregated.[11] All told, 85 percent of Mexican students living in the Southwest received instruction in either separate classrooms or entirely separate schools.[12]

The Southwest's Mexican and migratory schools struggled with significantly inferior resources, poor equipment, inadequate buildings, and lower-paid teachers who were permitted to transfer to Anglo schools as a reward or promotion.[13] In addition, the "Americanization" curricula of the resource-poor Mexican schools neglected many basic subjects of primary education, emphasizing

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[9] *Id.* at 179 n.64; James A. Ferg-Cadima, *Black, White & Brown: Latino School Desegregation Efforts in the Pre- and Post-Brown v. Board of Education Era*, at 20, Mexican American Legal Defense and Educational Fund, May 2004, *available at* http://www.maldef.org/pdf/LatinoDesegregation.pdf.

[10] Nancy Kuhr, *Segregated Public Schools in Texas, 1876-1940*, at 73, 1971, unpublished M.A. Thesis, University of Texas.

[11] Bowman, *supra* note 5, at 1770.

[12] Rubén Donato, *The Other Struggle for Equal Schools: Mexican Americans During the Civil Rights Era* 13 (State University of New York Press 1997).

[13] Bowman, *supra* note 5, at 1769 n.119.

instead "practical subjects" such as American norms and values, patriotism, sewing, housekeeping, handiwork and manual labor.[14] These lessons were designed to prepare Latino students for the roles that, in the popular view, they were destined to assume.

B. Latinos Have Continually Struggled Against Separate and Unequal Schools

Channeled into segregated schools with substandard resources, Latinos in Western communities mounted intermittent challenges to school segregation throughout the 1930s.[15] These efforts bore fruit in 1946 – eight years before the *Brown* decision – when Latino litigants obtained a federal court ruling barring some California school districts from maintaining separate Mexican and Anglo schools. *Mendez v. Westminister Sch. Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947). Sixty years later, Latino schoolchildren are at once the largest and the most segregated minority group in American schools, and the promises of *Mendez* and *Brown* remain unfulfilled. In the years leading up to the *Mendez* case and in the decades since, the Latino community has ceaselessly wrestled with the deep educational and social harms of *de jure* and *de facto* school segregation.

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[14] Lisa J. Soto, *The Treatment of the Spanish Language and Latinos in Education in the Southwest, in the Workplace, and in the Jury Selection Process*, 3 Hisp. L.J. 73, 76 (1997).

[15] For a more comprehensive discussion of this legal history, *see* Ferg-Cadima, *supra* note 9, at 14.

1. Latinos Turned to the Courts to Challenge Unlawful Discrimination.

The Latino community commenced its unfinished struggle for school desegregation with *Mendez*, the first federal lawsuit to challenge Latino segregation in K-12 schools on Fourteenth Amendment grounds.[16] Although *Mendez* was a landmark litigation for Latinos and an important precursor to *Brown*, the case developed in a way that separated Latino segregation from the issue of race discrimination. This disconnect limited *Mendez*'s reach and contributed to the exclusion of Latinos from future legal and academic discourses on school segregation.

Mendez evolved from the efforts of two Mexican American cousins, Gonzalo Mendez and Soledad Vidaurri, to enroll their respective children in the same Orange County "Anglo" school.[17] Although both sets of children had similar language abilities and were blood relatives, the district assigned the two Mendez children, whose surname and features were more evidently "Mexican," to the Mexican school, while enrolling their Vidaurri cousins in the Anglo school.[18] At the time, such segregation was routine in Orange County; 80 percent of the county's Mexican and Mexican American students were clustered into 14 Mexican schools, where they were racially isolated and received

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[16] Richard R. Valencia, *The Mexican American Struggle for Equal Educational Opportunity in Mendez v. Westminister: Helping to Pave the Way for Brown v. Board of Education*, 107 Tchrs. C. Rec. 389, 400 (2005).

[17] *Id.* at 399.

[18] *Id.*

instruction in trades – industrial labor for boys and homemaking for girls.[19]

While the school officials in *Mendez* contended that Latino students' "lack of American values, culture and proficiency in the English language" necessitated their segregation into separate schools,[20] they acknowledged having made school assignments based exclusively upon Mexican descent.[21] Yet, ultimately, the *Mendez* case did not tackle the issue of race and national origin discrimination head-on, due in large part to a critical and curious stipulation by the parties. The plaintiffs and the districts stipulated that Mexican Americans were part of the white race – an agreement that did not comport with the social reality of the time, but which each party evidently found expedient for the purposes of the litigation.[22] *See Mendez*, 64 F. Supp. at 546. The plaintiffs likely sought the stipulation to avoid then-existing caselaw that permitted segregation between races under the "separate but equal" doctrine, and to avoid a California statute that permitted districts to establish "separate schools for Indian children, excepting children of Indians who are wards of the United States Government and children of all other Indians who are descendants of the original American Indians of the United States." Cal. Educ. Code § 8003 (repealed 1947). This statute would permit

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[19] Gilbert G. Gonzalez, *Chicano Education in the Era of Segregation* 137 (1990).

[20] *Id.*

[21] Luna, *supra* note 6, at 241.

[22] For a discussion of the *Mendez* stipulation and its effect, *see* Thomas A. Saenz, Mendez *and the Legacy of* Brown: *A Latino Civil Rights Lawyer's Assessment*, in Symposium, Rekindling the Spirit of *Brown v. Board of Education*, 6 Afr.-Am. L. & Pol'y Rev. 194; 11 Asian L.J. 276; 15 Berkeley La Raza L.J. 67; 19 Berkeley Women's L.J. 395 (2004).

segregation of children descended from the Indians of Mexico; thus, plaintiffs' stipulation avoided a law directed toward segregation of Mexican Americans.[23]

The stipulation in *Mendez* rendered it a case about intra-racial, rather than inter-racial, segregation, effectively shifting the case's emphasis from racial discrimination to language. Still, the arguments in *Mendez* prefigured those of *Brown* in important ways. Like the *Brown* plaintiffs that followed them, the *Mendez* litigants introduced social science testimony that segregated learning environments stigmatized Latino schoolchildren and caused psychological harm.[24] The school districts responded by contending the schools' facilities and resources were adequate under the "separate but equal" framework of *Plessy v. Ferguson*, 163 U.S. 537 (1896).[25] Ultimately, in a decision that took steady aim at *Plessy*, Federal District Judge Paul J. McCormick concluded that "separate but equal" facilities were not sufficient to satisfy the equal protection clause:

> The 'equal protection of the laws' . . . is not provided by furnishing in separate schools the same

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[23] *Id.* The reason that the districts agreed to the stipulation might lie in their argument, redolent of Texas in the jury exclusion context, seeking to establish that intra-racial discrimination was more acceptable than inter-racial discrimination:

> "If it be fallacious argument to contend that the [African] race is stamped with a badge of inferiority by separation, how can it be contended that one group of white persons are [so] stamped . . . simply because they are separated from other groups of white people in the public schools?"

Appellant's Reply Br. to ACLU at 3, *Westminister Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (No. 11310).

[24] Valencia, *supra* note 16, at 391.

[25] *Id.* at 402.

> . . . facilities . . . that are available to the other public school children regardless of . . . ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.

Mendez, 64 F. Supp. at 549. The district court further accepted evidence that segregation harmed and stigmatized minority students:

> The evidence clearly shows that Spanish-speaking children are retarded in learning English by lack of exposure to its use because of segregation. . . . It is also established by the record that the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them where none exists.

Mendez, 64 F. Supp. at 550.

On appeal, the Ninth Circuit upheld the lower court's decision on far narrower grounds. Although it declined to rule explicitly on the issue of "separate but equal," as urged by the NAACP's *amicus curiae* brief, the Ninth Circuit's affirmance paved the path toward eradication of *de jure* school segregation in California.[26] *See Westminister Sch. Dist. v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947). In 1947, California's Governor Earl Warren, who as Chief Justice would write the Court's opinion in *Brown*, signed legislation that fully repealed California's segregation laws.[27] But despite the positive products of *Mendez*, its stipulation that Latino children were "white," though

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[26] Ferg-Cadima, *supra* note 9, at 14, 20.

[27] Charles Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975* at 132 (1976).

clearly contrary to social reality, disconnected the problem of Latino segregation from its roots in racial discrimination, thereby distinguishing Latinos from other segregated minority groups.[28] Indeed, the question of whether *Brown*'s central holding applied to Latinos did not reach this Court until 1973, nearly 20 years after it was rendered.

2. *Brown*'s Applicability to Latinos Was Not Settled Until Nearly Two Decades After the Ruling.

In the same term as *Brown* – generally acknowledged as the start of the modern civil rights era – Latinos celebrated their own victory in *Hernandez v. Texas*, 347 U.S. 475 (1954), the first Supreme Court decision that found Latinos to be a protected class under the Fourteenth Amendment. Concluding that Latinos are a protected class under the equal protection clause for jury eligibility purposes, the *Hernandez* Court cited the segregation of Latino schoolchildren as evidence that the white community considered Latinos a distinct and inferior race. *Hernandez*, 347 U.S. at 479-80. Yet the specific recognition that *Brown*'s doctrine applied to Latino school segregation would not reach the federal courts until many years later, with *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599 (S.D. Tex. 1970), and *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

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[28] In *Gonzales v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951), another district court anticipated *Brown*'s holding by recognizing that segregation stamped Latino students with a badge of inferiority. Like *Mendez*, *Gonzales* is rarely cited in legal and academic discussions of school segregation.

Jose Cisneros' challenge to his children's segregation into poorly-resourced, majority-Latino schools rested squarely upon the equal protection clause of the Fourteenth Amendment and this Court's reasoning in *Brown*. The trial court noted that although *Brown* and its progeny until that point specifically concerned African American segregation, "any other group which is similarly or perhaps equally, disadvantaged politically and economically, and which has been substantially segregated in public schools" deserved comparable constitutional protection. *Cisneros*, 324 F. Supp. at 606. The Fifth Circuit affirmed, noting that "[t]he decision in *Brown* is the clear embodiment of the legal framework for the resolution of these important issues." *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142, 148 (5th Cir. 1972).

Not long after *Cisneros*, *Keyes* received national attention as the first non-Southern school desegregation case to reach this Court.[29] The *Keyes* plaintiffs had challenged segregation of African Americans in Denver schools, and the matter of Latino segregation did not emerge until the Congress of Hispanic Educators intervened at the remedy phase of the trial.[30] Latinos at the time constituted 20 percent of Denver's public school enrollment. *Keyes*, 413 U.S. at 195. As in *Cisneros*, the *Keyes* ruling recognized that Latinos "constitute an identifiable class for purposes of the Fourteenth Amendment."

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[29] Tom I. Romero II, *From Brown to Grutter: Racial Integration and the Law: Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 Seattle J. For Soc. Just. 73, 74 (2004).

[30] George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 Harv. Latino L. Rev. 321, 332 (1997).

Keyes, 413 U.S. at 197. Moreover, the Court observed that "Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students," concluding that "petitioners [were] entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of 'segregated' schools." *Keyes*, 413 U.S. at 198. Following the *Keyes* decision, Denver became one of the few large metropolitan areas in the 1970s where both Latino and African American students experienced significant, albeit temporary, relief from school segregation.[31]

C. Latino Students Have Become the Largest and Most Segregated Minority Group in K-12 Public Schools

America's modern racial landscape looks vastly different than it did when this Court considered *Brown*, or even *Keyes*. According to the 2000 Census, the U.S. Latino population soared from 22.4 million to 32.4 million since the previous Census, representing a 45 percent increase.[32]

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[31] Denver schools are once again deeply segregated, driven in part by changing demographic patterns and the so-called Poundstone Amendment to the Colorado State Constitution, approved in 1974. The amendment prevented annexation of surrounding suburban, increasingly Anglo communities to the Denver school district without the consent of voters in each affected county, restricting the reach of the *Keyes* desegregation order. *See* Tom I. Romero, II, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado's Legal Past*, 73 U. Colo. L. Rev. 521, 583-84 (2002); Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace – and Denial – of Equal Opportunity in Higher Education*, 70 U. Colo. L. Rev. 703, 752 (1999).

[32] *See* U.S. Census Bureau, Statistical Abstract of the United States: 2001, at 19, *available at* http://www.census.gov/prod/2002pubs/01statab/pop.pdf.

More recent data shows that continued rapid growth has since propelled Latinos, now numbering 42.7 million, ahead of African Americans as the nation's largest minority group.[33] The rapid increase in the U.S. Latino population has been fueled in great part by immigration, but has also been driven by higher birth rates among both foreign and U.S.-born Latinos, who tend to have larger and younger families, and who have children at younger ages.[34]

These demographic trends mean that the tremendous growth in the U.S. Latino population is most pronounced and dramatic among Latino youth. In the 2003-2004 school year, Latinos comprised 19 percent of the K-12 student population.[35] Latino public school enrollment is currently concentrated in the metropolitan centers in a few large states, but it is dispersing rapidly; while only two states, California and Texas, have 26 percent of total U.S. public school enrollment and 56 percent of the nation's total Latino enrollment, growth in Latino enrollment is evident in every region of the country.[36] In Florida, for example, Latino K-12 public student enrollment increased by 614 percent from 1970 through

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[33] U.S. Census Bureau News Release, Nation's Population One-Third Minority (May 10, 2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/population/006808.html (estimating the respective populations of Latinos and African Americans as 42.7 million and 39.7 million).

[34] *Id. See also*, U.S. Census Bureau, Fertility of American Women: June 2004 (issued Dec. 2005) at 2, 4, *available at* http://www.census.gov/prod/2005pubs/p20-555.pdf.

[35] Adriana D. Kohler, *Hispanic Education in the United States* (Statistical Brief No. 8, Conference Edition) at 1, National Council of La Raza (2006).

[36] *Id.*

2000; in Illinois, by 304 percent for the same period; in New Jersey, by 240 percent; and in Arizona, by 248 percent.[37]

Latino growth is perhaps most striking when viewed as a *component* of total K-12 enrollment growth. An October 2006 study by the Pew Hispanic Center found that between 1993-94 and 2002-03, Latino children accounted for 64 percent of additions to public school enrollment.[38] During the same period, African Americans and Asian Americans accounted for 23 percent and 11 percent of the growth, respectively, while white enrollment dropped by about one percent.[39] The Pew Center also found that Latino growth was not uniform across all grades, and that the increase in Latino student enrollment in the nation's primary schools has been particularly dramatic. Indeed, Latinos have entirely driven growth in America's primary school enrollment; without the increase in Latino students, public school enrollment would have declined by about three percent.[40] During the study period, between the 1993-94 and 2002-03 school years, Latino enrollment rose 53 percent, from 3 million to 4.6 million. These trends are significant because they herald the future: public schools and a broader society that is more diverse, and more Latino, in composition.

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[37] Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, at 32, C.R. Project Harv. U., Jan. 2003, *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

[38] Richard Fry, *The Changing Landscape of American Public Education: New Students, New Schools*, Pew Hispanic Center, Oct. 5, 2006, *available at* http://pewhispanic.org/files/reports/72.pdf.

[39] *Id.*

[40] *Id.* at 9.

Due in part to the timing of this extraordinary growth in the Latino school-age population – and the relatively late recognition that *Brown* applied to Latino segregation – Latinos never reaped the benefits, however fleeting, of serious efforts at school desegregation.[41] In many regions, the rapid increases in Latino enrollment coincided with or followed the dissolution of desegregation orders, leaving Latino students without remedy. In other instances, even where Latino students were present in significant numbers, desegregation orders were extinguished without consideration of their interests.[42] The absence of significant initiatives to address Latino segregation, together with entrenched and growing residential segregation for Latinos,[43] have combined to make Latino students the most racially isolated minority group in the country.

Today, more Latinos than ever before attend segregated schools, and their racial isolation is increasing in every region of the country. Nationally and in every region, a typical Latino student attends a school that is less than one-third white.[44] Seventy-six percent of Latinos attend predominantly minority schools, more than any other group.[45] More alarming is the rise in Latino

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[41] Ferg-Cadima, *supra* note 9, at 34.

[42] Gary Orfield & Chungmei Lee, *New Faces, Old Patterns? Segregation in the Multiracial South* at 5, 7, C.R. Project Harv. U., Jan. 2003, *available at* http://www.civilrightsproject.harvard.edu/research/reseg05/resegregation05.php.

[43] For a fuller discussion of these patterns of residential segregation, *see* the *amicus curiae* brief submitted in this case by the Poverty and Race Research Action Council, *et al.*

[44] Frankenberg et al., *supra* note 37, at 44.

[45] *Id.* at 33.

enrollment at intensely segregated schools, defined as schools with 90 to 100 percent minority enrollment. The absolute number of students attending these schools grew from 462,000 in 1968 to 2.86 million in 2000, an increase of 520 percent.[46] Nationally, almost one in nine Latino students attend a school that is 99 to 100 percent minority.

National data also demonstrates that Latinos experience significant segregation by language as well as by race.[47] Latinos predominate among English Language Learners; about three-quarters of ELL students nationally are Spanish speakers.[48] Although ELLs represent a relatively small share of the total student population, more than 53 percent of these children are concentrated in schools where more than 30 percent of their peers are also ELLs. By contrast, 57 percent of English proficient students attend schools where less than one percent of students have limited English proficiency.[49]

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[46] *Id.*

[47] Richard R. Valencia et al., *Segregation, Desegregation, and Integration of Chicano Students: Old and New Realities,* in Chicano School Failure and Success – Past, Present and Future, 70-113 (Richard R. Valencia ed., Routledge Farmer 2d ed., 2002).

[48] Randy Capps et al., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act* at 16, MPI Breakfast Briefing, Sept. 30, 2005, Foundation for Child Development, *available at* www.fcd-us.org/PDFs/NewDemographypresentationfinal.pdf.

[49] *Id.*

II. IN AMERICA'S INCREASINGLY MULTIRACIAL LANDSCAPE, THE STATE HAS A COMPELLING INTEREST IN REDUCING RACIAL ISOLATION AND MAINTAINING DIVERSE CLASSROOMS

This demographic picture makes clear that the new paradigm for American education and society is increasingly multiracial in nature, and amplifies the importance of racial diversity in K-12 education. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court recognized that in the context of higher education, public universities have a compelling interest in seeking the educational benefits that spring from a diverse student body. The Court identified several benefits of diversity in *Grutter*, including promoting cross-racial understanding, combating racial stereotypes, and preparing all students to participate fully in civic life. *See Grutter*, 539 U.S. at 332. These interests apply with even greater force in the context of elementary and secondary schools, which, as *Brown* instructs, are charged with essential democratic duties.

As this Court noted in *Brown*, education "is the very foundation of good citizenship" and "is . . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown*, 347 U.S. at 493. In keeping with *Brown*'s noble and profoundly democratic goals, integrated schools can better prepare students of all races to participate in democratic life and to function in diverse communities by increasing tolerance and cross-racial understanding, by promoting participatory citizenship and by enhancing learning and access to educational opportunities. With Latinos now a sizable and swiftly rising population, their inclusion in integration efforts is of growing consequence, for the students

themselves, for their classmates, and for American economic and democratic life.

A. Integrated Schools Promote Democratic Values of Tolerance and Cross-Racial Understanding for Students of all Racial Groups

This Court's jurisprudence has long acknowledged that public schools bear responsibility not only for instructing their charges in academic subjects, but also for instilling the democratic ideals we collectively share and prioritize. As noted in *Brown* and *Plyler v. Doe*, 457 U.S. 202 (1982), public schooling "has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage." *Brown*, 347 U.S. at 493; *Plyler*, 457 U.S. at 203. Among the most cherished American values, and at the very foundations of the Fourteenth Amendment, are racial tolerance and an abiding belief in and commitment to equality. Integrated schools advance these democratic values by providing meaningful opportunities to encounter, engage with, and develop friendships with peers in other racial and ethnic groups.[50] For Latinos, whose residential segregation is both acute and on the rise, integrated learning settings may represent their *only* avenue for such contacts – contacts that promote cross-racial understanding among students, help them overcome fear and distrust of people of different races, and make

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[50] For a comprehensive discussion and analysis of this research, see the Social Science Statement and *amicus* brief submitted in this case by the Harvard Civil Rights Project.

them more likely to perceive people of different races as equals.[51]

As American society becomes more racially complex and heterogeneous, reducing racial prejudice and stereotyping and increasing cross-racial understanding are significant ends in themselves; these values are tied to both the normative underpinnings of the Fourteenth Amendment and to our traditional notions of the democratic purposes of public education. Racial diversity in schools can play a critical role in fulfilling education's fundamental and democratic mission of "transmitting 'the values on which our society rests.'" *Plyler*, 457 U.S. at 221 (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)). But even beyond these benefits, research demonstrates that attending integrated schools gives minority students greater comfort to actually participate in a hetereogenous democracy.[52] Motivating participatory democracy is of particular importance for the Latino community, which still has tremendous strides to make in the realm of civic engagement and political participation. For example, although Latinos comprised fully one-half of population growth from 2000-2004, they represented just one-tenth of new voters.[53] Although this disparity is explained partially by citizenship figures and by the youthfulness of the Latino population, it is also true that only 39 percent of eligible Latinos voted in the last

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[51] Amy Stuart Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* at 6, *available at* http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf#search='How%20desegregation%20changed%20us%20wells.

[52] Frankenberg et al., *supra* note 37, at 14.

[53] Roberto Suro et al., *Hispanics and the 2004 Election: Population, Electorate and Voters*, Pew Hispanic Center Report, June 27, 2005, *available at* http://pewhispanic.org/files/reports/48.pdf.

presidential election, compared to 68 percent of whites and 60 percent of African Americans.[54] As the Latino community ascends in numbers and in prominence, their full engagement in and contributions to American civic, economic, and political life will be essential to robust democracy. Integrated school settings, by promoting democratic values, motivating civic engagement and enhancing learning and educational attainment for minority students (as discussed in greater detail below), equip Latinos to participate more effectively in democratic life.

B. Integrated Schools Enhance Learning, Educational Opportunities and Access to Higher Education

Research shows integrated settings enhance classroom learning for all students in a number of important ways. Diverse schools can help expose students to multiple perspectives, for example, which can bolster comprehension of complex issues and "critical thinking," both crucial for development and growth in intellectual and academic skills.[55] Reducing racial isolation can also yield better opportunities for learning and educational attainment for minority students in particular, setting the stage for longer-term success and advancement in American society. As this Court has stated, "by depriving the children of any disfavored group of an education, we foreclose the means

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[54] *Id.*

[55] Michal Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District* at 3-4, C.R. Project Harv. U., Jan. 2003, *available at* http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php#fullreport.

by which that group might raise the level of esteem in which it is held by the majority." *Plyler*, 457 U.S. at 222. The vast majority of intensely segregated minority schools, so often schools of concentrated disadvantage, are marked by limited educational opportunities and diminished academic achievement and attainment, as measured by indicators ranging from test scores to graduation rates.

The nation's drop-out crisis, for example, is concentrated in segregated minority schools in large metropolitan areas, and is more acute for Latinos than for any other racial group.[56] Although Latino schoolchildren have good levels of grade completion throughout primary school, those rates drop precipitously as they move up into secondary school. The school attrition rate for Latino secondary school students is now near fifty percent, and the problem is even more pronounced in large inner-city school districts, among foreign-born Latinos, and among ELLs.[57] A 2005 report on the Los Angeles Unified School District – which enrolls more than 735,000 students (over 90 percent of them minorities) – found that only 39.1 percent of Latino students complete high school.[58] College matriculation rates for Latinos are lower than for members of any other racial or ethnic group, and in 2004 less than a quarter of Latinos between the ages of 18 and 24 were enrolled in institutions of higher learning, with a majority of these students attending two-year colleges.[59]

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[56] Kohler, *supra* note 35, at 3.

[57] *Id.* at 3, 7.

[58] Dan Losen & Johanna Wald, *Confronting the Graduation Rate Crisis in California* at 6, C.R. Project Harv. U., Mar. 24, 2005, *available at* http://www.civilrightsproject.harvard.edu/research/dropouts/dropouts05.pdf.

[59] Kohler, *supra* note 35, at 9.

These figures are compelling, but unsurprising when viewed in context: segregated minority schools have disproportionately higher concentrations of poverty and limited advanced curricula, such as Advanced Placement and other college preparatory courses.[60] The impact of racial segregation on teacher quality is particularly well-documented; ample research shows that well-qualified teachers tend to leave racially segregated schools to teach in more integrated settings, irrespective of such factors as working conditions, teacher salary or student poverty.[61] Skilled and experienced teachers are not only an important factor in student achievement, but also a source of support and networking for the college admissions or job-hunting process. Latinos in racially isolated schools tend, in general, to have less access to informal integrated networks, whether teacher, peer or alumni networks, placing them at additional disadvantage relative to counterparts at integrated schools.[62]

Integrated schools help prevent these harms that are so strongly associated with minority, and specifically Latino, isolation. Minority students in integrated schools experience smaller classes and greater teacher support, and are more likely to be in college-track classes.[63] They

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[60] *Id.* at 4-5.

[61] Benjamin Scafidi et al., *Race, Poverty, and Teacher Mobility*, Working paper 06-51, Andrew Young School of Policy Studies Research Paper Series, Aug. 2005, *available at* http://aysps.gsu.edu/publications/2006/downloads/ScafidiSjoquist_RacePovertyTeacherMobility.pdf.

[62] Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, Rev. Educ. Res. 64 No. 4, Winter 1994, at 531-55.

[63] Janet Ward Schofield, *Maximizing Benefits of Student Diversity: Lessons from School Desegregation Research in Diversity Challenged*, at

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also receive exposure to the integrated alumni, peer and teacher networks that are so critical to learning about and obtaining college and occupational opportunities.[64] In addition, they benefit from the support and higher expectations of teachers, counselors, and peers – support that improves these students' aspirations, confidence, and ambition. Predictably, these increased opportunities result in better educational outcomes for non-white students in integrated schools, including improved student achievement, higher graduation rates, and better rates of college matriculation and graduation.[65]

These integration benefits advance the interests of ELLs as well, who experience segregation particularly acutely, and who experience particular challenges and harms as a result of their racial and linguistic isolation in disadvantaged schools. Despite this Court's holding in *Lau v. Nichols*, 414 U.S. 563 (1974) that ELL students have a right to a "meaningful and effective" education, a large proportion of ELLs are poorly-served in schools characterized by ethnic and linguistic isolation and concentrated poverty. Because ELLs are so likely to attend school with other ELLs and to live in racially and linguistically isolated neighborhoods, they have few contexts in which to interact with English-proficient peers. Integrated schools can create meaningful opportunities for this peer interaction.[66] Further, ELLs, who are more likely to be children of

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99-111 (Gary Orfield & Michal Kurlaender eds., Harvard Education Publishing Group, 2001).

[64] Frankenberg et al., *supra* note 37, at 12.

[65] Schofield, *supra* note 63, at 99-101.

[66] At the same time, it is important to note that these benefits do not validate using English immersion programs over instruction in the primary language for ELL students; education researchers have

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immigrants or immigrants themselves, and to have parents without high school diplomas, stand to draw particular benefits from the informal networks available in integrated schools.[67]

C. Integrated Schools Provide Their Students with Greater Life Opportunities

Integrated schools strengthen students' desire to interact with people of different backgrounds in the future, readying students to work and to live in diverse communities and to interupt patterns of occupational and residential segregation. As noted in *Plyler*, public education "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler*, 457 U.S. at 221 (quoting *Ambach*, 441 U.S. at 77). Improving Latinos' high school graduation and college matriculation rates will, of course, substantially enhance their economic and occupational aspirations and opportunities: Latinos remain highly concentrated in lower-earning labor and service sectors, due in part to the poor representation of Latinos in the "pipeline" to many

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consistently found that instruction in the primary language is particularly effective in improving ELL student achievement in the second language. *See, e.g.*, Claude Goldenberg, *Improving Achievement for English-Learners*, Education Week, July 26, 2006, at 34-36, *available at* http://www.edweek.org/ew/articles/2006/07/26/43goldenberg.h25.html?qs=bilingual_education (summarizing research regarding effective instructional practices for ELL students); *see also* Jacqueline Vialpando et al., *Educating English Language Learners: Implementing Instructional Practices*, 2005 at 17, National Council of La Raza, *available at* http://www.nclr.org/content/publications/download/36199 (describing the dangers of the English "submersion," or "sink-or-swim" instructional approach).

[67] Capps, *supra* note 48, at 4.

professional occupations – from a strong preparatory K-12 education, to four-year colleges and universities, to graduate and professional schools. Only 16 percent of Latinos worked in professional occupations in 2000, compared with 34 percent of white and 42 percent of Asian American participants in the labor force.[68]

But integrated schools yield even broader benefits; namely, they can prepare students to participate in diverse American and global workforces by instilling a sense of greater comfort with members of other racial groups. These effects can translate to greater economic opportunity and productivity for students of all racial and ethnic backgrounds. For Latino students, this comfort may lead them to seek out economic opportunities in fields or sectors in which they have been traditionally underrepresented. The severe underrepresentation of Latinos in fields such as law,[69] the health professions,[70] and teaching[71]

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[68] Rakesh Kochhar, *The Occupational Status and Mobility of Hispanics*. Dec. 15, 2005, Pew Hispanic Center, *available at* http://www.pewhispanic.org/files/reports/59.pdf.

[69] *See* Miguel A. Mendez & Leo P. Martinez, *Toward a Statistical Profile of Latina/os in the Legal Profession*, 13 La Raza L.J. 59, 65 (2002) (Latinos were 9 percent of national population in 1990, but only 2.49 percent of lawyers).

[70] *See* U.S. Department of Health and Human Services, The Office of Minorities Health, Surgeon General's TODOS Report (1993), noting underrepresentation of Latinos at all levels of the health professions, including practitioner, faculty, advanced career positions, and decision-making bodies.

[71] In 2005, Latinos occupied 6.9 percent of education, training, and library occupations in K-12 schools. They accounted for four percent of postsecondary education teachers, 10.4 percent of preschool and kindergarten teachers, six percent of elementary and middle school teachers, five percent of secondary school teachers and about six percent of special education teachers. U.S. Department of Labor, Bureau of Labor Statistics, *Table 11. Employed persons by detailed*

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has led to a deepening crisis – namely, an astonishing scarcity of educators, legal service providers, and health care providers with the linguistic resources and cultural sensitivity to serve the growing Latino community.

The experience of attending racially diverse schools also makes students in all racial and ethnic groups more comfortable living in integrated communities.[72] Studies have shown that implementation of desegregation programs can lead to more stably integrated neighborhoods.[73] Because segregated neighborhoods help drive school segregation, the positive effects of integration programs can actually serve to break self-perpetuating cycles of racial isolation.

III. IN TODAY'S NEW MULTIRACIAL PARADIGM, SCHOOL OFFICIALS MUST BE PERMITTED TO TAKE FLEXIBLE APPROACHES TO COMBAT RACIAL ISOLATION

In a growing number of school districts, officials must grapple with increasingly diverse groups of learners. Latino enrollment, including significant numbers of ELL students and students from immigrant backgrounds, is a major element of this changing picture. As school officials confront these demographic changes and consider how best to meet important educational, community, and civic goals, they require the flexibility to respond to these new, more complicated paradigms.

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occupation, sex, race, and Hispanic or Latino ethnicity, available at http://www.bls.gov/cps.

[72] *Id.*

[73] Wells & Crain, *supra* note 62, at 531.

This Court has consistently acknowledged this need for flexibility, and recognized local governments' broad discretionary powers to ensure their students attend schools reflecting the racial and ethnic composition of their districts as a whole. *See North Carolina State Bd. of Ed. v. Swann*, 402 U.S. 43, 45 (1971) ("[S]chool authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements"); *see also, Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 242 (1973) (Powell, J., concurring) (noting that local school boards may exceed the minimal constitutional standards to promote racial and ethnic integration). Voluntary integration programs are fully in keeping with these principles, and emerge from the considered judgments of local educators, teachers, and parents – those who are in the best position to evaluate and respond to the challenges of a changing racial landscape.

CONCLUSION

The Latino past and present educational experience is defined by separation and exclusion, invariably paired with poor resources and limited educational opportunities. Yet the challenges and struggles of Latino schoolchildren have seldom been the focus of either historical attention or corrective action, even as Latinos comprise an ever-growing and ever-more isolated share of our public schools and communities as a whole. For Latinos, the promise of *Brown* has not only gone unfulfilled; it becomes more distant and dim with each year that Latino school segregation grows.

Voluntary integration programs represent meaningful opportunities to bring the dream of equal and integrated education within closer reach of Latinos, a rising population in every sense. Such programs are designed to meet compelling, and noble, ends, and for the sake of Latino students and of America's robust civic and democratic life, they should be permitted. The Court should affirm the judgments of the Sixth and Ninth Circuits.

Respectfully submitted,

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STATEMENT OF INTEREST

ASPIRA Association, Inc.

The ASPIRA Association, Inc. is the only national non-profit organization devoted solely to the education and leadership development of Puerto Rican and other Latino youth. ASPIRA takes its name from the Spanish verb *aspirar*, "aspire."

Since 1961, ASPIRA has pursued its mission of empowering the Latino community through the development of its youth. With community-based offices in large cities in seven states and Puerto Rico, ASPIRA's 1,600 staff members work with over 55,000 youth and their families each year to develop their potential. ASPIRA programs include academic enrichment, mentoring, guidance counseling, charter schools, and parental engagement initiatives. Whereas over 40% of Latino youth drop out of school, over 95% of Aspirantes (ASPIRA youth) complete high school and over 90% go on to college. Almost every Latino leader in the states served by ASPIRA – in government and in the private sector – have been Aspirantes. ASPIRA is proud of the over 300,000 young Latinos that have been through ASPIRA.

Dominican American National Roundtable (DANR)

The Dominican American National Roundtable (DANR) is a non-partisan, non-profit corporation seeking to bring together the different voices of all people of Dominican origin in the United States. DANR is a national forum for analysis, planning, and action to advance the educational, economic, legal, social, cultural, and political interests of Dominican Americans. DANR aims to ensure for U.S. Dominicans the full exercise of the rights and freedoms

guaranteed in the Constitution of the United States of America.

With those objectives in mind, DANR is committed to enriching the quality of life in the United States by highlighting the contributions of Dominicans to the larger American society.

Hispanic Association of Colleges & Universities (HACU)

The Hispanic Association of Colleges and Universities (HACU) has championed the higher education success of the nation's youngest and largest ethnic population. The formal mission of HACU is to promote the development of member colleges and universities; improve access to and the quality of postsecondary educational opportunities for Hispanic students; and, to meet the needs of business, industry and government through the development and sharing of resources, information and expertise.

HACU's member colleges and universities enroll two-thirds of the two million U.S. Hispanics in higher education today. But inadequate K-12 preparation, economic disparities, and high drop out rates continue to keep Hispanic participation in higher education at rates far below their representation in the U.S. population, especially in the traditional 18-24 year old college age cohort. HACU and the institutions it represents have a vital interest in assuring more adequate K-12 education for the Hispanic population.

Hispanic National Bar Association (HNBA)

The Hispanic National Bar Association (HNBA) is a non-profit, non partisan, national legal association representing the interests of 37,000 U.S. Hispanic attorneys, judges, law professors, law graduates, law students, legal administrators, and paralegals in the United States and Puerto Rico. The HNBA's continuing mission is to improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession. The primary objectives of the HNBA are to increase professional opportunities for Hispanics in the legal profession and to address legal issues that affect the Hispanic community. As such, the HNBA has a vested interest in the positive development of the U.S. educational system, in particular with respect to equal opportunity, and access to the best educational processes and programs for Latino youth.

Intercultural Development Research Association (IDRA)

The Intercultural Development Research Association's (IDRA) mission is to create schools that work for all children, and particularly those students that are minority, low-income or in the process of learning English. Since its inception in 1973, the organization has worked with thousands of schools to ensure that all students are provided equitable, high quality educational opportunities. IDRA'S school desegregation assistance activities date back to its inception, and it is one of a small number of organizations that has continuously worked with schools to ensure non-segregation of any students on the basis of race, gender or national origin. Our research on the issue has long validated the belief that students most benefit

from an education that includes diverse students, using instructional approaches that are inclusive and valuing of community and individual differences. IDRA supports the adoption, continuation and strengthening of racial diversity programs.

League of United Latin American Citizens (LULAC)

The League of United Latin American Citizens (LULAC) is the largest and oldest Hispanic membership organization in the United States. With over 115,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans. For more than 75 years, LULAC's members have sought increased opportunities in education for Hispanic students through the desegregation of public schools, reaching parity in school funding, the provision of scholarships, educational counseling and strong affirmative action programs.

Mexican American Legal Defense and Educational Fund (MALDEF)

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has represented Latino interests in school desegregation and other educational rights cases in Texas, California, Colorado, New Mexico, Arizona and many other states, and has been counsel on such landmark education cases as *Plyler v. Doe*. MALDEF's mission includes a commitment to

pursuing educational equity and opportunity through advocacy, community education, and the courts, and therefore it has a strong interest in the outcome of these proceedings.

Multicultural Education, Training, and Advocacy, Inc. (META)

Multicultural Education, Training and Advocacy, Inc. (META) is a national public interest legal organization which for more than two decades has advocated for the educational civil rights of Latino and other linguistic minority students. META has represented classes of Latino students in California, Florida, Texas, Massachusetts, Colorado, New York and New Mexico. Through its litigation and community advocacy, META has seen the harmful effects of racial and linguistic isolation on its clients. META supports creative solutions to such isolation and therefore joins with fellow *amici* in this brief.

National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund

The NALEO Educational Fund, established in 1981, is the leading nonprofit organization that facilitates full Latino participation in the American political process, from citizenship to public service. The NALEO Educational Fund carries out this mission through programs that integrate Latinos fully into American society, provide professional development opportunities and technical assistance to the nation's more than 6,000 Latino elected and appointed officials, and monitor and conduct advocacy on issues important to the Latino community and its political participation.

National Conference of Puerto Rican Women (NACOPRW)

The National Conference of Puerto Rican Women (NACOPRW), as a non-profit and non-partisan organization that promotes the full participation of Puerto Rican women and other Hispanics in the social, economic, and political life in the U.S., supports the educational interests set out in this *amicus* brief.

The National Council of La Raza (NCLR)

The National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy.

NCLR recognizes that if K-12 voluntary integration programs, which provide for diversity in K-12 public schools by using race as a factor in making school assignments, are found unconstitutional, the state's and the nation's minority students will be denied equal opportunities to attend academically challenging public schools and consequently, lifelong opportunities. NCLR stands in support of admissions policies intended to increase diversity in public schools not only for the sake of minority communities, but also for the sake of a better United States.

National Hispanic Medical Association (NHMA)

The National Hispanic Medical Association's (NHMA) mission includes improving the health of Hispanics and other underserved groups. NHMA supports increased diversity in education to enhance opportunities for Hispanics to join the medical profession, which eventually leads to expanded access to health care in the U.S. and to improved health of the nation.

National Puerto Rican Coalition, Inc. (NPRC)

The National Puerto Rican Coaltion, Inc. (NPRC) is a national non-profit organization representing the interests of close to 8 million Puerto Rican U.S. citizens on the mainland and in Puerto Rico. NPRC's mission is to systematically strengthen and enhance the social, political and economic well being of Puerto Ricans throughout the United States and in Puerto Rico, with a special focus on the most vulnerable.

Puerto Rican Bar Association (PRBA)

The Puerto Rican Bar Association (PRBA) is a professional organization composed of members of the bar and law students of Latino ancestry as well as other interested persons. The PRBA was founded to provide a forum for Latino and other lawyers who are interested in promoting the social, economic, professional, and educational advancement of Latino attorneys, the Latino Community and the administration of justice.

Puerto Rican Legal Defense and Education Fund (PRLDEF)

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) is a New York-based private not-for-profit, non-partisan civil rights, pan-Latino litigation and advocacy organization that has defended the civil rights and equal protection under law of Latinos for the past 34 years, with particular interest in protecting voting rights, equal employment opportunity, fair housing, language access rights, educational access, and immigrants' rights.

We are interested in this lawsuit because Latino students are disproportionately impacted by public education policies that have historically served to promote persistent school segregation. Equitable education opportunities are the critical path to civic engagement and creating a stake in a modern inclusive pluralistic society for Latinos and minorities. Decreasing racial isolation and promoting diversity at all levels of the educational system are important to the advancement and success of the Latino community.

William C. Velásquez Institute (WCVI)

The William C. Velásquez Institute (WCVI) is a non-profit, non-partisan public policy analysis organization chartered in 1985. The purpose of WCVI is to conduct research aimed at improving the level of political and economic participation in Latino and other underrepresented communities; to provide information to Latino leaders relevant to the needs of their constituents; to inform the Latino leadership and public about the impact of public policies on Latinos; and to inform the Latino leadership

and public about political opinions and behavior of Latinos.

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Nos. 05-908 and 05-915

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of JOSHUA RYAN McDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MISSOURI, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, UTAH, VERMONT, WASHINGTON, WISCONSIN, THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Amici States respectfully submit this brief in support of Respondents Jefferson County Board of Education and Seattle School District No. 1. At issue is the prerogative of States and local educational agencies to determine the best methods for providing high quality, integrated primary and secondary education responsive to the specific needs and concerns of their local communities.

The States and their subdivisions are responsible for the public education of America's school children, and Amici States are firmly committed to the tradition of local control of those schools. Control of public K-12 education at the local level provides parents the opportunity to participate in decisionmaking regarding the education of their children, increases the accountability and responsiveness of school districts to local needs, and leads to greater community support for the schools. It also encourages experimentation and innovation in the schools' operation, leading to higher quality education.

At the same time, to effectively plan and operate their school systems, school boards require stability and predictability in the legal landscape governing their schools. For the past 35 years, school boards that have voluntarily sought to reduce racial isolation in their schools have done so with the understanding that federal courts also recognize the importance of local control of public schools and the value of integrated education. The importance of these values should be reaffirmed in these cases, and the Court should continue to afford a degree of deference, within constitutional limits, to States' and local school boards' educational decisions as to how to advance these goals.

SUMMARY OF ARGUMENT

The tradition of public elementary and secondary education in this country has long embraced as an important goal the assimilation of children from diverse backgrounds into a common community. Particularly in the last two generations,

many state and local educators have come to believe that racially isolated schools thwart that goal. These educators are of the view that education in a racially integrated environment fosters meaningful interaction among students of different racial and ethnic backgrounds, leading to the breakdown of racial stereotypes and the development of mutual understanding and respect among children of different races and ethnicities. In their considered judgment, education in an integrated environment prepares school children to succeed in a diverse work environment and inculcates values necessary to maintain a cohesive democratic society.

These educational judgments are entitled to deference when the Court assesses whether the promotion of integrated public schools is a compelling goal that can justify consideration of race. Public education is one of the most critical functions of state and local government. It plays a crucial role in preparing children for participation as citizens and in preserving our democratic values. Accordingly, federal courts should be reluctant to usurp the States' constitutional role by imposing their own views as to preferable educational methods, not only for reasons of federalism, but also because courts do not possess the same experience and expertise as do state and local educational agencies in addressing complex educational issues.

The effect of prohibiting school boards from considering race in formulating an integration plan would be profound. It would severely limit their ability to seek for children in their districts the benefits of learning in an integrated environment. The Equal Protection Clause does not require such a drastic retraction of the States' ability to voluntarily integrate their schools. Rather, recognition of the compelling nature of a State's interest in integrated schools is consistent with principles of equality that animate the Fourteenth Amendment, and serves to maintain the stability of a system of public education that has long relied on a State's prerogative to consider race to maintain racially integrated schools.

Finally, the requirement that a school district's consideration of race to advance its goals of providing high quality, integrated education be narrowly tailored does not mean that a court should substitute its own policy choices for those of the local school board. It is for the school board, not the courts, to make educational policy choices that balance the goal of integrated education with the other educational needs of the school community.

POINT I

MANY STATES AND LOCAL SCHOOL BOARDS HAVE DETERMINED THAT REDUCING RACIAL ISOLATION IS INTEGRAL TO THE EDUCATIONAL MISSION OF THEIR SCHOOLS

Providing an education that equips students to interact with persons from different racial and ethnic backgrounds and instills values free from destructive stereotypes and racial prejudice has been recognized by many state-run schools as an important component of primary and secondary education. Indeed, facilitating the assimilation of all children into a common community was one of the early purposes of mandatory public schooling in the States. *See, e.g.*, John Dewey, DEMOCRACY AND EDUCATION 25-26 (1916). The Court has long recognized this aspect of the public school's mission, characterizing the schools as "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people." *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948); *see also Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (public schools are considered an "'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground") (quoting Dewey, DEMOCRACY AND EDUCATION 26).

Many States and local school boards have embraced this traditional educational philosophy, deciding that the educational goals of teaching tolerance and mutual cooperation among students of different races and ethnicities and instilling in them values that promote a cohesive society and a strong democracy are most effectively advanced in integrated settings. They have concluded that racial isolation severely undermines those goals, and that active measures are required to create integrated classrooms where those critical lessons are best learned. These local, state, and even federal policymakers have thus adopted measures designed to reduce racial isolation in public schools and secure for all children the benefits of learning in an integrated environment.

A number of States do this by directly prohibiting de facto segregation. New Jersey's constitution, for example, was amended in 1947 to prohibit both de facto and de jure segregation in the State's public schools. *See* N.J. Const. art. I, ¶ 5; Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 Rutgers L.J. 1267, 1301 (2004). The State's purpose in prohibiting even de facto segregation was grounded in the educational goals of teaching children to live together in a multi-racial society and promoting good citizenship and broad participation in mainstream affairs:

> In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations

> . . . . [T]he states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by.

Booker v. Bd. of Educ., 212 A.2d 1, 6 (N.J. 1965); *see also* N.J. Admin. Code § 6A:7-1.7.

Connecticut's constitution also contains an anti-segregation clause, dating from 1965, which, together with an education clause enacted at the same time, requires the State to remedy severe racial and ethnic isolation regardless of intent. *See* Conn. Const. art. I, § 20; art. VIII, § 1. The clause embodies the belief that "[r]acial and ethnic segregation has a pervasive and invidious impact on schools, whether the segregation results from intentional conduct or from unorchestrated demographic factors. . . .When children attend racially and ethnically isolated schools, the[] 'shared values' [through which social order and stability are maintained] are jeopardized. . . ." *Sheff v. O'Neill*, 678 A.2d 1267, 1285 (Conn. 1996).

Similarly, California's state constitution requires school boards to take reasonably feasible steps to alleviate de facto segregation because, in the State's view, "'racial isolation in the schools . . . fosters attitudes and behavior that perpetuate isolation in other important areas of American life,'" such as housing and employment. *Crawford v. Bd. of Educ.*, 551 P.2d 28, 38 n.7 (Cal. 1976) (quoting United States Commission on Civil Rights, "Racial Isolation in the Public Schools" (1967)).

The Pennsylvania Human Relations Act likewise requires school boards to take corrective measures to remedy de facto school segregation because the State believes that "the best way to demonstrate the 'inherent worth of [one's] neighbor' is to place individuals in a situation where they are exposed to their neighbor," especially "if a child can become aware of his neighbor's capabilities before his prejudices have had a chance to develop." *Pennsylvania Human Relations Comm'n v. Chester Sch. Dist.*, 233 A.2d 290, 297 (Pa. 1967).

The New York Commission of Education has used its supervisory authority to direct local school boards to take steps to eliminate racial imbalance, regardless of its cause, because it judged racially isolated schools to be educationally inadequate. *See Vetere v. Allen*, 206 N.E.2d 174, 176 (N.Y. 1965). The Regents of the State of New York concluded:

> If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society. The stability of our social order depends, in large measure, on the understanding and respect which is derived from a common educational experience among diverse racial, social, and economic groups — integrated education.

Lee v. Nyquist, 318 F. Supp. 710, 714 (W.D.N.Y.), *aff'd*, 402 U.S. 935 (1971) (quoting Regents of the State of New York 1969 Restatement of Policy on Integration and the Schools).

And the Supreme Court of Washington, on certification from the Ninth Circuit in this case, reiterated that the State's school districts are empowered to work to end de facto segregated schools because "the justifications for racial integration," such as "teaching tolerance and cooperation among the races [and] molding values free of racial prejudice," "are strong and lie close to the central mission of public schools." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 162 (Wash. 2003).

Consistent with these educational principles and each State's unique policy, political, and administrative considerations, state legislatures have passed laws adopting varying means to facilitate the reduction of racial isolation. For example, several States provide guidelines for maintaining a diverse student body in conjunction with open choice or transfer

plans,[1] or cite prevention of segregation as a required consideration in drawing attendance lines.[2] Other States provide guidelines or funding for districts following voluntary desegregation plans, or permit transfers only within guidelines for racial integration of student bodies.[3] Yet other States closely regulate local school assignment and inter-district transfer plans, as well as magnet school programs, to promote school integration,[4] or require state authorities to oversee racial diversity even at the local school district level.[5] These and other States empower state officials to require districts to take affirmative measures to reduce racial isolation, which can include redistricting, new construction, majority-to-minority transfers, as well as a variety of other steps. Other States have enacted statutes that authorize local school districts to determine how to move toward more integrated, less racially isolated schools[6] or provide technical assistance or funding for districts to accomplish this goal.[7]

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1. *See* Fla. Stat. ch.1002.31(5)(f); Va. Code Ann. § 22.1-269.1(B).

2. *See* 105 Ill. Comp. Stat. 5/10-21.3.

3. *See* Ark. Code Ann. § 6-18-206(a)(4), (f); Neb. Rev. Stat. §§ 79-232(2), -238(2)-(4); Wis. Stat. § 118.51(7)(a).

4. *See* Mass. Gen. Laws ch. 71, §§ 37C, 37D, 37I; Mo. Rev. Stat. § 162.1060; N.J. Stat. Ann. § 18A:36B-4(b).

5. *See* Conn. Gen. Stat. §§ 10-226a-e; Minn. Stat. § 124D.896; N.Y. Educ. Law § 3601-a(36).

6. *See* Ind. Code Ann. §§ 20-33-1-1, 20-33-1-3(b); Cal. Educ. Code § 35160.5(b)(2)(A).

7. *See* Iowa Code § 282.18(3); Mass. Gen. Laws Ch. 76, §§ 12A, 12B; Mo. Rev. Stat. § 162.1060; N.Y. Educ. Law § 3601-a(36); Oh. Rev. Code Ann. § 3301.18(B); Wis. Stat. § 121.85.

And, as did the Seattle and Louisville school districts, countless school districts have fashioned their own voluntary plans to further their interest in the educational benefits that flow from reducing racial isolation, while taking into account local conditions and concerns. Some, like Louisville, did so following a declaration of unitary status to prevent re-segregation of their schools, and others do so with no finding of de jure school segregation. For example, some districts have joined together to allow voluntary inter-district majority-to-minority transfers to reduce racial isolation in each of the member districts. *See, e.g., Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 741-42 (2d Cir. 2000). Other methods relied upon by individual districts to reduce racial isolation include voluntary intra-district majority-to-minority transfers, *see, e.g., Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 9-13 (1st Cir.) (en banc), *cert. denied*, 126 S. Ct. 798 (2005); *Riddick v. Sch. Bd.*, 784 F.2d 521, 527 (4th Cir. 1986); magnet schools with race-conscious admissions policies, *see, e.g., Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2002) (en banc); *Scott v. Pasadena Unified Sch. Dist*, 306 F.3d 646 (9th Cir. 2002); pairing, clustering, or grouping of schools, *see, e.g., Sch. Comm. v. Bd. of Educ.*, 287 N.E.2d 438 (Mass. 1972); *Guida v. Bd. of Educ.*, 213 A.2d 843 (Conn. 1965); busing, *see, e.g., Borders v. Bd. of Educ.*, 290 A.2d 510 (Md. 1972); or redrawn attendance zones, *see, e.g., Offermann v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967); *Van Blerkon v. Donovan*, 207 N.E.2d 503 (N.Y. 1965).

Congress has likewise judged voluntary integration and the reduction of racial isolation to be extremely important goals. In enacting the Magnet Schools Assistance Program ("MSAP"),[8] Congress found that it is in the best interest of the United States to continue its support of local educational agencies that are "seeking to foster meaningful interaction among students of

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8. MSAP was reauthorized in 2002 as part of the No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

different racial and ethnic backgrounds, beginning at the earliest stage of such students' education," 20 U.S.C. § 7231(a)(4)(A), and "to ensure that all students have equitable access to high quality education that will prepare all students to function well in a technologically oriented and a highly competitive economy comprised of people from many different racial and ethnic backgrounds," *id.* § 7231(a)(4)(B). Congress chose to accomplish these goals by providing financial assistance to school districts for "the development and implementation of magnet schools programs" to promote "the elimination, reduction, or prevention of minority group isolation." *Id.* § 7231(b)(1), (2). Eligible districts are those involved in either voluntary or court-ordered desegregation of their schools. *Id.* § 7231(a)(1), (b)(2).

This Court, too, has observed that "[a]ttending an ethnically diverse school" may "prepar[e] minority children for citizenship in our pluralistic society, while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington v. Seattle Sch. Dist., No. 1*, 458 U.S. 457, 473 (1982) (quoting *Columbus Board of Education v. Penick*, 443 U.S. 449, 485 n.5 (1979) (Powell, J., dissenting)). The majority and the dissenting opinions in *Washington* were in agreement on this point. *See Washington*, 458 U.S. at 495 (Powell, J., dissenting) ("children of all races benefit from exposure to 'ethnic and racial diversity in the classroom'") (citation omitted). Indeed, in the opinion quoted by the majority in *Washington*, Justice Powell found much of the dispute as to the degree of educational benefit that results from integrated schools to be "beside the point" because, "it is essential that the diverse peoples of our country learn to live in harmony and mutual respect. This end is furthered when young people attend schools with diverse student bodies." *Penick*, 443 U.S. at 485 n.5 (Powell, J., dissenting).[9] Moreover, this Court

9. Because it was Justice Powell's opinion in *Bakke* that first drew the constitutional line between a university's permissible consideration (Cont'd)

considers a law school's related interest in enrolling a diverse student body in part to promote cross-racial understanding and the breakdown of racial stereotypes to be compelling. *See Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

POINT II

THE COURT SHOULD DEFER TO STATE AND LOCAL SCHOOL BOARD JUDGMENTS THAT REDUCING RACIAL ISOLATION PRODUCES ESSENTIAL EDUCATIONAL BENEFITS

When assessing the compelling nature of the state interest at stake here, the Court should defer to state and local educational agencies' judgments that reducing racial isolation in their public schools will yield educational benefits that are essential to their schools' missions. This Court afforded the University of Michigan Law School similar deference in *Grutter*, grounded in the university's First Amendment academic freedom and the attendant respect due its academic decisions. *See* 539 U.S. at 328-30 ("The Law School's educational judgment that [student body] diversity is essential to its educational mission is one to which we defer."). No less respect is due a state or local educational agency's experience and expertise regarding the proper mission and operation of K-12 schools, where the strong tradition of local control of public schools, grounded in a State's Tenth Amendment prerogatives, is at stake. *See Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (the "Fourteenth Amendment does not override all principles of federalism").

(Cont'd)

of race to achieve the educational benefits of a diverse student body and unconstitutional racial balancing for its own sake – which he identified as the use of race simply to graduate more minority students, and not for any other reason – it is significant that Justice Powell consistently recognized the value of integrated K-12 education and the States' prerogative to seek those benefits for the children in their schools. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 300 n.39, 307 (1978) (Powell, J.); *Penick*, 443 U.S. at 488-89 n.7 (Powell, J., dissenting); *Washington*, 458 U.S. at 501 n.7 (Powell, J., dissenting).

"No single tradition in public education is more deeply rooted than local control over the operation of schools. . . ." *Milliken v. Bradley* ("*Milliken I*"), 418 U.S. 717, 741-42 (1974); *accord Missouri v. Jenkins*, 515 U.S. 70, 131 (1995); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977). As a result, the Court has consistently recognized that it is the province of States and their subdivisions to make the complex judgments essential to establishing and fulfilling the educational mission of public K-12 schools. This is never more true than when a local school board seeks the educational benefits of integrated schools:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

Swann v. Charlotte-Mecklenburg Bd. of Educ. ("*Swann I*"), 402 U.S. 1, 16 (1971); *accord North Carolina State Bd. of Educ. v. Swann* ("*Swann II*"), 402 U.S. 43, 45 (1971) ("We observed in *Swann* that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." (citations omitted)).

Local autonomy of public schools serves a number of important values, central among them "afford[ing] citizens an opportunity to participate in decisionmaking" regarding the education of their children, which leads to greater accountability and responsiveness to local needs, higher confidence in and support for the school system, and improved quality of education. *Milliken I*, 418 U.S. at 742; *see also Freeman*, 503

U.S. at 490; *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991). It also "encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Milliken I*, 418 U.S. at 742 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)); *accord Dowell*, 498 U.S. at 248.

In contrast, not only does "[u]surpation of the traditionally local control over education" diminish the quality of the education and weaken community support for the school system, it "deprives the States and their elected officials of their constitutional powers" to determine their educational goals. *Jenkins*, 515 U.S. at 138 (Thomas, J., concurring). Indeed, as this Court has long recognized, public education is "perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). By "inculcating fundamental values necessary to the maintenance of a democratic political system," public education performs a function that goes "to the heart of representative government." *Ambach*, 441 U.S. at 76, 77; *see Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("the public schools [are] the most vital civic institution for the preservation of a democratic system of government" (internal citation omitted)). It plays a crucial role in preparing individuals for participation as citizens, and in preserving the values on which our society rests. *Plyler*, 457 U.S. at 221; *accord Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Rodriguez*, 411 U.S. at 29-30. A State or school board's educational policy decisions with respect to public schools are thus due a degree of deference not only as a matter of tradition, but because they reside "firmly within a State's constitutional prerogatives." *Gregory v. Ashcroft*, 501 U.S. at 462-63 (citing *Ambach*, 441 U.S. at 73-74); *see United States v. Lopez*, 514 U.S. 549, 565 (1995); *id.* at 583 (Kennedy, O'Connor, JJ., concurring) (federal law criminalizing gun possession within a school zone impinges on state sovereignty over primary and secondary education by "foreclos[ing] the States from experimenting and exercising their own judgment

in an area to which States lay claim by right of history and expertise").

Deference to a state or local educational agency's judgment regarding the proper mission of K-12 schools is also appropriate because education "presents a myriad of 'intractable economic, social, and even philosophical problems,'" *Rodriguez*, 411 U.S. at 42 (quotation omitted), and "[f]ederal courts do not possess the capabilities of state and local governments" in addressing them, *Jenkins*, 515 U.S. at 131. "Federal judges cannot make the fundamentally political decisions as to which . . . educational goals are to be sought, and which values are to be taught . . . When [they do so,] . . . they intrude into areas in which they have little expertise." *Id.* at 133; *see also Bd. of Educ. v. Rowley*, 458 U.S. 176, 207-08 (1982) ("courts must be careful to avoid imposing their view of preferable educational methods upon the States"). Even where there has been a violation of the Equal Protection Clause, "'federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.'" *Freeman*, 503 U.S. at 489 (quoting *Milliken v. Bradley* ("*Milliken II*"), 433 U.S. 267, 280-81 (1977)); *see also Penick*, 443 U.S. at 488 (Powell, J., dissenting) ("Courts are the branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education").

In recognition of these principles, the Court should defer to States' and school boards' educational judgments regarding the need to reduce racial isolation. Such deference comports with the deference extended to the state university in *Grutter*, and is also in line with the deference afforded States' and local school boards' educational choices in other instances where those decisions implicate constitutional concerns. For instance, because public education performs a function that goes to the heart of representative government, and because of the critical role teachers play in "shaping the students' experience to achieve educational goals," the Court applied only rational basis review,

rather than heightened scrutiny, to New York's judgment that citizenship should be a qualification to teach in its public schools. *Ambach*, 441 U.S. at 78. This principle of deference to state and local educational policy choices is also evident in several rulings by this Court which uphold restrictions imposed by school officials on students' freedom of expression, with an eye toward minimizing any constraints on the school's ability to fulfill its educational mission. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that educators do not offend the First Amendment by exercising editorial control over student speech "so long as their actions are reasonably related to legitimate pedagogical concerns. This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *Bethel Sch. Dist. No. 403*, 478 U.S. at 685 ("The First Amendment does not prevent the school officials from determining that" certain speech "would undermine the school's basic educational mission").

In addition, this Court has deferred to the expertise and sensitive political judgments of States when it assesses equal protection challenges to race-conscious electoral redistricting, which is similar to the educational judgments of state and local educational agencies in many respects. Like public elementary and secondary education, electoral redistricting is a traditional state function that goes to the heart of representative government, and is a most difficult subject for legislatures that requires consideration of "a complex interplay of forces." *Miller v. Johnson*, 515 U.S. 900, 915-916 (1995). As with public K-12 education, equal protection review of redistricting thus "represents a serious intrusion on the most vital of local functions," *id.* at 915, and application of equal protection principles in both contexts is a "most delicate task," *id.* at 905. Accordingly, with respect to both, States and their subdivisions "must have discretion to exercise the political judgment necessary to balance competing interests."

Id. at 915; *accord Easley v. Cromartie*, 32 U.S. 234, 242 (2001). Because redistricting often will require legislatures to consider race, preserving the State's discretion to balance competing interests in that context means that a court will not apply strict scrutiny to race-conscious redistricting unless race predominates over traditional redistricting principles. *Miller*, 515 U.S. at 912-16. For similar reasons, States must also have discretion to balance competing interests in the context of education policy, including whether to take voluntary steps to reduce racial isolation in their public schools if they deem it appropriate, even where achieving that goal may require consideration of race. *See Penick*, 443 U.S. at 489 (Powell, J., dissenting) ("The primary and continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities.").[10]

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10. This Court's decision in *Johnson v. California*, 543 U.S. 499 (2005), which held that California's segregation of prisoners by race and ethnicity is subject to strict scrutiny, is not inconsistent with deference to a school board's educational judgment that reducing racial isolation at the K-12 level will produce educational benefits essential to the board's mission. The deference at issue in *Johnson* went to whether strict scrutiny applied at all; here, as in *Grutter*, it goes to whether the State's interest is compelling. *See Grutter*, 539 U.S. at 328 ("Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university"). Moreover, while the Court in *Grutter* afforded a degree of deference to a university's academic decisions, the Court in *Johnson* went even further and *presumed* that California's asserted interest in prison safety was compelling. *See Johnson*, 543 U.S. at 514. The only question identified for remand in *Johnson* was whether California's policy was narrowly tailored to that end, and even with respect to that, the Court held that the "special circumstances that [prisons] present" can be taken into account. *Id.* at 515.

POINT III

RECOGNIZING THAT VOLUNTARY SCHOOL INTEGRATION IS A COMPELLING INTEREST COMPORTS WITH EQUAL PROTECTION PRINCIPLES

Following their pedagogical assessment that integrated learning environments are key to best educating children to live productively in a diverse society, school boards often make the related policy judgment that it is necessary to take limited race-conscious measures in order to secure those benefits for the children in their districts. Local school boards, state legislatures, Congress, and even this Court have recognized that consideration of race is often essential to achieving a heterogenous learning environment. To interpret the Equal Protection Clause to preclude all consideration of race to achieve that goal would severely limit a school board's ability to seek more integrated schools. On the other hand, recognizing the compelling nature of a State's interest in integrated schools is consistent with the principles that animate the Equal Protection Clause, and also serves to maintain the stability and predictability of a system of public education that for generations has operated with the understanding that States cannot, consistent with the Equal Protection Clause, intentionally segregate their schools, but they do have the discretion to purposefully integrate them.

In *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971), a unanimous Court recognized that integrating a segregated school system will almost invariably require that students be assigned "differently because of their race." In that case, the Court upheld the use of race by the school board of Clark County, Georgia to voluntarily integrate its formerly segregated school system. While it could be assumed that the Georgia school system had been segregated by law (although the Court pointed out that there were no findings of a constitutional violation), there is no reason to think that the use of race is any less essential to remedying de facto segregation. *See Parents Involved in Cmty.*

Schs. v. Seattle Sch. Dist., No. 1 ("*PICS*"), 426 F.3d 1162, 1183 (9th Cir. 2005) (en banc) ("Because race itself is the relevant consideration when attempting to ameliorate de facto segregation, the District's tiebreaker must necessarily focus on the race of its students.").

Consistent with the importance placed in *McDaniel* on the consideration of race to achieve integrated schools, a number of state legislators and local school boards have established systems of voluntary majority-to-minority transfers to reduce racial isolation. *See, e.g., Penick*, 443 U.S. at 488 n.7 (Powell, J., dissenting) (holding out Wisconsin's voluntary, subsidized, majority-to-minority transfer provision, Wis. Stat. § 121.85, as "the sort of effort that should be considered by state and local officials and elected bodies"); *Brewer*, 212 F.3d at 741-42 (refusing to enjoin a school board's consideration of race pursuant to New York's law subsidizing voluntary inter-district transfers designed to reduce racial isolation, N.Y. Educ. Law § 3601-a(36)); Ark. Code Ann. § 6-18-206(a)(4) (permitting inter-district transfers provided the transfer "would not adversely affect the desegregation of either district"); Neb. Rev. Stat. §§ 79-232, -238(3)-(4) (requiring school districts with open enrollment programs to give first priority to students whose request would aid racial integration); N.J. Stat. Ann § 18A:36B-4(b) (Commissioner can restrict the number of students that can transfer from another district to maintain racial and ethnic diversity); *see also Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 241 (1973) (Powell, J., concurring) (noting benefits of voluntary majority-to-minority transfers to achieve school integration). Voluntary transfers are frequently relied upon to reduce racial isolation because they provide students with a choice among schools. Yet these programs would likely be banned or rendered impotent to achieve their intended goal if reducing racial isolation were not considered a compelling interest.

Magnet schools, conceived "as a voluntary alternative to busing" and considered a "typical and appropriate" tool to

decrease racial isolation in schools, also often consider race in their student admissions to accomplish that goal. *Belk*, 269 F.3d at 403; *see also Jenkins*, 515 U.S. at 92 (discussing benefits of magnet schools in school integration plan). Indeed, Congress not only anticipated that the use of race in MSAP-funded magnet school admissions may be necessary to accomplish the Act's goal of reducing minority group isolation, it specifically authorized race-conscious admissions criteria to accomplish that end. An application for MSAP funds must include an assurance that the applicant will not engage in discrimination based on race, color, or national origin in "the assignment of students to schools, or to courses of instruction within the schools, of such applicant, *except to carry out the approved [desegregation] plan*." 20 U.S.C. § 7231d(b)(2)(C)(ii) (emphasis added).[11]

In fashioning voluntary plans to reduce racial isolation that at times consider race – such as voluntary transfers or magnet schools – state and local governments have relied on the pronouncements of this Court suggesting that to do so is within their prerogative. On the same day in 1971, a unanimous Court decided two cases in which it stated that school authorities have broad discretion to decide as a matter of educational policy that the student body of each school in a district should reflect the racial composition of the district as a whole, *see Swann I*, 402 U.S. at 16; *Swann II*, 402 U.S. at 45. A third case decided that day stated that integration of a formerly segregated school district – one where there had been no finding of de jure segregation – almost invariably requires consideration of race, *see McDaniel*, 402 U.S. at 41. While none of the three cases expressly held that school authorities have discretion to use race in making student assignments to remedy de facto segregation, the Court did make its views on the subject known, and school districts have operated in reliance on that ever since. Indeed, it is difficult to see how a school district could "prescribe[]" the ratio of minority to white students in each school in the district,

11. A "desegregation plan" refers to plans to remedy either de jure or de facto segregation. 34 C.F.R. § 280.4(b).

"reflecting the proportion for the district as a whole," unless the school board considered race in making those assignments. *Swann I*, 402 U.S. at 16.

Since then, the Court has continued to recognize local school boards' discretion to seek voluntary school integration, and has never indicated that school boards cannot consider race for that purpose. For example, just two weeks after the *Swann* cases, the Court affirmed without opinion the decision of a three-judge court that struck down a New York law prohibiting student assignments based on race or for purposes of racial integration because the New York law would impede efforts to undo even de facto racial segregation. *See Lee*, 318 F. Supp. at 714. The Court confirmed that holding eleven years later in *Washington*, 458 U.S. 457, where it overturned a state initiative that mandated neighborhood school assignments, thereby precluding the possibility of assignments for the purpose of integration. Justice Powell, although dissenting from the Court's decision based on his view of a State's sovereign power to control its subdivisions, stated that on policy grounds he "would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory [student assignment] program" to reduce racial isolation, even though he and the other dissenters presumed that mandatory student assignments for the purpose of racial integration involved assigning students on the basis of race. *Id.* at 489, 501 n.17. In Justice Powell's view, "the local school board – responsible to the people of the district it serves – is the best qualified agency of a state government to make decisions affecting education within its district." *Id.* at 494, 501 n.17.[12]

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12. Other opinions by Justice Powell further bolster the view that local school boards have broad discretion to consider race to achieve their goals of voluntary integration. *See Penick*, 443 U.S. at 488-89 n.7 (Powell, J., dissenting); *Bakke*, 438 U.S. at 307 (Powell, J.) (contrasting the denial of medical school admissions with voluntary secondary school integration); *see also Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1383

(Cont'd)

School districts seeking to voluntarily comply with state prohibitions of de facto school segregation would be in a particularly precarious spot if they could no longer consider race to reduce racial isolation in their schools. Indeed, state courts have upheld their right to consider race to comply with state mandates to remedy de facto segregation, as well as to voluntarily desegregate their schools, on many occasions. *See, e.g. Bd. of Educ. v. Bd. of Educ.*, 608 A.2d 914 (N.J. Super. Ct. App. Div. 1992), *aff'd*, 625 A.2d 483 (N.J. 1993); *Citizens for Better Educ. v. Goose Creek Consol. Indep. Sch. Dist.*, 719 S.W.2d 350 (Tex. Ct. App. 1986); *Tometz v. Bd. of Educ.*, 237 N.E.2d 498 (Ill. 1968); *Sch. Comm. v. Bd. of Educ.*, 227 N.E.2d 729 (Mass. 1967); *Vetere*, 206 N.E. 2d 174 (N.Y. 1965); *Guida*, 213 A.2d 843 (Conn. Super. Ct. 1965). It would be ironic, indeed, if after five decades of supervising the desegregation of public schools, and in anticipation of finally returning all school districts to local control, the Court now profoundly limits local authorities from finding ways on their own to maintain their integrated schools if they so choose.

The Equal Protection Clause does not require such a drastic turnaround from the Court's earlier pronouncements. The accommodation between the First Amendment's prohibition of state establishment of religion and its requirement that States permit its free exercise suggests that a comparable space exists between the Equal Protection Clause's prohibition of state segregated schools and a State's prerogative to integrate them. The Court has stated that there is "room for play in the joints" when negotiating the religion clauses of the First Amendment,

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(Cont'd)

(1978) (Rehnquist, J., in chambers) (refusing to stay a state court order requiring student reassignments based on race to remedy de facto segregation in part because, while Justice Rehnquist had "the gravest doubts that the Supreme Court of California was required by the United States Constitution to take the action that it has taken in this case," he had "very little doubt that it was permitted by that Constitution to take such action.").

Locke v. Davey, 540 U.S. 712, 719 (2004), and there is room here too, to accommodate both a State's Tenth Amendment prerogatives and the Equal Protection Clause's limitation on those powers. Just as there are some state accommodations of religion that do not run afoul of the establishment clause, there are some considerations of race by a local school board to remedy de facto segregation that do not run afoul of the federal Equal Protection Clause. *See Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972) ("By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion."); *Rodriguez*, 411 U.S. at 42-44 (identifying the potential harm that imposing "inflexible constitutional restraint" on the policy judgments of state and local educational agencies may have on the "continued research and experimentation so vital to finding solutions to educational problems and to keep abreast of ever-changing conditions").

This accommodation between the Tenth Amendment and the Equal Protection Clause is possible because, even though remedying de facto segregation "draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel." *Locke*, 540 U.S. at 722. That is, remedying de jure and de facto segregation seek the same end – integrated schools controlled by local authorities, not federal or state courts. Permitting local authorities to select the means they deem most effective to remedy de facto segregation serves those ends, and does not raise the concerns generally associated with the use of race. *Cf. id.* at 724.

For example, the use of race to promote voluntary school integration does not involve the racial stigma or stereotyping that so often animate this Court's equal protection jurisprudence involving the segregation of persons by race. *See, e.g., Brown*, 347 U.S. at 494 ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community. . . ");

Johnson, 543 U.S. at 507-09 ("by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions"); *Shaw v. Reno*, 509 U.S. 630, 650 (1993) (separating voters into electoral districts solely on the basis of race "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole").

Voluntary school integration does not separate children of different races; it brings them together, and the lessons learned in integrated classrooms tend to foster equality rather than hinder it. See Point I, *supra*. *Cf. Johnson*, 543 U.S. at 509 ("The United States contends that racial integration actually 'leads to less violence in BOP's institutions and better prepares inmates for re-entry into society.'"); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 94-95 (1977) ("This Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial association . . ."). Those lessons do not depend on associating race or ethnicity with any particular set of experiences or viewpoints, and thus do not rely on stereotypes or invoke the stigmatic harm of using race as a proxy for another characteristic. *Cf. Johnson*, 543 U.S. at 511 ("When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers."). And where, as here, school admission is not competitive – that is, not based on the abilities or achievements of the students – there is not the same risk of stigmatic harm associated with traditional affirmative action. *Cf. Grutter*, 539 U.S. at 373 (Thomas, J., dissenting) (elite law school admissions); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (contracting); *United States v. Paradise*, 480 U.S. 149, 188 n.2 (1987) (Powell, J., concurring) (employment).

POINT IV

PETITIONERS' PREFERRED METHODS FOR ACHIEVING INTEGRATION ARE NOT REQUIRED BY LAW

Petitioners' application of the narrow tailoring factors is fundamentally flawed because it does not take account of the special context of K-12 education, and much of their analysis amounts to no more than Petitioners' preferred policy prescriptions. "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Grutter*, 539 U.S. at 333 (quoting *J. A. Croson Co.*, 488 U.S. at 493 (plurality opinion)). Strict scrutiny is necessarily a context-specific inquiry, and narrow tailoring factors are a framework to assist courts in determining the sincerity of the motive for using race. *See Grutter*, 539 U.S. at 327, 339-40. The federal judiciary's long experience with school desegregation is a reminder that "there will be more than one constitutionally permissible method" of integrating a public school system. *Rodriguez*, 411 U.S. at 42 (citation omitted).

1. A flexible K-12 student assignment plan does not require consideration of the same factors relevant to university admissions.

Petitioners argue that the Seattle and Louisville plans are not narrowly tailored to any goal except "outright racial balancing" because they supposedly employ rigid quotas rather than the individualized assessment upheld in *Grutter*. *PICS* Pet. Br. at 43-44; *see Meredith* Pet. Br at 7-8 . But Petitioners' attempt to import wholesale into this case the specific elements of the narrowly-tailored law school admissions plan approved in *Grutter* is misguided. In *Grutter*, the Court developed a narrow tailoring framework "calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education." 539 U.S. at 334. The Court's emphasis on the specific circumstances of university admissions in *Grutter*

belies any attempt to rigidly apply its reasoning to K-12 schools. *See id.* ("the very purpose of strict scrutiny is to take . . . 'relevant differences into account.' ") (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 227, 228 (1995)); *United States v. Fordice*, 505 U.S. 717, 728-29 (1992) ("a state university system is quite different in very relevant respects from primary and secondary schools," including that K-12 schools are generally "fungible," and students do not choose whether to pursue an education).

The differences between the admissions process at the University of Michigan Law School and the student assignments here highlight the distinction between the goals of enrolling a diverse university class and promoting integrated elementary and secondary schools. The interest identified in *Grutter* was that of a university selecting "those students who will contribute the most to a robust exchange of ideas." 539 U.S. at 333. A critical mass of minority students is only one element of a form of diversity that also values the contribution of students who, for example, "have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, " or have "unusual intellectual achievement, employment experience, nonacademic performance, or personal background." *Id.* at 338.

As with the goal of enrolling a "critical mass of minority students" that was approved in *Grutter*, the goal of racially integrated schools is "defined by reference to the educational benefits" that it "is designed to produce." *Id.* at 333. The benefits of educational diversity in elementary and secondary public schools are related to the goal of diversity in higher education, but are still very different. Its benefits do not arise primarily from "enlightening and interesting" "classroom discussion" among students with "the greatest possible variety of backgrounds." *Id.* at 330. They are, instead, based on the simple fact that contact with peers of another race at a young age in a school environment is seen as the best available tool for inculcating values of racial tolerance. For the youngest students, this is a critical opportunity to form relationships that are truly

color-blind before questions of difference are even present. As Justice Scalia suggested in his dissent in *Grutter*, these values are not so much "taught" as "learned." *Id.* at 347. See Point I, *supra*. That the lesson is learned primarily from experience does not make it any less a legitimate part of the K-12 educational mission. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Bethel Sch. Dist. No. 403*, 478 U.S. at 683. While the educational benefits of integrated education are not identical to those that flow from a diverse student body at a university, they are no less real.[13]

Moreover, that a school board opts not to run a competitive, Harvard-style admissions process does not makes its own student assignment plan a quota. The danger of a quota, or "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups,'" is not present here, since the assignment plans do not reserve a fixed number of slots for any school, and thus no student is insulated from competition with students of other races. *Grutter*, 539 U.S. at 334-35 (quoting *J.A. Croson Co.*, 488 U.S. at 496 (plurality opinion)). In the plans here, flexibility is shown in other ways, for example, through consideration of

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13. The *PICS* Petitioner also argues, Pet. Br. at 30, 37, that the Seattle plan is no more than racial balancing because it does not consider ethnicity. But whether advancing a school board's educational goals requires it to take active steps to consider any particular ethnicity, in addition to or instead of race, can only be determined by the board itself, in assessing the history, demographics, residential patterns, politics, and culture of the locality, among other factors that inform how it defines its mission. *See* Point II, *supra*. Moreover, Petitioner ignores the fact that U.S. Department of Education regulations administering the MSAP also do not differentiate among different ethnicities in defining "minority group isolation." *See* 34 C.F.R. § 280.4(b) (defining "minority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of the school").

students' own rankings of their school preferences, sibling preferences, geographical preferences, or by limiting consideration of race to oversubscribed schools or to certain grades.

The *PICS* Petitioner confuses this flexibility with underinclusiveness, pointing to the fact that race is only considered in the Seattle Plan with respect to oversubscribed schools. *See* Pet. Br. at 40. But it is the province of the school board whether to design a plan that balances, as Seattle's did, the district's integration goals, student choice, and family cohesion and convenience. Such a plan shows flexibility, not insincerity, and while it may reduce racial isolation to a more limited degree, that does not make it unconstitutional. *See Penick*, 443 U.S. at 482 n.2 (Powell, J., dissenting) ("an integrated system does not mean that '*every school* must in fact be an integrated unit'" (quoting *Keyes*, 413 U.S. at 227)); *Crawford*, 551 P.2d at 31 ("We have learned that the fastest path to desegregation does not always achieve the consummation of the constitutional objective; it may instead result in resegregation. In the absence of an easy, uniform solution to the desegregation problem, plans developed and implemented by local school boards, working with community leaders and affected citizens, hold the most promising hope for the attainment of integrated public schools in our state.").

2. The proposed race-neutral alternatives are not required by law.

The *PICS* Petitioner further argues that the Seattle plan is not narrowly tailored because there are viable alternatives to achieve the same educational benefits, such as consideration of socioeconomic status in lieu of race, or expansion of specialized school programs. Pet. Br. at 40-43. A school district should generally consider viable alternatives to race in its efforts to promote diversity and to create a teaching environment in which students will learn tolerance and appreciation for the differences of others. Petitioner's argument, however, misses the mark. First, the district court found that race-neutral alternatives would not allow the School District to meet its goals of racial diversity. *See PICS*,

426 F.3d at 1188-89. Second, Petitioner fails to recognize that relying upon another characteristic as a clumsy proxy for race not only risks potentially undesirable stereotypes, but it is also unnecessary. If a racially balanced school system is a legitimate goal for school districts to pursue, they must be permitted to make school assignments in a manner that will allow this goal to be achieved. *See Comfort*, 418 F.3d at 219 (Boudin, C.J., concurring).[14]

Third, Petitioner ignores the possibility that a school board may find it inconsistent with its educational mission to establish specialized programs at any particular school. In *Grutter*, this Court recognized that courts should not second-guess the educational benefits that educators have determined to be important, holding that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." 539 U.S. at 339-40. The reasons to respect a school district's educational judgments are just as compelling here. See Point II, *supra*. Even when it acts to remedy de jure segregation, a federal court has limited authority to make substantive policy decisions in the realm of public education. *See, e.g., Jenkins*, 515 U.S. at 112-13 (O'Connor, J., concurring). The Court has emphasized this bounded role, and has "specifically admonished" courts to "'take into account the interests of state and local authorities in managing their own affairs.'" *Id.* at 113 (citation omitted). Although federal courts have the remedial authority to address a constitutional violation, they may not substitute their own judgment for that of local school districts. *Id.* at 98-99. Courts should leave the administration of these

14. Nor is the federal magnet school program, touted by the United States as a preferred race neutral alternative, truly that. *See* U.S. Br. in *PICS* at 25-27. The MSAP considers race at the outset, in deciding which schools to fund. *See* 34 C.F.R. § 280.2(b)(2). Moreover, in authorizing a funded magnet school to consider race in student admission to implement its desegregation plan, *see* 20 U.S.C. § 7231d(b)(2)(C)(ii), Congress implicitly recognized that sometimes consideration of race is necessary for a magnet school to effectuate the program's goal of reducing racial isolation.

plans to "those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable." *PICS*, 426 F.3d at 1196 (Kozinski, J., concurring). "An integrated school experience is too important to the nation's children for this Court to jeopardize the opportunity for such an experience by constructing obstacles that would discourage school officials from voluntarily undertaking creative programs." *Higgins v. Bd. of Educ.*, 508 F.2d 779, 795 (6th Cir. 1974).

3. The assignment plans do not impose an undue burden on any student.

A K-12 student assignment plan does not impose an undue burden on students whenever they are denied admission to their first choice school, as Petitioner suggests. *See PICS* Pet. Br. at 45. In assessing the constitutionality of a school board's measures to promote integration, a significant factor is the burden placed on students and their families. Any burden must be reasonable and equitably distributed among students of all races. *See, e.g., Valley v. Rapides Parish Sch. Bd.*, 702 F.2d 1221, 1228-29 (5th Cir. 1983); *United States v. Hendry County Sch. Dist.*, 504 F.2d 550, 554 (5th Cir. 1974). Where, as here, the schools in the district provide a comparable education, admission to a school is not based on competitive criteria, and all students have a choice to attend a school in their neighborhood, any burden from a race-conscious integration plan is minimal, and not constitutionally cognizable.[15] Students have no constitutional right to attend a particular school. *See, e.g., Bustop, Inc.*, 439 U.S. at 1383; *McDaniel*, 402 U.S. at 42. And in contrast to the use of race to segregate students, racial integration benefits all students, regardless of race. "That a

15. *See Bakke*, 438 U.S. at 300 n.39 (Powell, J.) (finding the denial of admission to medical school to be "wholly dissimilar" to the position of a student bused to a comparable school in another neighborhood in the K-12 context: "Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education").

student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability." *PICS*, 426 F.3d at 1194 (Kozinski, J., concurring). And importantly, to the extent there is a burden at all, it is not imposed disproportionately on students of any one race. *Id.* at 1191.

4. The assignment plans are subject to periodic review.

The *PICS* Petitioner argues that the Seattle assignment plan is not narrowly tailored because there is no sunset provision. *See* Pet. Br. at 46. But both the Louisville and Seattle plans are subject to periodic review. Similar review was held to be sufficient to uphold the constitutionality of the Michigan Law School's student admissions policy in *Grutter*. *See* 539 U.S. at 342. Moreover, unlike with competitive university admissions or other forms of affirmative action, the choice plans here are self-limiting. Race is considered only as long the schools are not integrated, and it is not possible to consider race beyond the point at which it is needed to achieve integrated schools.

CONCLUSION

For the foregoing reasons, the judgments of the United States Courts of Appeals for the Sixth and Ninth Circuits upholding the constitutionality of the Louisville and Seattle student assignment plans should be affirmed.

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PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Ninth And Sixth Circuits

BRIEF OF 19 FORMER CHANCELLORS OF THE UNIVERSITY OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are nineteen former Chancellors from all ten campuses of the University of California ("University" or "UC"). *Amici* file this brief wholly in their individual capacities and not on behalf of the UC system, its administration, or its governing board.[1]

With over 150 years of collective experience at the helm of major universities, plus three times as many years as teachers and scholars in various disciplines, *Amici* speak in one voice from three perspectives in this brief. First, *Amici* are educators with professional expertise on the learning environments conducive to fostering high achievement and citizenship for a diverse society. Second, *Amici* are former university presidents committed to ensuring excellence and diversity in the pipeline of students entering higher education from the K-12 system. Achieving diversity of many kinds, including racial diversity, is essential to the mission of UC. Third, *Amici* are statewide leaders who were responsible for large public institutions that serve not only as premier teaching and research centers, but also as major employers, landowners, and engines of economic growth. From the day-to-day work of managing their institutions, *Amici* know that the strength of UC, the state, and the Nation depend on the stability and prosperity of our multiracial society.

SUMMARY OF ARGUMENT

Throughout our history, the Nation has absorbed a multitude of cultures and traditions while striving to unite our people in a common commitment to liberty, tolerance, and mutual respect. Nowhere is this more evident than in California, where citizens and their leaders grapple daily with the challenges presented by an increasingly multiracial society. As this Court has often said, racial prejudice

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[1] Letters of consent have been filed with the Clerk of the Court. *Amici* affirm that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *Amici* made a monetary contribution to the preparation or submission of this brief.

and stereotypes distort the proper functioning of our democracy and undermine equality of opportunity. Thus the University of California, like the state and the Nation, has an immense stake in public policies that build harmony and mutual respect among our diverse citizenry.

Racially integrated public schools enhance the stability and cohesion of our democracy by exposing children of all races to cultures and perspectives different from their own. Integrated schools also increase the likelihood that young people will live and work together across racial lines as adults. The salutary effects of integrated education are confirmed by the experiences of multiethnic societies throughout the world.

Yet these vital benefits are too rarely achieved, especially in California, because our schools are, to a significant degree, racially segregated. Many districts with entrenched patterns of residential segregation cannot create integrated schools without limited consideration of race in student assignment. Given the regrettable history of efforts to use public schools as instruments of racial division and subordination, it should now be cause for approbation, not reproach, that some communities voluntarily seek to promote tolerance and equal citizenship by integrating their public schools. Accordingly, *Amici* urge this Court to uphold a simple principle with great import to California and the Nation: Local communities, applying their educational judgment through democratic means, may use race as a limited factor in school assignment to create or maintain racially integrated schools.

Moreover, as this Court recently held, it is critically important that selective universities like UC educate a racially diverse set of leaders for our pluralistic society. This compelling interest cannot be achieved – especially in California, where state law prohibits race-conscious affirmative action in university admissions[2] – without

[2] *See* Cal. Const. art. I, § 31 ("Proposition 209"). *Amici* express no view on the applicability of Proposition 209 to voluntary K-12 integration plans. The issue is presently unsettled in light of school districts'

serious efforts to level the playing field in K-12 education for minority students. Black and Latino students are significantly underrepresented in UC compared to their statewide K-12 enrollment, and they are far less likely to be UC-eligible than white and Asian students when they graduate from high school. These disparities stem in large part from the disproportionate concentration of black and Latino students in racially isolated, inferior schools.

The educational disadvantages of attending a racially segregated school are well-documented. In particular, public schools with high black or Latino concentration have serious difficulty attracting and retaining high-quality teachers, and this problem is directly related to the racial make-up of schools *independent* of other factors such as teacher salaries, school poverty, or student achievement. The lack of high-quality teachers means that racially isolated black or Latino schools often do not have the informal networks, counseling resources, and climate of high expectations that facilitate college access. Thus it is no accident that black and Latino students who gain access to UC disproportionately come from majority-white high schools. Unless school districts have latitude to pursue effective strategies, including voluntary integration, that improve educational opportunities for black and Latino students, institutions of higher education cannot achieve their mission of educating leaders who genuinely

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concurrent obligation under California's equal protection clause to alleviate *de facto* racial segregation. *See Crawford v. Bd. of Educ.*, 551 P.2d 28, 39 (Cal. 1976); *see also* Cal. Const. art. I, § 7(a) (prohibiting court-ordered busing to remedy *de facto* segregation but providing that "[n]othing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan"). State courts that have examined the validity of race-conscious integration plans under Proposition 209 have reached varied results. *Compare Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002) (invalidating high school policy barring a white student from transferring out until a white student transfers in) *with Avila v. Berkeley Unified Sch. Dist.*, No. RG03-110397, 2004 WL 793295 (Cal. Super. Ct. Apr. 6, 2004) (upholding limited use of race as one of many factors in assigning students to racially diverse schools).

reflect the increasing racial and ethnic diversity of California and the Nation.

ARGUMENT

I. RACIALLY INTEGRATED PUBLIC SCHOOLS STRENGTHEN THE FABRIC OF OUR DIVERSE DEMOCRACY BY PROMOTING TOLERANCE, COOPERATION, AND MUTUAL RESPECT.

California is the largest and most racially diverse state in the Nation. In 2004, the state's population was 12% Asian, 6% black, 35% Latino, and 45% white. "An exceptional feature of California is that ethnic diversity is not isolated to one particular city or region. With the exception of the two least populated regions in the state, every region of California is more racially and ethnically diverse than the nation as a whole."[3] This dynamic pluralism presents enormous opportunities for enriching our culture, politics, and economy. It also presents significant challenges for citizens and policymakers in combating stereotypes, promoting cooperation, and ensuring equality of opportunity.[4] For this reason, California has an immense stake in the broad availability of policy options for building "the harmony and mutual respect among all citizens that our constitutional tradition has always

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[3] Hans P. Johnson, *A State of Diversity: Demographic Trends in California's Regions*, CAL. COUNTS: POPULATION TRENDS & PROFILES, May 2002, at 1, 11.

[4] *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 502-03 (2005) (racial conflict in California prisons); *Lopez v. Monterey County*, 525 U.S. 266, 274 (1999) (retrogression of Latino voting strength in Monterey County); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1107-11 (9th Cir. 2004) (racially hostile workplace for blacks in Long Beach company); *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (racially hostile workplace for Koreans in San Diego company); *Choi v. Gaston*, 220 F.3d 1010, 1012 (9th Cir. 2000) (racial profiling of Asians by police in Anaheim); *Aguilar v. Avis Rent A Car Sys.*, 980 P.2d 846, 849-50 (1999) (racially hostile workplace for Latinos in San Francisco company); *People v. Durazo*, 124 Cal. App. 4th 728, 735-38 (2004) (racial profiling of Latinos by police in Camarillo, northwest of Los Angeles).

sought." *Grutter v. Bollinger*, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting).

The University of California has long dedicated itself to strengthening the fabric of our multiracial democracy. Through its core mission of teaching and research, UC strives to cultivate the habits of openness, inquiry, and tolerance essential to addressing the challenges presented by the state's growing diversity. In particular, the University's commitment to securing the educational benefits of a diverse student body is familiar to this Court. *See* Brief for Petitioner at 32-33, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811).

UC is comprised of ten campuses with 209,000 students and 170,000 faculty and staff. The long-term health of this complex enterprise and its base of public support depend on the stability and prosperity of California's multiethnic society. In preparing citizens to participate in our diverse democracy, UC is part of a broader "educational system [that] liberates and sustains our capacity to live together." JOINT COMM. FOR REVIEW OF MASTER PLAN FOR HIGHER EDUC., CAL. LEGISLATURE, CALIFORNIA FACES . . . CALIFORNIA'S FUTURE: EDUCATION FOR CITIZENSHIP IN A MULTICULTURAL DEMOCRACY ii (1989). Within this system, the central institution on which UC and the state rely – not only to prepare students for higher education[5] but also "to forge a creative and productive society of mutual respect and accommodation," *id.* at 7 – is the public school.

Despite the richness of the state's diversity, too few students actually experience this diversity in public schools. As discussed below, K-12 schools throughout the state are racially segregated, depriving students of essential opportunities to develop interracial friendships, to combat stereotypes, and to learn perspectives and traditions different from their own. As Judge Kozinski observed:

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[5] *See* Part II, *infra*.

> The reality is that attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact successfully with individuals who are very different from oneself. It is important for the individual student, to be sure, but it is also vitally important for us as a society.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc) (Kozinski, J., concurring). *Amici* respectfully urge this Court to affirm a simple principle with great import to California and the Nation: Local communities, exercising their educational judgment through democratic means, may use race as a limited factor in school assignment to create or maintain integrated schools that prepare students for effective citizenship in our pluralistic society.

A. Interracial harmony and mutual respect are essential to the proper functioning of our democracy.

As this Court has often noted, irrational prejudice and stereotypes distort the proper functioning of our democratic system. Ensuring fair participation by minority groups is a matter of constitutional concern not simply because a minority group, by definition, lacks majority power. *Cf. Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003) ("'minority voters are not immune from the obligation to pull, haul, and trade to find common political ground'" (citation omitted)). Rather, it is because "*prejudice* . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added). Over many years, in a variety of contexts, this Court has made clear that animus, bias, and stereotypes have no place in the proper working of democracy. *See Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). "If our society

is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

This backdrop of constitutional principle underscores the imperative of providing our young people with opportunities to learn and work across racial lines. Public schools are uniquely important in this regard, for they are "the most powerful agency for promoting cohesion among a heterogeneous democratic people." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948). Not only do public schools serve as "a principal instrument in awakening the child to cultural values," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), but the values they transmit are sanctioned by the state. For more than a century after the Nation ratified the promise of equal citizenship, many states and local communities used public schools to perpetuate notions of racial inferiority. California is no stranger to this history.[6] Given this regrettable past, it should now be cause for approbation, not reproach, that some communities voluntarily seek to promote tolerance and equal citizenship by creating integrated schools.

In public schools no less than in selective universities, the educational and social benefits of racially integrated schooling "are not theoretical but real." *Grutter*, 539 U.S. at 330. Ample research confirms that interracial contact can reduce prejudice and stereotypes and improve race relations.[7] This is especially true when interracial contact

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[6] *See, e.g., Diaz v. San Jose Unified Sch. Dist.*, 733 F.2d 660 (9th Cir. 1984) (en banc) (*de jure* Latino segregation); *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (same); *Spangler v. Pasadena City Bd. of Educ.*, 311 F. Supp. 501 (C.D. Cal. 1970) (*de jure* black segregation); *Ward v. Flood*, 48 Cal. 36 (1874) (same); *Wong Him v. Callahan*, 119 F. 381 (N.D. Cal. 1903) (*de jure* Chinese segregation).

[7] *See, e.g.*, Christopher Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 SOC. SCI. Q. 385 (1994); Mary R. Jackman & Marie Crane, "*Some of my best*

occurs early in life because "[t]he early school years are crucial for the formation of the child's own racial identity as well as an understanding of prejudice and fairness."[8] Indeed, greater interracial contact in school is associated with increased racial tolerance and friendship for both white and minority children,[9] especially when schools engage students in cooperative learning.[10]

The habits of racial tolerance that children develop in integrated schools enhance their likelihood of living integrated lives as adults. Black students who attend schools with higher white enrollment are more likely to enroll in majority-white colleges, to work in mixed-race settings, to live in integrated neighborhoods, and to have white friends.[11] Similarly, white and Latino students who

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friends are black . . . ": Interracial Friendship and Whites' Racial Attitudes, 50 PUB. OPINION Q. 459 (1986).

[8] Susanne E. Dutton et al., *Racial Identity of Children in Integrated, Predominantly White, and Black Schools*, 138 J. SOC. PSYCHOL. 41, 42 (1998).

[9] *See* Dutton et al., *supra*, at 48; Richard R. Scott & James M. McPartland, *Desegregation as National Policy: Correlates of Racial Attitudes*, 19 AM. EDUC. RES. J. 397, 412-13 (1982); Charles S. Bullock III, *Contact Theory and Racial Tolerance Among High School Students*, 86 SCH. REV. 187, 210-13 (1978).

[10] *See* Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. SOC. ISSUES 45, 59 (1985) (concluding based on a review of nineteen studies that "when students work in ethnically mixed cooperative learning groups, they gain in cross-ethnic friendships"). Of course, the assignment of students to racially diverse schools does not by itself guarantee positive outcomes. But teachers and school officials can play important roles in structuring the pedagogical conditions that foster diversity's educational benefits. *See* Janet Ward Schofield, *Fostering Positive Intergroup Relations in Schools*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 799, 802-08 (James A. Banks & Cherry A. McGee Banks eds., 2004).

[11] *See* Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994).

attend more integrated schools are more likely to work in mixed-race environments,[12] and they are more inclined to live in diverse neighborhoods, to have friends of other races, and to work to improve race relations.[13] Among college freshmen of all races, the most significant determinant of perceived social distance from other races is the degree of segregation in the schools they attended while growing up.[14]

The patterns of interaction fostered by integrated schools strengthen our diverse democracy. Racially integrated workplaces are often important sites of cooperation, trust, and communication. *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 69-76, 105-24 (2003). The same is true of voluntary associations. *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 117 (Phillips Bradley ed., Knopf 1954) (1835). Networks that "encompass people across diverse social cleavages" build the social capital necessary "[to solve] our biggest collective problems." ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22, 363 (2000). If we

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[12] *See* William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255, 256-57 (1997); Marvin P. Dawkins et al., *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites, and Hispanics*, 31 INT'L J. CONTEMP. SOC. 273, 279-80 (1994).

[13] *See* 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 110-13 (1967); 2 *id.* at 211-41; Michal Kurlaender & John T. Yun, *Fifty Years After* Brown: *New Evidence of the Impact of School Racial Composition on Student Outcomes*, 6 INT'L J. EDUC. POL'Y, RES. & PRACTICE 51, 58, 62-63 (2005); *cf.* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 353 (2002) (interracial contact in college is positively associated with citizenship engagement and racial/cultural engagement for Asian, black, Latino, and white students).

[14] *See* DOUGLAS S. MASSEY ET AL., THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES 171-74 (2003).

hope for a society where race is not a barrier to political cooperation and mutuality, *see Georgia v. Ashcroft*, 539 U.S. at 481, 490-91, then few imperatives can be more compelling than creating racially integrated schools.

B. California public schools are highly segregated, depriving students of critical opportunities to develop interracial understanding and mutual respect.

Given the societal importance of integrated schools, it is troubling that California, which educates one of every eight children in the United States, has many of the most segregated schools in the Nation. In 2003-04, California's public school enrollment was 11% Asian, 8% black, 47% Latino, and 33% white. Yet "California is now a national leader in isolation for both blacks and Latinos." GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 26 (2006). Forty-seven percent of Latinos and 38% of blacks attended intensely segregated schools with 90% to 100% minority enrollment in 2003-04. *See id.* at 28 tbl.12. Nearly one-fourth of California public schools have 80% or higher single-race enrollments; indeed, 36% of Latino students attend schools with 80% or greater Latino enrollment.[15]

White students, too, are highly segregated. "Although Whites are a minority in every region of the State except the northernmost counties, Whites in every region are concentrated in schools with majority-white populations." JEANNIE OAKES ET AL., SEPARATE AND UNEQUAL 50 YEARS AFTER *BROWN*: CALIFORNIA'S RACIAL "OPPORTUNITY GAP" 2 (2004). Whites comprise only one-third of California's student population, but nearly two-thirds of whites attend majority-white schools. *See id.* at 15. Thus, most white

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[15] These data are tabulated from the California Department of Education, California Basic Educational Data System, Enrollment by Ethnic Group and School 2004-05, http://www.cde.ca.gov/ds/sd/cb/filesethsch.asp.

students in California are educated in a demographic context that does not resemble the majority-minority society where they will live and work.

Moreover, only 34% of white students and 26% of Latinos, compared to 55% of Asians and 55% of blacks, attend a "multiracial" school, defined as a school where each of three or more racial groups has at least 10% enrollment. *See* ORFIELD & LEE, *supra*, at 15 n.26, 21 tbl.9. In sum, too few students have regular opportunities to develop the understanding and mutual respect that a strong multiracial democracy requires.

C. The limited use of race in student assignment is necessary to create and maintain racially diverse schools.

Housing segregation plays a key role in structuring school segregation. Nevertheless, California school districts have "the authority to maintain appropriate racial and ethnic balances among their respective schools at the school districts' discretion or as specified in applicable court-ordered or voluntary desegregation plans." Cal. Educ. Code § 35160.5(b)(2)(A). Where districts have exercised this authority, experience shows that the limited use of race in student assignment is necessary to create and maintain racially diverse schools.

Perhaps the most instructive example is the desegregation and resegregation of San Francisco Unified School District under a consent decree from 1983 to 2005. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 413 F. Supp. 2d 1051, 1052-63 (N.D. Cal. 2005) (reviewing litigation history). The consent decree was adopted at a time when single-race enrollment exceeded 50% at two-thirds of the district's elementary schools, even though the largest racial group (whites) made up only 34% of total enrollment. *See id.* at 1053 ("There were 29 white schools, 23 black schools, four Hispanic schools and seven Chinese schools [in 1970]."). The 1983 decree sought to eliminate this pattern by limiting the concentration of any racial group at a given school. From 1983 to 1997, "this goal was

realized." *Id.* at 1055. "At the apex of integration [in 1997-98], . . . only one school [out of 122 in the district] enrolled more than fifty percent of a single race/ethnicity." *Id.*

In 1999, however, as a result of a lawsuit challenging the limits on single-race school enrollment, the 1983 decree was modified to eliminate race as a factor in student assignment. *See id.* at 1055-58. In 2001, the district introduced a parental choice system that assigned students based in part on "a 'diversity index' taking into account socioeconomic status, academic achievement, English-language learner status, mother's educational background, academic performance at the student's prior school, home language and geographic areas." *Id.* at 1058. The consequences of this race-neutral assignment method were swift and dramatic: While less than 1% of schools had a single-race enrollment exceeding 50% in 1997-98, "[s]ix years later, this number has climbed back up to 35 percent," and "over one in three San Francisco public schools is resegregated." *Id.* at 1059. In a district with 43% Asian, 14% black, 22% Latino, and 9% white enrollment, forty-three schools had a single-race enrollment of 60% or higher at one or more grade levels in 2004-05. *See id.* at 1059, 1069. In November 2005, U.S. District Judge William Alsup terminated the consent decree, concluding that "[t]he current student-assignment system based on the diversity index . . . has in fact allowed, if not caused, resegregation of the school district." *Id.* at 1071.[16]

Although the diversity index applies only to schools that are oversubscribed, it is clear that the index, even if applied to all schools, would result in substantial resegregation. The reason is that the socioeconomic diversity generated by the index has limited congruence with racial diversity. Thus, many schools deemed highly "diverse" by the diversity index are among the most severely resegregated by

[16] The index, though no longer compelled by decree, remains in effect as the school board examines other options, including the limited use of race, to achieve integrated schools. *See* Jill Tucker, *City School Assignment Plan Stuck*, S.F. CHRON., Aug. 22, 2006, at B1.

race. In 2003, the state-appointed consent decree monitor reported that "for a very large percentage of the most severely resegregating incoming classes, the diversity index shows that the schools are projected to be among the most diverse, and yet the racial/ethnic enrollments show that the schools are projected to be among the least diverse with regard to race." Report No. 20 of Consent Decree Monitoring Team 2002-2003, at 33, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, No. C78-1445-WHA (N.D. Cal. July 31, 2003).

School assignment policies based on socioeconomic diversity are unlikely to achieve substantial racial diversity not only in San Francisco but in urban districts throughout California and the Nation. *See* Sean F. Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVAL. & POL'Y ANALYSIS 49 (2006). The reason is twofold. First, race and poverty are only loosely correlated; in a given district, many whites are poor while many minorities are not. *See id.* at 57-58 & fig.1. Second, the vast majority of U.S. cities with high residential segregation by race have relatively lower within-race residential segregation by income. *See id.* at 64 & fig.5.[17] Assuming a general preference for neighborhood schools, these facts mean that income-based diversity policies will most likely produce school assignment patterns that mirror residential patterns of racial segregation. *See id.* at 64-66. In other words, a policy of socioeconomic integration that

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[17] Among 228 major U.S. cities with at least 5% black population, the average level of black-white residential segregation in 2000 was nearly three times the average level of within-race segregation by income. *See* Reardon et al., *supra*, at 64. This finding confirms other research. *Compare* John R. Logan et al., *Segregation of Minorities in the Metropolis*, 41 DEMOGRAPHY 1, 6-7 (2004) (measuring residential segregation by race using index of dissimilarity) *with* Douglas S. Massey & Mary J. Fischer, *The Geography of Inequality in the United States, 1950-2000*, *in* BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 1, 6-13 (2003) (measuring within-race segregation by income using index of dissimilarity).

ignores race will tend to mix poor children with nonpoor children *within racially segregated neighborhoods*. The resulting schools will be socioeconomically diverse *within* racial groups but still segregated *across* racial groups.[18]

The resegregation of the San Francisco school district stands in contrast to the stable integration achieved by the limited use of race in Berkeley Unified School District. For four decades, Berkeley Unified has sought to enroll in each school a mix of children from the mostly white eastern hillside and the mostly black and Latino western flatlands. Under a controlled choice plan in effect from 1995 to 2003 and upheld under the state constitution, *see Avila v. Berkeley Unified Sch. Dist.*, No. RG03-110397, 2004 WL 793295 (Cal. Super. Ct. Apr. 6, 2004), the district assigned students to schools within three demographically diverse attendance zones. In each zone, parents' choices were considered in light of space availability, school of previous attendance, sibling enrollment, and the student's residence, socioeconomic status, and race. For each school, the district sought, but did not mandate, an enrollment of each major racial group within five percentage points of its citywide share. In 2004, the district adopted a new choice plan that computes a composite diversity score for each student based on the household income, parental educational level, and racial composition of the student's immediate neighborhood. The plan combines parents' choices with sibling priority and the diversity scores to produce schools with a socioeconomic and racial composition within five to ten percentage points of the attendance zone demographics.[19]

The use of race as one of many factors in school assignment has helped to maintain racially integrated

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[18] *Amici* agree that socioeconomic integration has independent social and educational value. *See infra* note 26 and accompanying text. But it is no substitute for the role of racial integration in combating racial prejudice and racial stereotypes.

[19] *See* Berkeley Unified School District, BUSD Student Assignment Plan/Policy, http://www.berkeley.k12.ca.us/student_assign.html.

schools throughout Berkeley. In 2005-06, the district's student population was 7% Asian, 31% black, 17% Latino, and 29% white.[20] At nine out of fifteen elementary and middle schools, where almost two-thirds of all students were enrolled, three or all four major racial groups had enrollments within five percentage points of their districtwide shares.[21] Out of sixteen schools in the district, only one had a single-race enrollment exceeding 40%. The controlled choice system has achieved a similar pattern of school integration for each of the past five years. Developed with broad community support, the Berkeley policy offers a model of "a race-conscious school assignment plan that seeks to provide all students with the same benefit of desegregated schools." *Avila*, 2004 WL 793295, at *3.

D. The experiences of other nations confirm the importance of integrated education to strengthening the stability and cohesion of a diverse democracy.

Diverse communities in the United States are not alone in seeking to create integrated schools where children learn to transcend lines of social division. In Northern Ireland, the government in 1989 established a statutory framework to facilitate the voluntary development of integrated schools enrolling Protestant and Catholic schoolchildren. *See* The Education Reform (Northern Ireland) Order, 1989, SI 1989/2406 (N. Ir. 20), pt. VI; Seamus Dunn, *Integrated Schools in Northern Ireland*, 15 OXFORD REV. EDUC. 121 (1989). Under this framework, parents in fifty-six communities throughout Northern Ireland have voted to establish publicly funded

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[20] The data in this paragraph are available from the California Department of Education at http://data1.cde.ca.gov/dataquest/ [hereinafter CDE DataQuest].

[21] Because Berkeley Unified has only one high school, the school assignment policy does not apply there. In 2005-06, the racial composition of Berkeley High – 7% Asian, 31% black, 12% Latino, 35% white – was representative of the district. *See id.*

integrated schools with enrollment targets for religious balance. *See* TONY GALLAGHER ET AL., INTEGRATED EDUCATION IN NORTHERN IRELAND: PARTICIPATION, PROFILE AND PERFORMANCE 2 (2003).[22]

"Research appears to overwhelmingly support a positive effect of integrated education [in Northern Ireland] on sectarian attitudes." Claire McGlynn et al., *Moving Out of Conflict: The Contribution of Integrated Schools in Northern Ireland to Identity, Attitudes, Forgiveness and Reconciliation*, 1 J. PEACE EDUC. 147, 157 (2004) (reviewing empirical literature). Integrated schools promote intergroup contact, leading to more positive attitudes toward other groups, higher rates of cross-community friendships, and a greater willingness to live and work in mixed settings. *See* COLIN IRWIN, EDUCATION AND THE DEVELOPMENT OF SOCIAL INTEGRATION IN DIVIDED SOCIETIES 41-66 (1991); Carol McClenahan et al., *Intergroup Friendships: Integrated and Desegregated Schools in Northern Ireland*, 136 J. SOC. PSYCHOL. 549 (1996); Dirk Schubotz & Gillian Robinson, *Cross-Community Integration and Mixing: Does It Make a Difference?*, RES. UPDATE (N. Ir. Soc. & Pol. Archive), Apr. 2006. The impact of schooling relative to parental influence in shaping attitudes toward other groups is especially significant for students attending integrated schools. *See* McGlynn et al., *supra*, at 155; Schubotz & Robinson, *supra*, at 2.

Similar efforts are found in Israel, where integration of Western and Middle Eastern children[23] in public schools has created opportunities for interethnic contact and thereby cultivated more tolerant attitudes. *See* Aharon

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[22] Updated data are available from the Department of Education of Northern Ireland, Integrated Schools, http://www.deni.gov.uk/index/85-schools/10-types_of_school-nischools_pg/16-schools-integratedschools_pg.htm.

[23] Western children are those whose families immigrated to Israel from Europe, North and South America, Australia, and South Africa. Middle Eastern children are those whose families come from countries such as Egypt, Iraq, Iran, Syria, Yemen, Morocco, and Tunis.

Bizman & Yehuda Amir, *Integration and Attitudes*, *in* SCHOOL DESEGREGATION: CROSS-CULTURAL PERSPECTIVES 155, 168 (Yehuda Amir & Shlomo Sharan eds., 1984) (reviewing empirical literature and concluding that "in Israeli schools the very fact of integration creates greater willingness on the part of both groups to live together and maintain various kinds of interaction"). Even in South Africa, where the fresh legacy of apartheid has perpetuated racial conflict in public education, there are signs that integrated schools, with appropriate democratizing reforms, are helping to foster interracial communication, tolerance, and understanding. *See* Clive Harber, *Desegregation, Racial Conflict and Education for Democracy in the New South Africa: A Case Study of Institutional Change*, 44 INT'L REV. EDUC. 569, 572-80 (1998).

Of course, the origins and severity of social conflict differ from one society to the next. But the basic societal challenge of building cohesion and mutual respect is largely the same. Our Nation offers the world the example of a constitutional tradition that deeply values the eradication of racial prejudice and stereotypes. Progress toward this goal is critically dependent on the education our children receive in the public schools. So long as education remains "the very foundation of good citizenship," *Brown*, 347 U.S. at 493, local communities must have effective policy options, including the limited use of race in school assignment, to create racially integrated schools that prepare students to live together in our increasingly diverse democracy.

II. INTEGRATED PUBLIC SCHOOLS ENHANCE MINORITY ACCESS TO HIGHER EDUCATION AND CULTIVATE DIVERSE LEADERS FOR OUR DIVERSE DEMOCRACY.

Three years ago, this Court affirmed the compelling importance of educating a racially diverse group of leaders for our increasingly heterogeneous society. *See Grutter*, 539 U.S. at 332. Like the university in *Grutter*, UC aims to provide a "training ground for . . . our Nation's leaders"

that is "inclusive of talented and qualified individuals of every race and ethnicity." *Id.*[24]

University admission policies play a critical role in cultivating diverse leaders for the Nation. However, since 1996, state law has barred UC from using race-conscious affirmative action. *See* Cal. Const. art. I, § 31. This prohibition has underscored the reality that UC cannot enroll a student body that truly reflects California's racial diversity without serious efforts to level the playing field in K-12 education.[25] The assertion that "[f]or the last ten years, California school districts have been providing equal educational opportunities to all its K-12 public school students," Br. of *Amicus Curiae* Pacific Legal Foundation at 26, is simply false. As discussed below, black and Latino students throughout California are disproportionately concentrated in racially segregated, inferior schools. As a result, they are far less likely to attend UC than their white and Asian peers. By reducing the racial isolation of black and Latino students, voluntary integration plans enhance college access and further the compelling interest in educating diverse leaders for our diverse democracy.

A. UC's commitment to excellence and diversity cannot be sustained without improved K-12 education for underrepresented minority students.

Since its founding in 1868, the University has dedicated itself to both excellence and diversity. The state law

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[24] The University's undergraduate alumni include Chief Justice of the United States Earl Warren, U.S. Circuit Judge Alex Kozinski, U.S. District Judge Thelton Henderson, U.S. Senator Ted Stevens, U.S. Representative Bob Matsui, U.S. Attorney General William French Smith, Michigan Governor Jennifer Granholm, Los Angeles Mayor Antonio Villaraigosa, economist Michael Boskin, architect Julia Morgan, businessmen Richard Blum and Walter Haas, chef Alice Waters, and Nobel laureates Ralph Bunche and William Sharpe, among many others.

[25] In 2005, over 95% of all UC freshmen, 98% of black freshmen, and over 99% of Latino freshmen came from California high schools.

establishing UC sought to benefit "any scholar in the public schools of the State who shall distinguish himself in study" and instructed the Board of Regents "to so apportion the representation of students, when necessary, that all portions of the State shall enjoy equal privilege therein." An Act to Create and Organize the University of California, ch. 244, §§ 10, 14, 1868 Cal. Stat. 251, 254. In setting current policy for undergraduate admissions, the Regents have unanimously declared that "the University shall seek out and enroll, on each of its campuses, a student body that demonstrates high academic achievement or exceptional personal talent, and that encompasses the broad diversity of backgrounds characteristic of California." Regents of Univ. of Cal., Policy on Future Admissions, Employment, and Contracting; Resolution Rescinding SP-1 and SP-2 (2001).

To a large degree, the University has successfully implemented this policy. Admission to UC requires a strong academic record, typically evidenced by completion of rigorous coursework, high school grades, and test scores. Over time, admission has become increasingly competitive. For example, UC Berkeley admitted only one in five applicants in 2006, with average grades and test scores among admitted students in the top tenth percentile nationally. At the same time, over one-fourth of UC Berkeley's 23,000 undergraduates are the first in their families to attend college, and nearly one-third come from families earning $35,000 a year or less. In fact, UC Berkeley enrolls more low-income students who are eligible for federal Pell Grants than all Ivy League schools combined.[26]

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[26] The same is true of UCLA. In 2003-04, UC Berkeley had 7,840 Pell Grant recipients, UCLA had 9,686, and the eight Ivy League schools had 7,454 combined. The number and percentage of Pell recipients for each school are as follows: Brown (697, 12%), Columbia (1,122, 16%), Cornell (2,340, 17%), Dartmouth (535, 13%), Harvard (693, 7%), Princeton (349, 7%), Penn (1,174, 10%), Yale (544, 10%), UC Berkeley (7,840, 34%), and UCLA (9,686, 38%). *See* Institute for College Access and Success, Economic Diversity of Colleges Comparison Tool, http://www.economicdiversity.org/tool.php.

However, UC's enrollment has not kept pace with the state's changing diversity. In 2005-06, 8% of students in California public high schools were black and 43% were Latino, but only 3% of UC undergraduates were black and 14% were Latino. Given the state ban on race-conscious affirmative action, this underrepresentation of black and Latino students fundamentally reflects the unequal quality of K-12 education afforded to our schoolchildren. Among California public high school graduates, 16.2% of whites and 31.4% of Asians – but only 6.2% of blacks and 6.5% of Latinos – met UC eligibility requirements in 2003. *See* CAL. POSTSECONDARY EDUC. COMM'N, UNIVERSITY ELIGIBILITY STUDY FOR THE CLASS OF 2003, at 6 (2004). In fact, these data understate the problem, since UC eligibility rates do not take into account the massive racial disparities in rates of high school graduation. *See* HARV. CIVIL RIGHTS PROJECT, CONFRONTING THE GRADUATION RATE CRISIS IN CALIFORNIA (2005). As discussed below, these disparities stem in large part from the disproportionate concentration of black and Latino children in racially segregated and inferior schools.

B. Black and Latino students who attend segregated schools have diminished access to UC.

Part I.B, *supra*, described the racial isolation of black and Latino students in California public schools. Table 1 shows this pattern of isolation in various high schools throughout the state.[27] In Elk Grove Unified School District in Sacramento County, for example, the 2005-06 student population was 50% white and Asian and 41% black and Latino. Yet enrollment at Elk Grove High School was 71% white and Asian and 23% black and Latino, while Valley High School, a few miles away, was 29% white and Asian and 62% black and Latino. Similarly, in Long Beach Unified School District in Los Angeles County, the student

[27] The data in Table 1 are from CDE DataQuest, *supra*.

Table 1. Percent Enrollment by Race/Ethnicity, 2005-06

	White	Asian	Black	Latino
Elk Grove Unified (Sacramento County)	30.2	19.5	20.0	21.0
Elk Grove High	61.5	9.0	7.9	15.0
Valley High	7.2	22.1	35.2	26.7
Long Beach Unified (Los Angeles County)	16.9	8.9	18.1	50.1
Wilson High	33.2	11.7	15.4	36.4
Cabrillo High	2.7	2.5	21.5	61.8
Jordan High	3.5	6.8	27.5	55.0
San Diego Unified	25.6	8.7	13.9	43.5
La Jolla High	62.0	10.6	2.1	23.8
Gompers Secondary	1.4	8.6	26.0	61.1
Hoover High	3.3	13.2	14.9	67.3

body was 26% white and Asian and 68% black and Latino. Yet Wilson High was 45% white and Asian and 52% black and Latino, while Cabrillo High, on the other side of a freeway, was just 5% white and Asian and 83% black and Latino. Jordan High was also segregated, with 10% white and Asian and 83% black and Latino enrollment. Similar disparities are apparent in San Diego Unified School District.

The racial composition of public schools is strongly associated with the likelihood of gaining access to UC.[28] At majority-white La Jolla High in San Diego, for example, 50% of black graduates and 25% of Latino graduates in 2005 had completed the coursework required for UC eligibility, while only 17% of blacks and 11% of Latinos graduating from Gompers, and only 12% of blacks and 13% of Latinos from Hoover, had done so. Similarly, in Sacramento County, 49% of blacks and 65% of Latinos graduating from majority-white Elk Grove High, but only 15% of blacks and 10% of Latinos graduating from Valley High, had completed UC-required coursework. In Los

[28] The data in this paragraph are from CDE DataQuest, *supra*.

Angeles County, the UC coursework completion rate among Latinos was lower at Cabrillo High (8%) and Jordan High (14%), both majority-Latino schools, than at Wilson High (25%) where Latinos are less racially isolated.

The negative association between concentrated black and Latino enrollment and UC eligibility is confirmed by several statewide studies. A 2004 study found that black and Latino students in California who attend majority-white or majority-Asian public high schools have significantly higher rates of UC eligibility than their counterparts in majority-black or majority-Latino high schools. *See* Robert Teranishi et al., *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, 106 TEACHERS C. REC. 2224, 2234 tbl.3 (2004). Among Latino high school graduates in 2000, only 0.5% who attended majority-Latino schools and 1.2% in majority-black schools had completed UC-required coursework and taken the SAT, compared to 4.5% of Latino graduates in majority-white schools and 13.4% of Latinos in majority-Asian schools. *Id.* Among black high school graduates, 0.6% in majority-black schools and 1.5% in majority-Latino schools had completed UC-required coursework and taken the SAT, compared to 3.7% in majority-white schools and 17.8% in majority-Asian schools. *Id.*

Similarly, a 2005 study of California public high schools found that the percentage of graduates admitted to UC is negatively correlated with the percentage of blacks and especially Latinos in the student body. *See* Isaac Martin et al., *High School Segregation and Access to the University of California*, 19 EDUC. POL'Y 308, 318, 319 tbl.3 (2005). For Latinos, racial isolation in high school is strongly associated with low rates of completion of UC-required courses and low rates of application to UC. *Id.* at 319-22. For blacks, racial isolation is associated with low rates of admission among those who apply. *Id.*

These unequal rates of college access based on high school racial composition are evident in UC's undergraduate population. In 2000, only 22% of Latinos and 34% of blacks attended majority-white high schools across the state. But 53% of black and Latino freshmen at UC San Diego, 49% at UC Berkeley, and over 40% throughout the UC system came from majority-white high schools.[29] Among the twenty-five public high schools with the highest rates of UC admission in 1999, fourteen were majority-white and seven were majority-Asian; only one had majority black and Latino enrollment. *See* Isaac Martin et al., *Unequal Opportunity: Student Access to the University of California*, *in* UNIV. OF CAL. INST. FOR LABOR AND EMPLOYMENT, THE STATE OF CALIFORNIA LABOR, 2003, at 119, 145 (2003).[30]

The negative relationship between black and Latino racial isolation and college access is partly due to socioeconomic differences between less segregated and more segregated schools. But neither student poverty nor school-level poverty fully accounts for variation in educational outcomes by school racial composition. Minority students in less segregated high schools have greater college access than their peers from similar socioeconomic backgrounds who attend more segregated schools.[31] And

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[29] *See* Robert Teranishi & Tara Parker, Social Reproduction of Inequality: The Composition of Feeder Schools to the University of California 12-13 (2006), *available at* http://www.law.berkeley.edu/centers/ewi/research/TeranishiParker2006_AERJ_v2.pdf.

[30] For the racial composition of the top 25 schools identified by Martin et al., see CDE DataQuest, *supra*. Racially integrated high schools also supply a substantial share of the black and Latino students who attend elite colleges nationally. A study of fall 1999 freshmen in 28 of the Nation's most selective colleges, including Yale, Stanford, Columbia, Princeton, and UC Berkeley, found that 78% of Latino freshmen and 64% of black freshmen came from high schools with less than 50% black or Latino enrollment. *See* MASSEY ET AL., *supra*, at 94 tbl.5.4.

[31] *See* Julie E. Kaufman & James E. Rosenbaum, *The Education and Employment of Low-Income Black Youth in White Suburbs*, 14 EDUC. EVAL. & POL'Y ANALYSIS 229, 235 (1992); Jomills Henry Braddock

attending a less segregated school is associated with higher achievement, even after controlling for the family background of individual students and socioeconomic composition of the school.[32] The benefit of attending a school with lower black enrollment is especially significant for *high-achieving* black students.[33] Thus, the negative effects of segregation on black students fall most heavily on those with the greatest chance of admission to selective universities like UC.

C. Black and Latino students in segregated schools have diminished access to UC because segregated schools provide inferior educational opportunities.

The disadvantages of attending a segregated school are well-documented. Most importantly, the least qualified teachers are disproportionately found in schools with the highest minority enrollment. In 2004-05, 20% of teachers in California schools with over 90% minority enrollment were underprepared (lacked a full credential for their teaching assignment) or were novice teachers (in their first or second year of teaching) compared to only 11% of teachers in schools with 30% or lower minority enrollment. *See* CAMILLE E. ESCH ET AL., TEACHING AND CALIFORNIA'S FUTURE: THE STATUS OF THE TEACHING PROFESSION 2005, at 70-71 (2005). In the 500 California schools where 20% or more teachers were underprepared, average black and

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11, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 SOC. EDUC. 178, 183 (1980).

[32] *See* Eric A. Hanushek et al., New Evidence About *Brown v. Board of Education*: The Complex Effects of School Racial Composition on Achievement 14-15 (Oct. 2004), *available at* http://edpro.stanford.edu/hanushek/admin/pages/files/uploads/race.pdf; John F. Kain & Daniel M. O'Brien, Black Suburbanization in Texas Metropolitan Areas and Its Impact on Student Achievement 20-24 (Mar. 2000), *available at* http://www.utdallas.edu/research/tsp/pdfpapers/paper15.pdf.

[33] *See* Hanushek et al., *supra*, at 19-20, 24.

Latino enrollment was 74%, compared to 55% statewide. *Id.* at 63. The percentage of underprepared math and science teachers was four times greater in schools with over 90% minority enrollment (16%) than in schools with 30% or lower minority enrollment (4%). *Id.* at 74-76.

Table 2 shows the unequal levels of teaching experience in the public high schools listed in Table 1.[34] In Sacramento County, the average teacher at majority-white Elk Grove High had 4.5 more years of experience than the average teacher at Valley High, a predominantly black and Latino school. Novice teachers comprised only 6% of the staff at Elk Grove High, compared to 14% at Valley High. The same pattern is evident in Long Beach and San Diego. Given stable enrollments, these data show that teacher

Table 2. School Racial Composition and Teaching Experience, 2005-06

	% black or Latino	Average years of experience	% Novice teachers*
Elk Grove Unified (Sacramento County)			
Elk Grove High	22.9	15.4	5.8
Valley High	61.9	10.9	14.0
Long Beach Unified (Los Angeles County)			
Wilson High	51.8	14.7	7.2
Cabrillo High	83.3	10.6	14.9
Jordan High	82.5	12.9	12.3
San Diego Unified			
La Jolla High	25.9	17.7	6.0
Gompers Secondary	87.1	11.7	12.9
Hoover High	82.2	12.0	11.5

**Teachers in the first or second year of teaching*

[34] The data in Table 2 are from CDE DataQuest, *supra*.

turnover occurs at a much higher rate in heavily black and Latino schools, and that students in those schools are far more likely to be taught by inexperienced teachers. Because beginning teachers "perform significantly worse than more experienced teachers," Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417, 447 (2005), and because teacher turnover undermines school stability and effectiveness, *see* ESCH ET AL., *supra*, at 64, these disparities confirm the historical truth that racially segregated schools provide inferior opportunity.

Importantly, the maldistribution of experienced teachers is a function of school racial composition *independent* of other factors. Controlling for school poverty, teacher salaries, and other school and district characteristics, California teachers are more likely to transfer out of schools with higher black or Latino enrollment, and the odds that a newly hired teacher will be fully credentialed vary inversely with the proportion of blacks or Latinos in a school. *See* STEPHEN CARROLL ET AL., RAND, THE DISTRIBUTION OF TEACHERS AMONG CALIFORNIA'S SCHOOL DISTRICTS AND SCHOOLS 76, 114-15 (2000); *see also* Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80(3) PEABODY J. EDUC. 44, 61 tbl.5 (2005) (finding that majority black enrollment and majority black or Latino enrollment are significant predictors – net of school poverty, salaries, and working conditions – of California teachers reporting that turnover is a serious problem in their school).

Similarly, a 2004 study of Texas teachers found that higher teacher turnover is significantly correlated with higher black or Latino school enrollment after controlling for salaries, student test scores, and school poverty. *See* Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326, 343-50 (2004).[35] In addition, the

[35] Black and Latino teachers are an exception to this pattern; higher black and Latino enrollments tend to reduce turnover among black and Latino teachers, respectively. *See* Hanushek et al., *supra*, at 343, 345, 347.

study found "little evidence of an independent effect" of school poverty on teacher turnover when minority enrollment and other factors are taken into account. *Id.* at 343. A 2005 study of Georgia teachers likewise found that teachers are much more likely to leave schools with high black enrollment and, further, that high poverty and low test scores do not predict higher teacher turnover once black enrollment is taken into account. *See* Benjamin Scafidi et al., Race, Poverty, and Teacher Mobility 14-16 (2005), *available at* http://ssrn.com/abstract=902032. Consistent with the Texas study, the Georgia study concluded that, while "teachers are much more likely to leave high poverty schools," this "occurs because teachers are more likely to leave a particular type of poor school – one that has a large proportion of minority students." *Id.* at 16.

In sum, the *racial* make-up of a school – apart from other characteristics, including its socioeconomic composition – is a crucial determinant of student access to the most important educational resource that schools can provide: good teachers.[36]

The lack of high-quality teachers in racially segregated schools is compounded by serious shortcomings in curriculum and supports necessary for college access. A recent study of California high schools examined three "roadblocks to college": (a) more students per counselor than the national average, (b) more students per teacher than the national average, along with inadequate training of teachers in college prep courses, and (c) shortage of college prep courses in the curriculum. *See* JOHN ROGERS ET AL., CALIFORNIA EDUCATIONAL OPPORTUNITY REPORT 2006: ROADBLOCKS TO COLLEGE 6, 15-17 (2006). Whereas 24% of high schools with over 90% minority enrollment

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[36] Although many states and districts offer monetary or other inducements to encourage teachers to work in high-minority schools, there is "little evidence that using financial incentives to entice teachers to certain jobs actually reduces turnover or raises student achievement." Linda Jacobson, *Teacher-Pay Incentives Popular But Unproven*, EDUC. WK., Sept. 27, 2006, at 1.

had all three roadblocks to college in 2004-05, only 6% of majority-white high schools had the same combination of problems. *Id.* at 9.

Teachers not only provide instruction but also set expectations and shape the school culture. Thus minority students in more integrated schools attend college at higher rates as a result of higher standards, more rigorous curriculum, and better counseling. *See* AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 198-205 (1997) (describing college-going expectations set by teachers and counselors in majority-white schools); Kaufman & Rosenbaum, *supra*, at 237-38 (describing individualized instruction and college counseling that teachers provide in majority-white schools).

Moreover, racially integrated schools tend to have social environments that reinforce teachers' high expectations. Students in high schools with greater white enrollment are more likely to have a strong interest in attending college, even after controlling for school poverty. *See* John T. Yun & Michal Kurlaender, *School Racial Composition and Student Educational Aspirations: A Question of Equity in a Multiracial Society*, 9 J. EDUC. STUDENTS PLACED AT RISK 143, 155 (2004). Such aspirations exert positive peer pressure and "se[t] a 'school climate' more favorable to achievement." Robert L. Crain, *School Integration and the Academic Achievement of Negroes*, 44 SOC. EDUC. 1, 17 (1971). Racially integrated schools also provide minority students with crucial access to information networks that facilitate upward mobility. *See* Wells & Crain, *supra*, at 534 ("Desegregated schools may be the only institutions in which African-American and Latino students would have access to the abundance of college and employment contacts that white and wealthy students often take for granted[.]").

In addition, black and Latino students in more racially diverse California schools report less bullying and greater safety. *See* Jaana Juvonen et al., *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 PSYCHOL. SCI. 393 (2006). Similarly, black and Latino

college freshmen from racially integrated high schools report less violence, drug use, and disorder in their high schools than their peers who attended segregated high schools. *See* MASSEY ET AL., *supra*, at 95 tbl.5.5.

The problems facing racially isolated black or Latino schools are multifaceted, with no single answer. In recent years, California has sought to improve such schools through a rigorous accountability system and funding for after-school programs, school safety initiatives, and recruitment and retention of qualified teachers. In 2005-06, UC itself engaged in K-12 support activities totaling $29 million, including professional development for teachers, partnerships with underserved schools, and college prep programs for low-income students.[37]

But none of these efforts, alone or in combination, purports to fully level the playing field. The fact remains that racially integrated schools offer a school climate where good teachers set high standards and encourage educational success, while segregated schools with high black or Latino enrollment often lack these basic features. The answer to this problem is a subject of ongoing debate, innovation, and educational judgment. Although some interventions have worked in some places, there is no definitive list of race-neutral policies known to provide a complete solution. Local communities must have latitude to pursue thoughtful strategies, including race-conscious school assignment, that work to narrow the disparities in our current system.

CONCLUSION

If selective institutions of higher education are to be accessible to individuals of all races and ethnicities, then public schools need a broad range of effective policy options, including voluntary integration, for enhancing the

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[37] *See* UNIV. OF CAL. OFFICE OF THE PRESIDENT, 2006-07 BUDGET FOR CURRENT OPERATIONS 178-92 (2005), *available at* http://budget.ucop.edu/rbudget/200607/200607-budgetforcurrentoperations.pdf.

educational opportunities afforded to minority students. And if California and the Nation are to build the social harmony and mutual respect that are central to our constitutional tradition, then voluntary efforts to create racially integrated public schools should be hailed as an affirmation, not a violation, of constitutional principle. In our increasingly diverse society, there are few imperatives more compelling than the cultivation of tolerance, trust, and mutual understanding among our young people. Local communities, exercising sound educational judgment, must have the latitude to achieve this goal. Accordingly, *Amici* respectfully urge this Court to affirm the judgments below.

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In the

Supreme Court of the United States

CRYSTAL D. MEREDITH, Custodial Parent
and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a school district's judgment is entitled to deference when it uses a racial classification to assign students to public schools to achieve racial diversity or racial integration.

2. Whether achieving racial balancing is a compelling governmental interest sufficient to permit race-based restrictions on school assignments in public elementary and secondary schools.

3. Whether a student assignment plan that mechanically and inflexibly restricts assignments so that no school has less than 15% or greater than 50% black students meets the narrow tailoring requirements of the Equal Protection Clause.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF), the Center for Equal Opportunity (CEO), and the American Civil Rights Institute (ACRI) submit this brief amicus curiae in support of Petitioner Crystal D. Meredith.[1] The parties have lodged universal letters of consent with the Clerk of this Court for the filing of briefs amicus curiae.

For more than 30 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Johnson v. California*, 543 U.S. 499 (2005), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Additionally, PLF has been at the forefront in interpreting and enforcing Proposition 209, the voter initiative that prohibits the state, including school districts, from discriminating against or granting preferences on the basis of race. PLF attorneys were lead counsel in, among others, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 24 Cal. 4th 537 (Cal. 2000) (interpreting Proposition 209); and *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96, 98 Cal. App. 4th 1275 (Cal. Ct. App. 2002) (applying Proposition 209 to a school district's racial balancing plan).

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

CEO and ACRI are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources studying the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici advocate the cessation of racial, ethnic, and gender discrimination by all public and private entities. Amici have participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case, and participated previously as amici curiae in this case supporting the petition for writ of certiorari.

STATEMENT OF THE CASE

After being released from a desegregation order, Jefferson adopted a student integration plan (2001 Plan). The plan divides students into two racial categories—black and white.[2] It then uses race to assign children to elementary and secondary public schools to ensure that no school has a black population of less than 15% or greater than 50% in a system whose overall student population is 34% black. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 840-42 (W.D. Ky. 2004), *aff'd* 416 F.3d 513 (6th Cir. 2005). Jefferson uses its 15-50% racial guidelines to set non-contiguous attendance boundaries, to grouping of elementary schools into clusters, for admissions into special programs including magnet programs, and to handle student transfer requests. *Id.* at 842. Where the racial composition of a school is at either end of the range, race is the ultimate factor in granting or denying a child his or her choice of school if the request places the school outside the racial guidelines, even if the receiving school has space available. *Id.* at 842 (the racial guidelines provide a firm definition of the racial quota to be maintained by "provid[ing]

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[2] Jefferson lumps Latino and Asian students into the white racial group. *McFarland*, 330 F. Supp. 2d at 840 n.6.

administrators with the authority to facilitate, negotiate and collaborate with principals and staff *to maintain* schools within the 15-50% range") (emphasis added). The purpose of the racial guidelines is to facilitate racial balancing by ensuring that each public school will have a predetermined racial mix of black and white students.

When Crystal Meredith sought to transfer her son, Joshua McDonald, from Young to Bloom Elementary School, she was told that the transfer application was denied—not because of his grades or interests or school capacity—but because he is white. He "was denied admittance because his transfer to Bloom would have had an adverse effect on Young's racial composition." *Id.* at 838 n.3. Ms. Meredith filed a lawsuit claiming that the race-based school assignment plan violates the Equal Protection Clause.

In deferring to the locally elected school board, the lower court held that Jefferson has a compelling interest in "maintaining integrated schools." *Id.* at 849-55. Although the district court noted that the "context of an elementary and secondary school student assignment plan" was "slightly different" from the context of *Grutter*, *id.* at 837, it found that the educational benefits flowing from its race-based assignment plan "are precisely those articulated and approved of in *Grutter*." *Id.* at 853.

Then the lower court examined each of the *Grutter* narrow-tailoring factors and upheld the 2001 Plan.[3] Holding that the plan did not constitute an illegal quota, the court then distinguished the school district from a law school, downplaying the need for individualized review since the district's plan did not involve competition and comparative

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[3] The lower court held that the assignment policy at traditional public schools where white and black applicants were put on separate assignment tracks was an illegal quota. *Id.* at 837. This holding is not an issue in this case.

criteria. *Id.* at 860. Considering the undue harm factor of *Grutter*, the court again distinguished the public school setting from higher education, pointing out that "the consequences of assigning students to various public schools are quite different from denying an applicant admission to a selective college or job placement." *Id.* at 860. According to the lower court, Jefferson's public schools are "basically equal" and using race to grant or deny a student's choice of school does not "den[y] anyone a benefit nor impose[] a wrongful burden." *Id.* at 860.

SUMMARY OF ARGUMENT

Striving for a predetermined racial balance to ensure that no public school has a black population of less than 15% or greater than 50%, Jefferson County Board of Education (Jefferson) racially discriminates in assigning children to K-12 public schools. In determining that there was a compelling interest in such discrimination, the court below relied on *Grutter*. But, the *Grutter* rationale for promoting student body viewpoint diversity in institutions of higher education simply has no counterpart in the context of elementary and secondary public schools. The extraordinary deference this Court accorded the judgment of officials of the University of Michigan springs from their unique First Amendment right and is not available to locally elected boards because they are susceptible to politics of all kinds, including racial politics. Both *Croson*, 488 U.S. at 496, and *Wygant*, 476 U.S. at 276, refused to defer to elected local bodies. The Equal Protection Clause cannot take a backseat to the discretion of elected local school boards.

No decision from this Court sanctions discriminatory student assignments to achieve racial balancing in K-12 public schools as a compelling state interest. Racial integration in K-12 is based on the idea that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. *Grutter*'s acceptance of a genuine diversity

interest has no counterpart in K-12 public schools and should be limited to higher education. Unlike universities where students choose to apply, K-12 students have a right to admission. Public universities have expansive freedoms of speech whereas the education mission of K-12 public education is to teach fundamental values, including the principle of nondiscrimination and the lesson that we not define by skin color.

This Court should not rely on disputed social science research to support a claim that racial balancing is a compelling interest. Social science research frequently rests on uncertain footing. Its use in *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), *Grutter*, and *Gratz* has been strongly criticized because such research can be revised or repudiated. Using social science research to support racial discrimination is simply too thin. Its use must be cabined here or there will be no end to the creativity with which such claims are made.

Racial balancing of K-12 public schools also cannot meet the Court's narrow tailoring requirements. Race is the decisive factor here and is used mechanically and in the nonindividualized manner rejected in *Grutter* and *Gratz*. K-12 administrators simply cannot perform the individualized holistic review *Grutter* found paramount in its race-conscious admissions program.

Public school should be required to prove as part of the narrow tailoring inquiry that race neutral alternatives for achieving educational benefits have failed before resorting to racial discrimination. Since the adoption of Proposition 209 ten years ago, California has prohibited the use of race as a factor in the operation of its public schools. As a result of Proposition 209, the University of California has expanded its outreach programs to prepare students from low-income families—regardless of race—for college. Since the adoption of Proposition 209, more students are graduating from high

schools, the dropout rate has improved, and more students are taking classes for admission to the University of California and state universities.

ARGUMENT

I

DEFERENCE TO ELECTED LOCAL SCHOOL BOARDS ON THE USE OF RACE IS INCOMPATIBLE WITH THE EQUAL PROTECTION CLAUSE

In this case, the lower court improperly accorded deference to an elected local school board's policy that uses race in assigning children to K-12 public schools. Because of the importance of local control of public education, the lower court reasoned that elected school boards who formulate and implement educational policies for their communities, including the use of race in assignment policies, are entitled to deference. *McFarland*, 330 F. Supp. 2d at 851 n.32. Deferring to elected local school boards engaged in race-based classification and assignment of students, however, is fundamentally incompatible with this Court's Equal Protection jurisprudence. "The undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (the "Fourteenth Amendment . . . protects citizens against the State itself and all of its creatures—Board of Education not excepted").

The Equal Protection Clause mandates that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Because the Fourteenth Amendment 'protects *persons* not *groups*,' all governmental action based on race—a *group* classification long recognized as in most circumstances

irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227) (internal quotation marks and citations omitted). *See also Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States").

In *Adarand*, this Court reiterated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This Court stated that free people "should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. This intolerance is necessary because government racial discrimination of any sort is inherently suspect, and so racial characteristics are almost never an appropriate consideration for the government. *Id.* at 216.

> The central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and subject to the "most rigid scrutiny" and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

Id. (citations omitted). This includes so-called neutral policies that burden or benefit the races equally. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996); *see also*, *Loving*, 388 U.S. at 8 (rejecting the argument that a miscegenation statute did not discriminate because it "punish[ed] equally both the white and

the Negro participants in an interracial marriage"). Indeed, this Court rejected the notion that separate can ever be equal—or "neutral"—in *Brown*, 347 U.S. at 495, and refused to resurrect it in *Johnson*, 543 U.S. at 500. Therefore, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand*, 515 U.S. at 224.

For race-based educational policies "[t]o withstand our strict scrutiny analysis, respondents must demonstrate that the[ir] use of race in [their] current admission program employs 'narrowly tailored measures that further compelling governmental interests.'" *Gratz*, 539 U.S. at 270. The lower court's deference to local elected officials is antithetical to strict scrutiny's requirement of "the *most searching* judicial inquiry." *Adarand*, 515 U.S. at 235.

Grutter did not overturn this doctrine. In *Grutter*, this Court accorded extraordinary deference to the determination by officials of the University that genuine diversity was essential to its educational mission. *Grutter*, 539 U.S. at 328-29. This deference springs from the University's unique First Amendment interests. 539 U.S. at 329. The "proper institutional mission" is stated in terms of academic discussion grounded on the First Amendment.[4] This First Amendment deference would not be granted to any other government agency. *See, e.g., Johnson*, 543 U.S. at 512 (this Court refused

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[4] This deference to university officials is not open-ended. The dissents in *Grutter* recognized the danger of according deference to university officials when race classifications are used. Justice Kennedy said that according deferential review "is nothing short of perfunctory," when the Court accepts the law school's "assurances that its admissions process meets with constitutional requirements." *Grutter*, 539 U.S. at 388-89 (Kennedy, dissenting). Justice Thomas found this Court's deference to the university to be a total abdication of its duty to strictly scrutinize. *Id.* at 362 (Thomas, J., dissenting).

to accord deference to state prison officials on race "where those officials traditionally exercise substantial discretion"). The law school's First Amendment right is not part of the education mission of K-12 public schools. Instead, K-12 education is inculcation, not exposure. Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003).

Further, elected school boards, like elected city councils, are not insulated from the temptation of "racial politics." "Racial politics" is not only helping one's own race, it uses race to curry votes. Tom Campbell, *Separation of Powers in Practice* 122 (2004). In *Croson*, this Court invalidated an elected local city council's voluntary race-based preference program fearing that it was adopted for the purpose of "racial politics"—a concept that applies equally to local school boards. This Court demanded that any government entity seeking to classify by race must point to specific identified instances of past or present discrimination.

> [I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

Croson, 488 U.S. at 510-11. Race-based decisions made by political groups in the political process are suspect. *Id.* at 496. This Court held:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications

> are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493. Justice Scalia concurred in the judgment, arguing that racial classifications must be restricted even more narrowly:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens."

Id. at 521 (Scalia, J., concurring in judgment) (citations omitted).

The circumstances under which racially discriminatory local legislation or programs may legally be enacted are extremely narrow. The enactment of racially discriminatory programs merely as a part of the political process to better the condition of one racial group is not permitted under the Constitution. *Croson*, 488 U.S. at 495-96. At best, racial integration of public schools is likely nothing less than a local school board's attempt to remedy general societal discrimination, an interest that has been rejected by this Court.

The lower court's deference to Jefferson's elected school board is contrary to *Wygant*, 476 U.S. 267. In *Wygant*, this Court did not defer to a local school board's judgment with respect to the purported benefits of a racially mixed teaching staff. There, this Court found unconstitutional a collective-bargaining agreement between a school board and a teacher's union that favored certain minority races. The school board defended the agreement on the grounds that minority teachers provided "role models" for minority students and that a racially "diverse" faculty would improve the education of all students. 476 U.S. at 275-76. This Court held that the use of race violated the Equal Protection Clause and rejected an asserted interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate the effects of societal discrimination." *Id.* at 274. That interest was found to be "too amorphous a basis for imposing a racia[l] classifi[cation]." *Id.* at 276. The *Wygant* decision and many others will have to be revisited if the school district's "social science" is deferred to here.

Similarly, this Court should not defer to Jefferson's elected school board with respect to an educational policy that uses race to discriminate against students in assigning them to public schools. Jefferson's purported interest in using race is neither remedial nor necessary to prevent imminent danger of life and limb. It is not only open-ended, it is also entirely free-floating because it is not tied to any showing of actual racial discrimination and has no logical stopping point. The lower court's reference to *Brown*, 347 U.S. at 836-37, is of no assistance. Indeed, in *Wessmann v. Gittens*, 160 F.3d 790, 797 (1st Cir. 1998), the First Circuit explicitly rejected the argument that courts should "defer[] to school officials' determinations anent the racial and ethnic composition of the student body." The *Wessmann* court said that "the School Committee's citation to *Brown* is self-defeating, for the *Brown* Court made it abundantly clear that constitutional principles cannot take a

backseat to the discretion of local school officials in respect to matters such as the racial composition of student bodies." *Id.* at 797 n.3.

Deference to an elected local body is inconsistent with the holdings of this Court in *Grutter*, *Adarand*, *Croson*, and *Wygant*. Because Jefferson is an elected political body, it may "be greatly tempted to use race for political advantage if permitted to do so." Campbell, *supra*, at 125. Any watering down of equal protection review will effectively assure that race will always be relevant in American life, and that the " 'ultimate' goal of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Croson*, 488 U.S. at 495 (citations omitted).

II

RACIAL BALANCING IS NOT A COMPELLING INTEREST SUFFICIENT TO JUSTIFY DISCRIMINATING AGAINST STUDENTS IN K-12 PUBLIC SCHOOLS

A. *Grutter* Does Not Countenance Racial Discrimination in K-12 Public Schools

Jefferson discriminates against students in assigning them to its elementary and secondary public schools. A student will be denied a transfer to a school of his or her choice, or assignment to a special program or magnet program, if the student's assignment will impact Jefferson's goal "to achieve a racial mix of between 15% and 50% black students at each school." *McFarland*, 330 F. Supp. 2d at 857. According to Jefferson, this discrimination against children is to ensure a predetermined racial mix of black and white students in order "[t]o give all students the benefits of an education in a racially integrated school." *Id.* at 850 n.29. The lower court changed the rationale in *Grutter* in an attempt to justify the use of race.

The lower court held that the "benefits that the board seeks from an integrated school system are precisely those articulated and approved of in *Grutter*." *Id.* at 853.

Grutter's rationale cannot be changed to justify discrimination against children for the purpose of racially integrating public schools. As this Court emphasized in *Grutter*, "[c]ontext matters when reviewing such [race-based] action." *Grutter*, 539 U.S. at 308.

First, this Court granted *certiorari* in *Grutter* to resolve "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public *universities*." *Grutter*, 539 U.S. at 322 (emphasis added).[5] *Accord*, *Gratz*, 123 S. Ct. at 2422. The Court held that student body "diversity" of the kind approved by Justice Powell in *Bakke*, 438 U.S. 265, could be a compelling interest for state universities and graduate schools.[6] *Grutter* did not address whether racial diversity can be a compelling interest that justifies the use of race in K-12.

Second, context is crucial. *Grutter*'s compelling interest analysis was expressly limited to the use of race in admissions in the context of "the expansive freedoms of speech and thought associated with the university environment . . . a special niche in our constitutional tradition." *Grutter*, 503 U.S. at 329; *accord Bakke*, 438 U.S. at 312 (Powell, J., opinion) (a

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[5] To emphasize that context is limited to public *universities*, this Court noted: "Compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest), with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (holding that it is)." *Grutter*, 539 U.S. at 322.

[6] In *Bakke*, Powell recognized a university's right to "select those students who will contribute the most to the 'robust exchange of ideas,'" a goal of "paramount importance in the fulfillment of [the University's] mission." 438 U.S. at 313.

university's First Amendment right to "[a]cademic freedom," includes "[t]he freedom of a university to make its own judgments as to education" and "the selection of its student body").

Grutter's compelling state interest analysis simply has no counterpart in K-12 public schools. First, students in elementary and secondary schools have a right to admission. *Goss v. Lopez*, 419 U.S. at 574. Second, the educational mission of K-12 public schools is different from that of universities. The purpose of American public schools is to *teach* fundamental values necessary to maintain a democratic system. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). K-12 public schools prepare students for citizenship, which includes teaching the principles of our Constitution. *Bethel*, 478 U.S. at 681. Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003).[7]

At bottom, Jefferson's 2001 Plan is simply a mechanism for racial balancing where the school district demands nothing more than proportional representation by pigmentation to achieve the school district's preferred racial mix of black and white students.

B. Racial Balancing To Promote Racial Integration in K-12 Public Schools Offends the Equal Protection Clause

The lower court held that the 2001 Plan's use of race to promote racial integration does not violate the Equal Protection

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[7] *Available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Oct. 4, 2005).

Clause. *McFarland*, 330 F. Supp. 2d at 855. Under the 2001 Plan, race is the ultimate factor in approving or denying a transfer request or assignment to a special program. Under the 2001 Plan, a child classified as "white" may not receive a transfer, even if the receiving school has capacity, if the school the child wishes to transfer from does not have "enough" white students. In contrast, a child classified as "black" may not receive a transfer if the school that child wishes to transfer into has "too many . . . black children." *See* 330 F. Supp 2d at 838 n.3 ("[Joshua] was denied admittance because his transfer to Bloom would have had an adverse effect on Young's racial composition"). The purpose of the discrimination is to ensure that no school has a black student body of less than 15% or greater than 50%. *Id.* at 840-42. *Grutter* rejected racial balancing as a compelling interest, stating that "[e]nrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin" (539 U.S. at 308) would "amount to outright racial balancing, which is patently unconstitutional." *Id.* at 329-30 (citations omitted).

Jefferson's attempt to describe its program in terms of racial range rather than a single racial percentage does not immunize the Plan from the prohibited practice of racially balancing its student body. Jefferson admits that if a "school exceeds its capacity or hovers at the extreme ends of the racial guidelines," an application will be denied. 330 F. Supp. 2d at 844. "At a certain point in its application process . . . the [Plan] relies on race and ethnicity, and nothing else, to select a subset of entrants." *Wessman*, 160 F.3d at 794. Unlike genuine diversity in higher education, diversity measured by race alone does not provide any demonstrable education benefit in the public school setting and does not constitute an interest compelling enough to justify the use of a racial classification that is used to discriminate against children. Relatively few school systems use race-based assignments, yet they teach their

children well; indeed, Jefferson could not claim that education is impossible without discrimination—just that it is improved by some nebulous degree.

Further, the 2001 Plan's goal of achieving "racial integration" through racial balancing has no support under the federal Constitution. While there can be no question the Constitution prohibits a school district from acting to segregate students, there is no federal constitutional mandate to implement a proactive program of balancing that also uses race to discriminate against children. This Court has made it clear that such a plan is *not required* by the federal Equal Protection Clause.

The 2001 Plan does not pursue diversity of socioeconomic class, life experience, or talents. Instead Jefferson seeks diversity measured by race alone. Under the 2001 Plan, children are granted or denied their transfer requests to their preferred public schools according to a mechanical, arithmetic formula. The only purpose of these racial percentages is to move the racial composition of the schools affected closer to a predetermined racial balance. It provides "administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15-50% range." *McFarland*, 330 F. Supp. 2d at 842. And it is just this process of racial balancing—the mechanical use of race to accomplish a predetermined racial balance—that this Court has condemned beginning with *Bakke* through *Grutter* and *Gratz*.

C. There Should Be No "Social Science" Exception to the Equal Protection Clause

In this case, Jefferson proffered social science evidence to buttress its claim that racial integration is a compelling interest. *Id.* at 852. The use of social science evidence to support the development of the law has been highly criticized because it is value laden and litigation driven. For example, although there was universal approval of *Brown*'s desegregation mandate, this

Court's reliance on psychological findings to supports its ruling was immediately attacked because psychological findings can be revised or repudiated.

> Today the social psychologists . . . are liberal and egalitarian in [their] basic approach. Suppose a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past; suppose they were to present us with a collection of racist notions and label them "science." What then would be the state of our constitutional rights?

Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 167 (1955); Angelo N. Ancheta, *Civil Rights, Education Research, and the Courts*, Educational Researcher, Jan.-Feb. 2006 at 26.

Professor Ancheta recognizes that social science evidence rests on an uncertain footing in civil rights and other forms of litigation for a number of reasons. *See*, Ancheta at 27. First, "law and science operate through highly dissimilar institutions and processes, with significantly different vocabularies, methodologies, and cultures that do not readily lead to clear paths for judges, litigators, or expert witnesses to follow." *Id.* at 27.[8] Second, courts lack the expertise necessary to interpret social science evidence or statistical methods. This lack of knowledge may cause courts to avoid deeper inquiries on important debates about scientific knowledge. *Id.* And third, the screening of social science research is virtually nonexistent,

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[8] Ancheta identified numerous core differences including, among others, "legal reasoning is largely deductive, while scientific method is largely inductive; legal findings are often based on certainties and standards such as proof beyond a reasonable doubt, while scientific findings are typically based on probabilities and levels of confidence." *Id.* at 27.

and so "weak or bad science" has been used to formulate public policy and create broad legal principles. *Id.*[9]

The lack of reliability of social science evidence is often critiqued by dissenting judges. In *Grutter*, Justice Thomas cited conflicting research suggesting that greater racial diversity on college campuses actually "hinders students' perception of academic quality." 539 U.S. at 364 (Thomas, J., dissenting). Justice Thomas goes on to criticize the majority for ignoring research on students at historically black colleges and universities that indicated that racial heterogeneity could impair learning among black students. *Id.* Likewise, Justice Scalia criticized the scientific research on diversity stating that cross-racial understanding "is not, of course, an 'educational benefit' on which students will be graded on their law school transcript." *Id.* at 347 (Scalia, J., dissenting).

In this case, the court below relied on Jefferson's social science evidence proffered by Dr. Gary Orfield to support its opinion that "racial integration" provides a benefit in public schools. *McFarland*, 330 F. Supp. 2d at 839 n.5. Yet, Dr. Orfield's social science research on voluntary desegregation plans has been strongly criticized. *See, e.g.*, Christine H. Rossell, *An Analysis of the Court Decisions in Sheff v. O'Neill and Possible Remedies for Racial Isolation*, 29 Conn. L. Rev. 1187, 1214 (1997) (criticizing Dr. Orfield's conclusion

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[9] The social science evidence presented by the University of Michigan in *Gratz v. Bollinger* has been strongly criticized for its "research design and method measurement, sampling, statistics, and statistical interpretation." Robert Lerner & Althea K. Nagai, *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger* 4, *available at* http://www. ceousa.org/recent.html (last visited June 30, 2006); Drs. Thomas E. Wood & Malcolm J. Sherman, *Race and Higher Education* 79 (2001) (finding that the data base used by Patricia Gurin "disconfirms" the claim that racial and ethnic diversity in school benefits students) *available at* http://www.nas.org/reports/sup_ct_mich/sup_ct_mich_ launch.htm (last visited June 30, 2006).

that school districts with voluntary desegregation plans had virtually no increase in white enrollment loss. Dr. Rossell found that school districts that either dismantled their plans or had no plan actually had less "white flight." Likewise, Abigail Thernstrom & Stephan Thernstrom, *No Excuses, Closing the Racial Gap in Learning* 170-79 (2004) criticized Dr. Orfield's findings that attending a school in which minorities are in the majority has terrible educational and social consequences because they are exposed to too few whites).

This Court should not create a social science exception to the Equal Protection Clause. The racial integration rationale is simply too thin to justify government action that discriminates against a child's skin color. If the use of social science evidence is not cabined here, there will be one dubious social-science-supported claim of compelling interest after another. There are few government programs that cannot be tied in some way to an interest that is arguably "compelling," and there will always be a social scientist who can show a connection between achieving the interest and some "benign" use of race. Indeed, this case shows that there is unlikely to be an end to the creativity with which such claims are made. "It is no coincidence that both the science of race and the law on race have reflected underlying societal values, whether it has been scientific racism and the upholding of slavery in the 19th century; social Darwinism, eugenics, and the maintenance of Jim Crow segregation in the early 20th century; or the growth of egalitarianism in science and law in the 1940s and 1950s." Ancheta, *supra*, at 29 (citation omitted). Nondiscrimination cannot be taught by discrimination—assigning students by skin color feeds stereotyping and the notion that we are defined by race.

III

RACIAL BALANCING OF K-12 PUBLIC SCHOOLS CANNOT MEET THE NARROW TAILORING REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE

A. Jefferson's Racial Balancing Plan Fails To Provide Individual, Holistic Review of Students

When racial balancing becomes a permissible government objective, few of the narrow tailoring requirements of strict scrutiny apply in any meaningful way. If racial balance is a permissible goal, there is no need for individualized consideration of applicants or consideration of other ways in which students can contribute to diversity. Race becomes the decisive factor and is used in the mechanical, non-individualized manner rejected in *Grutter*. 539 U.S. at 337 ("[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount"). When race is not the means to an end but the end itself, we have "discrimination for its own sake," *Bakke*, 438 U.S. at 307, and there is no compelling interest.

Picking and choosing from *Grutter's* hallmarks of narrow tailoring, the lower court found that Jefferson's use of race in assigning students to elementary and secondary public schools "actually operates like the 'plus' system" approved in *Grutter*. *McFarland*, 330 F. Supp. 2d at 859. Yet, the contrast could not be sharper.

In *Grutter*, this Court found that the law school admissions program

> engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment . . . . [T]he Law

> School affords this individualized consideration to applicants of all races. There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single "soft" variable.

Grutter, 539 U.S. at 337. The law school program "awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.* The program "adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions" and does not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." *Id.* at 337-38. The law school "seriously considers each 'applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.'" *Id.* at 338. Further, the law school plan "gives substantial weight to diversity factors besides race." *Id.* In sum, the law school plan

> seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.

Id. at 338-39.

In this case, the 2001 Plan operates as a quota to achieve and maintain a predetermined ratio of white to black students in the public schools. Its sole function is to prevent any school from deviating by more than a preset number of percentage points from the district's preferred 15/50 ratio of white to black students. *McFarland*, 330 F. Supp. 2d at 842.

Although Jefferson offers students choices of numerous and varied school programs, it withholds choice whenever

> the racial composition of an entire school lies near either end of the racial guidelines, the application of any student for open enrollment, transfer or even to a magnet program could be affected. In a specific case, a student's race, whether black or white, could determine whether that student receives his or her first, second, third or fourth choice of school.
>
> For the most part, the guidelines provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15-50% range.

Id. at 842.

Race becomes the ultimate factor. As the First Circuit recognized in *Wessmann*, 160 F.3d at 799, "[t]he [Plan] is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden." In *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999), the Fourth Circuit addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. In finding that the use of race was not narrowly tailored, the appeals court found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing . . . . Although the transfer policy does not necessarily apply "hard and fast quotas," its goal of keeping

> certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

The 2001 Plan provides none of the individualized considerations essential to the Court's approval of the use of race by the Michigan Law School. Jefferson has not demonstrated how it gives each K-12 student "a highly individualized, holistic review" when its purpose is simply to ensure that each school has no less than 15% black students and no more than 50%.

> It is challenging enough to determine what elements of "diversity" a young adult, who has had time to gain some modicum of life experience, might bring to a law school class. It would be absurd to presume the ability to make such a determination for students in the public K-12 setting. Instead of conducting a thorough examination of relevant individual characteristics, schools would likely resort to race as a proxy for "the diversity that furthers a compelling state interest [which] encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

J. Kevin Jenkins, *Grutter, Diversity, and Public K-12 Schools*, 182 Educ. Law. Rep. 353, 368 (2004).

The 2001 Plan demands nothing more than proportional representation by pigmentation to achieve the school district's preferred racial mix of students. This racial balancing is constitutionally forbidden. *Gratz*, *Grutter*, and *Bakke* lead to the conclusion that narrowly tailoring a racial preference program at the K-12 level is impossible.

B. School Districts Remain Free To Address Racially Imbalanced Schools Through Race-Neutral Means

The school board asserts that racially balanced schools are essential to reassure the community that all children will be given equal educational opportunities. *McFarland*, 330 F. Supp. 2d at 836. Surely transparency of each school's budget, its faculty's qualifications, its curricula, and so forth is an equally effective way to supply the community this reassurance. Parents want to know that their children are not being short changed in favor of anyone, not just short-changed on the basis of race. A parent whose child attends an underfunded school will not be mollified by being told that the school is racially identical to an overfunded school.

At a minimum, school districts should be required to prove that race-neutral alternatives have failed before resorting to a race-based plan. Using race is personally unfair, it sets a disturbing legal, political, and moral precedent in favor of government discrimination, it creates resentment and teaches that racial identity is more important then individual rights. These interest costs make the use of race less compelling, they also make it essential to find other means to achieve the ends of education. Instead, school districts should ensure broad educational opportunities to all students without regard to irrelevant characteristics such as race.

> Perhaps in lieu of spending time and money on racial balancing schemes, public school officials could better use the resources trusted to their care by focusing on the problems that currently exist in many schools serving disadvantaged students. Addressing deficiencies in neighborhood schools would allow interested students the opportunity to prepare for higher education and to compete for admission on

> equal footing, without the accompanying stigma and resentment associated with racial preferences.

Jenkins, *supra*, at 369-70.

Moreover, there is nothing prohibiting school districts from addressing racially imbalanced schools through genuine race-neutral means. The United States Department of Education, Office of Civil Rights, identifies numerous "innovative 'race-neutral' alternatives to encourage diversity 'to ensure that their student bodies are accessible to people from a wide variety of backgrounds.' " United States Department of Education, Office of Civil Rights, *Achieving Diversity: Race-Neutral Alternatives in American Education*, Feb. 2004.[10] Examples include:

- Providing preferences on the basis of socioeconomic status. These plans seek to reduce concentrations of poverty and "set the tone that academic achievement is to be valued and that aspirations should be set high." *Id.* at 34.

- Creating many new "skills development" programs—projects designed to improve educational achievement among students who attend traditionally low-performing schools. *Id.*

- Low-performing schools entering into partnership with universities to strengthen their students' ability to succeed in college.

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[10] *Available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html (last visited July 9, 2006).

C. California's Proposition 209 Provides All K-12 Public School Students Equal Education Opportunities Without Using Race-Based Assignment Plans

For the last ten years, California school districts have been providing equal educational opportunities to all its K-12 public school students without using race-based assignment plans. In 1996, the voters overwhelmingly approved Proposition 209, adding Article I, Section 31, to the California Constitution. The operative provision provides:

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a). "State" includes school districts. Cal. Const. art. I, § 31(f).

In adopting Proposition 209, the voters made it clear that section 31 does not permit the use of race for any reason whatsoever:[11]

> Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no

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[11] The Ninth Circuit Court of Appeals in *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997), held that Proposition 209 did not violate the Equal Protection Clause. "That the [federal] Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification." *Id.* at 708.

> "compelling state interest" exception; we find nothing to suggest the voters intended to include one sub silentio.

Hi-Voltage, 12 P.3d at 1087, 24 Cal. 4th at 567.

One of the goals of Proposition 209 was to "address inequality of opportunity . . . by making sure that *all* California children are provided with the tools to compete in our society." 12 P.3d at 1083, 24 Cal. 4th at 561. The voters also recognized that adopting Proposition 209 would "eliminate, or cause fundamental changes to, voluntary desegregation programs run by school districts." *Id.* at 584 (concurring and dissenting opinion of George, C.J.). The Legislative Analyst estimated "that up to $60 million of state and local funds spent each year on voluntary desegregation programs may be affected." *Hi-Voltage*, appendix. Those funds would be spent on other public school programs. 24 Cal. 4th at 600-01.

Since the passage of Proposition 209, California has used race-neutral methods to pursue the goal of providing opportunity for all California's children. For example, the UC Links program at the University of California Berkeley prepares K-12 students from low-income families for college.

> UC Links is a network of educational programs that connect community and university partners to provide computer-based and other learning activities for school children. UC Berkeley has seven UC Links sites, where UCB students and K-12 youth, working in small groups, learn together . . . designed to promote literacy, science, and computer skills, as well as collaborative behavior.[12]

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[12] *Available at* http://students.berkeley.edu/outreach//Programs.asp?rid=52 (last visited June 23, 2006).

These and other outreach programs have provided positive results without considering the race of the student. "The graduation rates of California's high school students steadily increased after the passage of Proposition 209" in every ethnic group. Eryn Hadley, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 BYU J. Pub. L. 103, 132 (2005).

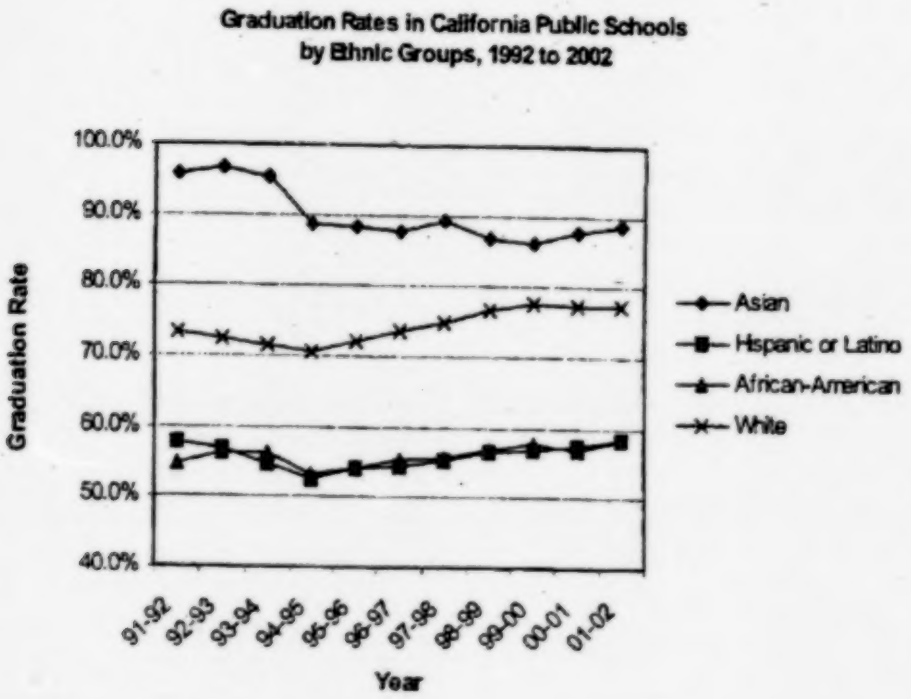

Figure 6. Based on California Department of Education data using basic completion ratio

Ms. Hadley goes on to state that

> [t]he graduation rates of California's minority students were above the national average in 2001. In California, 82.0% of Asian students graduated in 2001, compared to 76.8% of Asian students nationally. Fifty-seven percent of Hispanic students in California graduated in 2001, compared to 53.2% nationally. California's black students beat the

> national graduation rate by 5.1% in 2001, with 55.3% of California's black students graduating from high school.

Hadley, *supra*, at 133. Ms. Hadley concludes that "California's minority students are obtaining their high school diplomas at a greater rate than minority students nationally." Hadley, *supra*.

Improvements also are evident in the dropout rate for California's high school students for both minority and non-minority students. For example, between 2002-2003 and 2004-2005, the average drop rate for minorities decreased by1.32% and the overall average dropout rate decreased by 1.89%. Education Data Partnership, High School Accountability - State of California, http://www.ed-data.k12.ca.us/Navigation/fsTwoPanel.asp?bottom=%2Fprofile%2Easp%3Flevel%3D04%26%20reportNumber%3D16 (last visited July 14, 2006). Since the adoption of Proposition 209, more students are graduating from high school, the drop out rate has improved, and more students are taking classes for admission to the University of California and state universities. *Id.*

The constitutional answer to helping disadvantaged persons is equal educational opportunities for all. It is the responsibility of elected local school boards to ensure that every child has a genuine opportunity to receive a serious education no matter what school he or she attends.

CONCLUSION

There is more than a touch of irony in this case. By discounting the core concept of equal protection, public schools are sending the wrong message to our children—that racial discrimination is more important than individual rights and liberties in today's society. As the Fourth Circuit Court of Appeals said:

> We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups.

Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999). The central question before this Court is whether the federal constitution permits this result. Amici respectfully suggest that this Court should adopt a bright line rule that race should play no role in assigning students to noncompetitive, compulsory K-12 public schools, that *Grutter* is limited to its facts, and overturn the decision below.

DATED: August, 2006.

Respectfully submitted,

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In the Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Amicus Curiae the Prichard Committee will address the following question:

Whether a school district formerly under a federal desegregation decree and with a history of *de jure* segregation, substantial current residential segregation as a result of that *de jure* segregation, and a state constitutional mandate to provide an equal and adequate public primary and secondary education to every child, may continue to use a race-conscious element in its student assignment plan which was part of its desegregation plan before the district was declared unitary, and which it applies only as to schools which offer a standard curriculum and equal resources and facilities.

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BRIEF *AMICUS CURIAE* OF PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Prichard Committee for Academic Excellence ("Prichard Committee") respectfully submits this brief *amicus curiae* in support of Respondents Jefferson County Board of Education and Stephen W. Daeschner, as Superintendent of Jefferson County Public Schools, pursuant to Supreme Court Rule 37.3.[1] The parties have lodged universal letters of consent with the Clerk of this Court for the filing of briefs *amicus curiae*.

The Prichard Committee is an independent, nonpartisan group of volunteers dedicated to improving public education in Kentucky at all levels for all Kentuckians, including primary and secondary public school education.

The Prichard Committee has participated in important litigation concerning the quality of education in Kentucky, most notably *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), in which the Kentucky Supreme Court declared the system of school funding in place at that time to be unconstitutional under the Kentucky Constitution. *Rose* lead to the passage in June 1990 of the Kentucky Education Reform Act ("KERA"), a landmark piece of

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[1] Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

legislation that instituted sweeping educational reforms in Kentucky public education that were admired and emulated throughout the nation. The Prichard Committee played a vital role in developing the consensus necessary to gain KERA's passage, and to maintain public support for KERA's reforms.

STATEMENT OF THE CASE

A. Pre-1970s Segregation in Louisville and Jefferson County.

Louisville and Jefferson County, Kentucky,[2] the metropolitan area with the largest population and largest African-American population in Kentucky, has an unfortunate history of racial segregation and prejudice paralleling that of other parts of the country. While Kentucky did not secede from the union nor officially join the Confederacy, Kentucky was a slave state[3] which enforced a slave code.[4] After the Civil War, Southern sympathy dominated Kentucky politics,

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[2] Louisville and Jefferson County merged their governments in 2002 and are now known as the Louisville/Jefferson County Metro Government.

[3] Thomas D. Clark, A HISTORY OF KENTUCKY (6th ed.), 319-58; Robert V. Remini, HENRY CLAY, 27-28, 347. *See also* Stuart Sprague, *Civil War*, in KENTUCKY ENCYCLOPEDIA 92-94 (John E. Kleber, ed., 1992); Harold D. Tallant, Jr., *Slavery*, in KENTUCKY ENCYCLOPEDIA 827-29 (John E. Kleber, ed., 1992).

[4] Don E. Fehrbacher, THE DRED SCOTT CASE, 59-67. In 1850, Kentucky convened a constitutional convention to enshrine the property rights of slaveholders in its constitution. Lowell H. Harrison and James C. Klotter, A NEW HISTORY OF KENTUCKY, 117-18.

and Kentucky was part of the Jim Crow South.[5] Kentucky generally enforced racial segregation after the end of the Civil War in housing, education and public accommodations.[6] Louisville unfortunately still bears the scars of that segregation.

1. Residential Segregation

Louisville and Jefferson County have long had segregated neighborhoods and racial housing patterns, vestiges of *de jure* segregation that are still evident today. These patterns date back to the time of legally mandated segregation in housing, and survived through state court enforcement of restrictive covenants. The City of Louisville enforced ordinances mandating segregated neighborhoods as late as 1915. *Harris v. City of Louisville*, 177 S.W. 472 (Ky. 1915). In *Harris*, the Kentucky Court of Appeals addressed an ordinance requiring that no person may sell a piece of property to a person whose race is in the minority in the neighborhood. *Id.* at 473-74. The court upheld this ordinance, saying:

> The enforced separation of the races alone is not a discrimination or denial of the constitutional guaranty [of the Equal Protection Clause]; and if such separation should result in the members of the colored race being restricted to residences in the less desirable portion of the city, they may render those portions more desirable through their own efforts, as the white

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[5] James C. Klotter, KENTUCKY: DECADES OF DISCORD 1865-1900, 29-49.

[6] Harrison and Klotter, NEW HISTORY, 234-48. *See also* Klotter, DECADES OF DISCORD 90-94; Thomas Llewellyn, *Segregation*, in KENTUCKY ENCYCLOPEDIA 807-08 (John E. Kleber, ed., 1992).

race has done.

Id. at 476. This Court eventually struck down Louisville's ordinance as violative of the Fourteenth Amendment. *Buchanan v. Warley*, 245 U.S. 60 (1917).[7]

This Court's decision in *Buchanan* did not stop the white majority in the City of Louisville from attempting to maintain segregated neighborhoods, as whites turned to the use of restrictive covenants. The Kentucky Court of Appeals enforced restrictive covenants in a case originating in Jefferson County. *United Coop. Realty Co. v. Hawkins*, 108 S.W.2d 507 (1937). Restrictive covenants were enforced in Kentucky until this Court's decisions in *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that a court could not restrain a sale in violation of a restrictive covenant), and *Barrows v. Jackson*, 346 U.S. 249 (1953) (holding that a party cannot be held liable for damages for violating a restrictive covenant). Though restrictive covenants became unenforceable concurrently with *de jure* school segregation becoming unlawful in the 1950's, one cannot determine how long they were honored as "gentlemen's agreements" after *Shelley* and *Barrows*.

In 1954, Carl and Anne Braden were prosecuted for sedition after they bought a home in a white neighborhood with the intent of deeding it to an African-American family. When segregationists bombed the home, Carl and Anne Braden were charged with sedition on the theory that the mere purchase of the home on behalf of the Wades was sedition against the Commonwealth. Carl Braden was convicted and

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[7] *See also* Thomas Llewellyn, *Segregation*, in KENTUCKY ENCYCLOPEDIA 807-08 (John E. Kleber, ed., 1992).

sentenced to 15 years in prison. He served 8 months in prison, and was eventually released on bail until the sedition law under which he was convicted was invalidated by the Kentucky Supreme Court in 1956.[8]

The Louisville Board of Aldermen enacted an open housing ordinance in December 1967. Even with the passage of this ordinance in the late 1960s, however, there has been little integration of neighborhoods when judged by census data. *See, e.g.*, JA 99. The segregated neighborhoods of today are the direct by-product of the history of *de jure* segregation of housing in Louisville and Jefferson County.

2. Educational Segregation

Both the City of Louisville and Jefferson County school systems also enforced *de jure* segregation in the public schools until this Court's landmark opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954).[9] Prior to *Brown*, the City of Louisville school system maintained separate schools for both African-American and white students. The Jefferson County school system also enforced segregation, and paid to

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[8] Catherine Fosl, SUBVERSIVE SOUTHERNER: ANNE BRADEN AND THE STRUGGLE FOR RACIAL JUSTICE IN THE COLD WAR SOUTH, 135-74; *see also Com. v. Braden*, 291 S.W.2d 843 (Ky. 1956); *Braden v. Lady*, 276 S.W.2d 664 (Ky. 1954); Anthony Newberry, *Braden Affair*, in KENTUCKY ENCYCLOPEDIA 114 (John E. Kleber, ed., 1992).

[9] Kentucky's 1891 Constitution required segregated education. KY. CONST. § 187 (1891). *See also Berea College v. Kentucky*, 211 U.S. 45 (1908) (affirming enforcement of Kentucky statute mandating racially-segregated education). This provision was not repealed until 1996.

send African-American high schoolers to the Louisville all-black high school Central High School because the County system did not maintain a high school for African-American students. *Newburg Area Council, Inc. v. Board of Educ. of Jefferson Co.*, 489 F.2d 925, 927-28 (6th Cir. 1973). After *Brown*, both the City of Louisville and Jefferson County took some minor steps to desegregate, but the majority of the schools attended by African-American were still racially-identifiable as of the 1970s. *Id.* at 930.

B. Efforts to desegregate Louisville's schools—1970s to 1990s.

When parents brought class actions to force the Louisville and Jefferson County Boards of Education to fully integrate the public schools, the local federal district court judge, James F. Gordon, refused to order the schools to desegregate. It was not until the Sixth Circuit Court of Appeals reversed the findings of Judge Gordon, and held that the segregated schools were vestiges of prior *de jure* segregation, that the efforts to desegregate the schools began to bear fruit. The Louisville Board of Education voted to dissolve itself, putting the city schools under the control of the County Board of Education ("Board"), to ensure that any remedial decree would apply county-wide, removing the interdistrict remedy issue as a point of contention.[10]

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[10] The Kentucky State Board of Education approved of the dissolution in 1975. *See Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976).

When the Sixth Circuit issued a writ of mandamus,[11] Judge Gordon desegregated the now-unified Louisville and Jefferson County schools, issuing a decree that involved massive busing of students based on the first letter of the students' last name—the so-called "alphabet" system. Busing appeared to be the only option for effective integration due to the stark residential segregation in Louisville and Jefferson County, particularly in light of the Sixth Circuit's finding that reliance on neighborhood schools were part of the problem: "[t]he attendance areas tracked neighborhood lines; the demographics of each neighborhood shaped the racial composition of the schools." *Hampton v. Jefferson County Board of Education*, 72 F.Supp.2d 753, 759 (W.D. Ky. 1999) ("*Hampton I*").

The "alphabet" system busing plan – one of the most extensive busing plans in the nation – engendered great public discord, and even violence. *See id.* at 755. Anti-busing protests surrounding the beginning of the 1975 school year erupted into riots. One riot in September 1975 involving over 10,000 people on Dixie Highway, one of Louisville's largest thoroughfares, resulted in fires, and rocks and bottles being thrown at police. Another riot occurred the same night on Preston Highway, another large thoroughfare. That riot led

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[11] Judge Gordon resisted the issuance of a desegregation decree even after the Sixth Circuit's opinion in *Newburg*. Judge Gordon stalled while the parties litigated over the issue of whether the Sixth Circuit could require an interdistrict remedy in light of *Milliken v. Bradley*, 418 U.S. 918 (1974), and the Sixth Circuit had to resort to a issuance of writ of mandamus ordering Judge Gordon to fashion a remedy for the 1975-1976 school year. *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578 (6th Cir. 1975).

to 35 school buses being damaged by fire and required the use of tear gas and nightsticks to disperse the crowd.[12]

Judge Gordon's decree remained largely intact until 1984, though Judge Gordon ended active oversight of the decree in 1978. *Hampton I*, 72 F. Supp.2d at 765. In 1984, the Board sought to amend the decree in order to gain greater support for the public schools among parents and taxpayers. Specifically, the Board sought a mechanism by which it could maintain desegregation without as much reliance on busing. The Board developed a "managed choice" student assignment plan, allowing some parental choice while maintaining desegregation through the introduction of the 15-50 low and high percentages for African-American enrollment per school. The Board sought to make these changes due to minor demographic changes and the continued lack of community support for desegregation. The original plaintiffs from the 1970s opposed the transition to this plan, and sought to maintain the "alphabet" busing plan. The Board sought a declaration from the federal court that it had been declared "unitary" so that it could implement the new "managed choice" plan. The federal court ruled that Judge Gordon's withdrawal of active oversight in 1978 gave the Board the authority to amend the assignment plan. *Id.* at 766-67.

The institution of the "managed choice" plan has led over time to greater public satisfaction and acceptance of public school desegregation in Louisville and Jefferson County. While the great majority of Louisvillians opposed

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[12] *Abstracts of Television Coverage of Louisville Desegregation, Walter J. Brown Media Archives & Peabody Awards Collection,* available at http://www/libs.uga.edu/media/events/oldsite/bhm/bhm2004/kentucky.html (last visited October 5, 2006).

desegregation in 1975, the vast majority of parents polled in 2000 - 77% - supported the use of race in student assignment, and 82% of parents believed that students benefited from a racially diverse school environment. JA 107.

C. Enactment of Kentucky Education Reform Act.

The Board was faced with an additional mandate with the passage of the Kentucky Education Reform Act ("KERA"), 1990 Ky. Acts Ch. 476, enacted in the wake of the Kentucky Supreme Court's opinion in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). In *Rose*, the Kentucky Supreme Court (1) declared the system of school funding in place at the time to be unconstitutional under the Kentucky Constitution's requirement that the Kentucky General Assembly provide for an "efficient system of common schools," KY. CONST. § 183; and (2) held that students in Kentucky had a constitutional right to an adequate public primary and secondary education, and that funding disparities between rich and poor areas would not be allowed:

> The system of common schools must be adequately funded to achieve its goals. The system of common schools must be substantially uniform throughout the state. Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education.

Id. at 211.

In reaching its ruling in *Rose*, the Kentucky Supreme Court called on the words of this Court in *Brown*:

> Education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 191 (quoting *Brown*, 347 U.S. at 483).

KERA represented a radical departure in state educational theory. It established new organizational structures in addition to setting new educational standards. KERA instituted six goals and academic expectations, including a goal that students should become "self-sufficient individuals," a goal that students should "develop their abilities to become responsible members of a family, work group, and community, including demonstrating effectiveness in community service," and a goal that students should "develop their abilities to think and solve problems in school situations and in a variety of situations they will encounter in life." Ky. Rev. Stat. § 158.6451(1)(b); *see also* JA 31. All of these goals stretch beyond the normal conception of school of imparting "book learning"—the goal of KERA is to educate students to reach the goals quoted from *Brown*: good citizenship, awakening to shared cultural values, and adjustment to the social environment.

Because public education is a state constitutional mandate in Kentucky, taxpayer support for the public educational system as a whole - the kind achieved in Louisville for the

"managed choice" plan since 1984 – is vital to maintaining the funding necessary for an "efficient system of common schools" that provides an equal and adequate education for each and every child.

D. Unitary declaration and the 2001 Assignment Plan

The Board continued to use the 1984 Assignment Plan essentially unamended until 2000, when the Federal District Court for the Western District of Kentucky determined that the Board had achieved unitary status. *Hampton v. Jefferson County Board of Education*, 102 F. Supp.2d 358 (W.D. Ky. 2000) ("*Hampton II*"). Notably, the unitary declaration was made over the objection of the Board, in contrast to the Board's arguments in 1984 when it introduced the 15-50 racial percentages to minimize busing. *Id.* at 359.

Having declared the Jefferson County Public Schools unitary, the District Court held that the Board could not apply the 15-50 racial percentage to schools offering special curricula such as magnet schools and magnet programs. *Id.* at 380-81. However, the court specifically found that, in contrast to magnet schools and magnet programs, schools offering the basic standardized curriculum – called "resides" schools in the terminology of the 1984 Assignment Plan – are essentially "fungible," and that there is no individual right to attend a specific school in those circumstances. *Id.* at 380. That factual finding was not challenged on appeal.

The Board developed a modified assignment plan in light of the holding in *Hampton II*. The 2001 Assignment Plan maintains the "managed choice" plan introduced in 1984, and the 15-50 racial percentages, only as to "resides" schools, and only after all the "managed choice" aspects are exhausted. Primary schools are grouped into clusters in the same manner

as first presented in 1984, and each student is assigned a "resides" school, the "fungible" schools in the terminology of the District Court. Students may then transfer between cluster "resides" schools based on parental preference, or apply for admission to one of the magnet schools available at the primary level. JA 37-39. At the secondary school level, students are also assigned a "resides" school, just like in the 1984 Assignment Plan. If a student does not wish to attend the "resides" school, he or she may apply for a transfer to any other "resides" school in the county or apply to magnet schools and magnet programs. JA 41-43. Transfers may be requested and granted based on day care arrangements, medical issues, adjustment problems, general hardship, or any other valid reason. JA 43. Only after these options for achieving student assignment does race affect student assignment, and only with respect to the "resides" schools. JA 37-43.

When evaluating the 2001 Assignment Plan in the context of this litigation, the District Court (affirmed by the Sixth Circuit) again determined that there was no right to attend a particular "resides" school because they offered comparable curricula, and affirmed the use of the 15-50 percentages as they applied to the "resides" schools. The District Court invalidated the 15-50 percentages with respect to schools offering the "traditional" program, a unique program not offered at other schools.[13] *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 856-863 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2006), *cert. granted*, 126

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[13] The traditional schools were not addressed in *Hampton II*. The District Court applied the same rationale to the traditional schools in this case as it did to the magnet schools and magnet programs in *Hampton II* because of their uniqueness.

S. Ct. 2351 (2006). The District Court's ruling with respect to the "traditional" schools is not before this Court.

In sum, the 15-50 percentages do not apply to magnet schools, magnet programs, or traditional schools. The percentages only apply to the "resides" schools, and there has been no challenge to the District Court's factual determination that the "resides" schools offer equal educational opportunities in curricula, facilities and resources.

SUMMARY OF ARGUMENT

The 2001 Assignment Plan represents the culmination of a long, unique history of attempting to provide an adequate and equal public education within Jefferson County. Because of the requirements of Kentucky's constitution, and the sometimes tumultuous background of desegregation efforts in Jefferson County's history, the Board created a system that balanced its compelling interest in fostering diversity with the requirement to use racial considerations in a narrowly tailored manner. In order to achieve this goal, the Board created a plan that used race only as a last resort to be considered at the end of the assignment process in limited cases so as to effectuate the goals of a diverse learning environment. Unlike the other cases that this Court has considered concerning the interest in diversity, the Jefferson County school district contains "fungible" schools, thus ensuring that race is not used to award any "prize" to a particular student, but is simply a placement method for allocating substantially similar resources. The use of racial considerations is substantially limited so that school districts have a wide range of racial makeups (from 15-50% African-American students) and nothing resembling a "quota" is in place. The Board engages in individual review as much as is feasible considering the age of the students, and student choice is

given substantial weight in the final assignment of a particular child. The use of race is as limited as it can be considering the practicalities of elementary and secondary school education. Thus, a decision that this narrowly-tailored system is unconstitutional would have the effect of holding that there is simply no way to achieve the compelling interest of diversity at the pre-university level.

ARGUMENT

I. A diverse school population is a necessary component of a modern public education.

In today's modern and diverse world, any individual who expects to succeed must have the ability to interact with a wide range of individuals from a variety of different types of backgrounds. For the vast majority of children, their first interaction with people with different social, economic and ethnic backgrounds is through the public educational system. For the reasons this Court recognized in *Grutter v. Bollinger*, a school district has a compelling interest in obtaining "the educational benefits of a diverse student body." 539 U.S. 306, 328 (2003). In *Grutter*, the court accorded deference to the University of Michigan Law School's determination that "diversity is essential to its educational mission."[14] *Id.* Like

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[14] It is important to note that more than five justices agreed that deference should be given to education bodies' "considered judgment that racial diversity among students can further its educational task." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). While there was a dispute as to whether, and how much, deference should be, or was given, to the university in the implementation of that goal, the notion that deference is due to a local school district's decision that deference integral is a "compelling interest" is one that has broader support.

the law school, the Board has long recognized the benefits of having a diverse student body, and through the course of time, so have the citizens of Jefferson County. At this point, 77% of the citizens of Jefferson County believe that the use of race in student assignment is helpful and 82% believe that students benefit from these racially diverse environments. JA 107. In order for Jefferson County to be able to continue to provide its students with the popularly-supported reality of racially-diverse school environments, the Court must uphold the current student assignment plan.

A. In the Commonwealth of Kentucky, one of the stated purposes of the educational system is to prepare future citizens to be members of a diverse society.

As much as any other governmental function, education of children in the United States has been a matter of local control. This can be seen in a number of different ways, none more obvious than the fact that this Court has continually endorsed the important role of locally-elected school boards in determining the crucial educational policies for their communities. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 489-90 (1992); *Wash v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 482 (1982); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). Allowing local school districts to maintain the primary control over the curriculum and makeup of their schools increases the involvement of those in the community, but also makes the crucial connection between parents and their children's schools, a connection that is integral to both the success of the individual student and the district as a whole. Thus to whatever extent deference was deemed to be significant for institutions of higher learning, that importance is only magnified on the primary and secondary school level,

where local control is a foundational hallmark of successful school systems.

In order to put the 2001 Assignment Plan in the proper context, it is important to consider the context of not only the history of Jefferson County but the goals of the Kentucky educational system as a whole. As this Court pointed out in *Grutter*, "[n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." 539 U.S. at 327.

In the specific context of Jefferson County, the creation of school districts that foster the values necessary to become good citizens is at the heart of the educational system. When the Kentucky Supreme Court declared the state system of school funding unconstitutional in 1989, it did so because the system did not allow each student in the Commonwealth to be provided with an equal and adequate education. *Rose*, 790 S.W. 2d. at 211. The Kentucky General Assembly was thus charged with carrying out its constitutional mandate and providing for an "efficient system of common schools." *Id.* As part of this mandate, it was recognized that education "is the foundation of good citizenship. It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment." *Id.* at 191. This theory became the basis for the legislative effort to seek a broader educational scheme in order to transform the Kentucky educational system.

The Kentucky General Assembly then created what at the time was a radical new experiment in state educational theory

with KERA. KERA recognized that, in Kentucky, education meant more than simply memorizing theorems or reading great literature. Educational goals should also include the creation of "self-sufficient individuals." Emphasis was placed on helping students develop their abilities to "become responsible members of a family, work group, and community" and "think and solve problems in school situations and in a variety of situations they will encounter in life." Ky. Rev. Stat. § 158.6451(1)(b). The 2001 Assignment Plan was constructed based in part on the mandates of KERA, and as part of this Plan, a new emphasis was made on helping students become more valuable members of their community and better citizens, able to succeed in a diverse world.

B. The history of race relations and school desegregation in Jefferson County also makes diversity a particularly compelling interest in the local system.

In addition to the various features of KERA, the Board also considered the specific history of Jefferson County and the various racial problems that have plagued the city over the years. As recounted above, segregation in Louisville was difficult to overcome. Despite the difficulties, the Board continues to attempt to remedy the past effects of segregation. Over the course of the last 30 years, the idea of educational equality and the benefit of an integrated learning environment has become ingrained in the community and has gained widespread acceptance.

This unique background showcases the importance of granting local school districts deference in determining what educational goals should be priorities for their local area. There may be school districts in the country that do not

possess the historical racial difficulties that have occurred in Jefferson County or that do not operate under a state educational system with such wide-ranging educational mandates. In these localities, diversity may not be one of the most important values that the local school board seeks to implement. However, creating a diverse school environment has become an ingrained part of the educational mission in Jefferson County and is one that has not only bettered the local school system, but also maintained the support of taxpayers and voters that is essential to maintaining equal opportunity for all students. Unique local characteristics matter, and the Board "is convinced that integrated schools provide a better educational setting for all its students; [and] that concentrations of poverty which may arise in neighborhood schools are much more likely to adversely affect black students than whites." *Hampton II*, 102 F.Supp. 2d. at 371 n.30. This is a conclusion made based upon the unique circumstances of Louisville and Jefferson County and is one that should be given the appropriate deference.

The finding of unitary status by the District Court in *Hampton II* finally turned the school system fully over to the Board's control. Prior to that time, the federal courts substituted their judgment concerning local educational policy for that of the Board. This Court has repeatedly stated that it is not ideal to maintain the federal court's involvement in local educational policy indefinitely, and has supported the concept of allowing local school boards set policy within constitutional bounds. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'"); *see also id.* at 506 (Scalia, J., concurring) ("We envisioned it as temporary partly because 'no single tradition in public education is more deeply rooted that local control over operation of the schools.'") (quoting *Milliken v. Bradley*, 418

U.S. 717, 741 (1974)). This Court has also cautioned, however, that local school boards must keep a watchful eye out for racial discrimination even after a declaration of unitary status:

> Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school system. Where control lies, so too does responsibility.

Id. at 490. It would be illogical to hold that the Board must maintain desegregated schools for 25 years using a race-conscious plan imposed by federal court order, but once the order is dissolved, to forbid the Board from using its discretion to retain the race-conscious plan to protect against resegregation. The Board, in attempting to provide an equal and adequate public education to all students, exercised its hard-earned discretion to enact a race-conscious plan to ensure that the desegregation victories of the past 25 years would not be lost. There can be no doubt that the Board has a compelling interest in support of its student assignment plan, and this Court should give deference to the board in making the determination that it is necessary to maintain a race-conscious plan.

II. The Board, in exercising its discretion to maintain desegregated schools, fashioned a narrowly tailored plan using race only to the extent necessary to achieve the goal.

Even when attempting to achieve a compelling purpose such as diversity, the Board may admittedly only use race in a manner "specifically and narrowly framed to accomplish that purpose." *Grutter*, 593 U.S. at 333. In order to meet this requirement, the Board's use of race must "fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). The 2001 Assignment Plan thus must be carefully "calibrated to fit the distinct issues raised by the use of race" in Jefferson County, taking into account the special needs of the county and its unique history and situation. *Grutter*, 593 U.S. at 334. Thus, in determining whether the Jefferson County assignment plan has been narrowly tailored and is the proper "fit," it is important to consider the specifics of the Plan as compared to the plans approved by the Court in *Grutter* and struck down in *Gratz*.

A. A public primary and secondary school system is fundamentally different from higher education.

All of the cases in which this Court has considered the use of race in promoting the compelling interest of diversity in education have been in the context of higher education. *See Grutter v. Bollinger*, 593 U.S. 306 (2003); *Gratz v. Bollinger*, 593 U.S. 244 (2003); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1977). In all of these cases, the Court was reviewing the constitutionality of systems designed to determine which students would be denied admission to a special educational opportunity. The

UC Davis Medical School in *Bakke*, the Michigan undergraduate program in *Gratz*, and the Michigan law school in *Grutter* are all systems in which the admissions process is one of exclusion. Boards of Admissions in each case used various factors to determine who will be admitted, with those who do not meet the criteria rejected. These systems of exclusion make admission into the particular institution essentially a "prize"; thus the factors utilized in determining the winners of that "prize" are of significant importance. *See also Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995) (invalidating the use of race in the awarding of the "prize" of a governmental contract); *J.A. Croson Co.*, 488 U.S. at 493 (invalidating the use of race in the awarding of the "prize" of municipal contracts).

In this case, however, the Board is under a state constitutional and statutory obligation to provide an adequate and equal education to all students within its jurisdiction. *See Rose, supra*. Unlike the other higher education admissions policies in *Bakke*, *Grutter* and *Gratz*, the Board is not excluding any students. It is merely determining where it will place students under its regular assignment policy. Jefferson County will educate all of its students at some school within its jurisdiction. The only question is which school a particular student will attend. Thus, the concern expressed by some members of this Court in *Grutter*, *i.e.* that a part of the interest being upheld was the University of Michigan Law School's interest in remaining an elite institution with high academic admittance standards, is not relevant here. *See Grutter*, 539 U.S. 306, 351 (Thomas, J., dissenting in part). The Board is obliged to educate all of its students, and its stated goal of achieving diversity is not for the benefit of the school district itself. The goal is solely designed to benefit the students.

With this in mind, it is important to remember that, under the District Court's various judgments in *Hampton II* and this case, the 15-50 guideline is inapplicable to magnet schools, magnet programs, and traditional schools. The limited use of race in the 2001 Assignment Plan occurs solely as a final factor in determining whether a student who has requested a transfer to a particular school outside of his or her "cluster." A choice to seek admission to a particular school within the district does not equate to the "prize" of admission to an elite college. The "resides" schools within Jefferson County have been found as a fact to be "fungible" by the District Court, a finding made at the same time the school district was declared unitary. *Hampton II*, 102 F.Supp. 2d. at 371 n.30. Thus from a legal perspective, all the "resident" schools in Jefferson County at issue in this case offer equal educational opportunities in terms of curriculum, resources and facilities. It is surely the case that a variety of attributes may make a particular school more appealing to a particular student or parent. Parents may prefer the school closest to their workplace or to their residence. But such individualistic preferences are distinctly different from the opportunity to attend an elite institution of higher learning. No court has ever held that a particular student has the right to attend a particular school based upon their own individualized criteria, when from a legal perspective the schools offer equal educational opportunities.

B. In the context of primary and secondary public education, the Board's criteria are narrowly tailored.

While it is clear that the requirement that the 2001 Assignment Plan must be narrowly tailored in order to survive strict scrutiny, it is equally true that the inquiry must "be calibrated to fit the distinct issues raised by the use of race"

in the particular case, issues that produce distinct challenges in the context of a mandatory primary and secondary school system. The District Court identified a number of factors that this Court considered in *Grutter* in making its determination that the Michigan Law School Plan was sufficiently narrowly tailored to satisfy strict scrutiny. *McFarland*, 330 F. Supp. 2d at 856. When considered in this context, the 2001 Assignment Plan satisfies all of these criteria.

As the District Court noted, the most important issue with respect to narrow tailoring is whether the Board's Plan operates as a quota. *Id.* This Court has held that a quota is "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Grutter*, 539 U.S. at 335 (quoting *J.A. Croson Co.*, 488 U.S. at 496). It is not the case, however, that any use of numbers by a school district immediately dooms the Assignment Plan. Rather, as this Court noted in *Grutter*, "[s]ome attention to numbers, without more, does not transform a flexible admission system into a rigid quota." *Id.* at 336. In fact, if school districts are to able to fully reach their compelling interest in diversity, numbers must be considered, as it would be impossible for a district to accurately gauge to what extent diversity is being attained without some consulting of racial numerical data.

The numerical data are used in the most flexible way possible in the 2001 Assignment Plan. The Board has a goal of achieving between 15 and 50 percent African-American students at each school in the district. This range is so widely dispersed that calling it a "quota" would deprive the word of any meaning. In fact, when compared with the ranges accepted by this Court in *Grutter*, the Jefferson County range is substantially more variant. Justice O'Connor in her majority opinion found that the range of minority students at

Michigan Law School varied between 13.5% and 20.1%, "a range inconsistent with a quota." *Id.* While Justice Kennedy, writing in dissent, took issue with the exact range being used by Michigan Law School, he cited approvingly the range of minority applicants accepted at Amherst College, a range that varied between 8.5% and 13.2%. *Id.* at 389 (Kennedy, J., dissenting).

In this case, not only is the range much wider than those approved by both the majority and members of the dissent in *Grutter,* but the disparity between individual schools in Jefferson County proves that the broad target range is flexible. The District Court found that 62 of the 87 elementary schools, 17 of the 23 middle schools and 15 of the 20 high schools have over 40% or under 30% African-American students. *McFarland*, 330 F. Supp. 2d at 856. Only 30% of all schools have an African-American population within five percent of the system-wide average. *Id.* The Board has determined that, due to the many factors that make up a diverse school environment, true diversity can be reached within a wide range of racial demographic populations. In so doing, the Board has shown a commitment to diversity as a compelling interest, rather than simply a static attempt at racial quotas. It is constitutionally permissible to set broad racial goals in student assignment so long as a good-faith effort is made "to come within a range demarcated by the goal itself." *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 495 (1986). The Board has enacted such a range here and, in so doing, has far exceeded the range of plans already approved of by this Court and done so in a way that has gained the approval of the community as a whole.

In addition to the prohibition on the use of racial quotas, the Court's opinion in *Grutter* made clear that, in the context

of higher education, a "highly individualized, holistic review" of applications is required in order to ensure that "each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Grutter*, 539 U.S. at 337. While it is clear that individualized decisions must be made by schools and race can only be considered as one of many factors in making student assignments, it is important to remember that the Board's Plan is instituted in a context very different from the elite law school in *Grutter*. Unlike a university or graduate program, the Board's goal is not to exclude applicants or to weigh criteria in a competitive manner, but rather to create equal educational opportunities for all its students. The particularized individual review in this context has a completely different purpose. Rather than rewarding those who have already achieved, the Board is attempting to foster greater achievement by all students in a broad range of areas, *see* Ky. Rev. Stat. § 158.6451(1)(b), and thus its individualized attention should be considered with that goal in my mind.

Even with this distinct goal, the Board's assignment process focuses a great deal of attention on the individualized characteristics of the student's application. Factors such as place of residence and student choice represent the initial criteria in student assignment, and the vast majority of placement decisions derive from this criteria. In a very few instances, when requests for student transfers would bring the diversity of a particular school outside the range deemed ideal for the Board to achieve its compelling interest, race can be used as a "tipping factor" in accepting or denying the application. JA 44-45. This factor is not used to grant a special educational benefit or an academic or career "prize." Rather, because it has already been held that the "resides" schools in Jefferson County are fungible and provide the exact

same educational opportunity, this use of race does nothing except potentially deny a student from a preference for attendance at a particular school, a benefit that amounts to nothing more than personal preference, not a constitutional right. *See Johnson v. Bd of Educ. Of Chi.*, 604 F.2d 504, 515 (7th Cir. 1979).

Various *amici* have criticized the Jefferson County Plan for its use of race in even this limited capacity and have argued that the Board does not consider the wider range of potential diverse qualities that were utilized by the University of Michigan Law School. While this is true, this argument seeks to remove this case from its proper context. The Board is responsible for the education of all students in Jefferson County, including students as young as five years old. The law school in *Grutter* utilized criteria such as potential foreign travel, knowledge of several languages, overcoming personal adversity, potential family hardship, leadership qualities, extensive community service and careers in other fields. *Grutter*, 539 U.S. at 338. While these criteria certainly are applicable in helping create a diverse student body for individuals who are at least 21 years old and have experienced a variety of activities, those criteria have virtually no corollary in the primary and secondary school context. The factors that can be utilized to ensure diversity are strictly demographic. The Board has chosen to do this by creating diversity through the "resides" areas, while allowing for the opportunity for the free-flow of students to schools away from their home area and in very few cases, the potential use of race as a "tipping point."

In *Grutter*, this Court noted that entities ranging from the United States Armed Forces to various corporations have made clear that diversity, including racial diversity, is of a benefit in educating individuals for success in the real world.

Id. at 334; Ky. Rev. Stat. § 158.6451(1)(b). When dealing with students of primary and secondary school age, other important components of diversity, such as interests, beliefs and experiences, have yet to develop in any meaningful way. Thus the "individual, holistic review" presented in *Grutter* would be impossible as applied to children of a much younger age. To the extent that individualistic review is possible for these young students, the Board engages in such a review. This review ensures that, in the context of primary and secondary education, its plan is narrowly tailored.

The 2001 Assignment Plan is also sufficiently narrowly tailored so as to not "unduly harm members of a racial group." *Id* at 341. This criterion also must be considered in the context of primary and secondary education. As Justice Powell first noted in *Bakke*, there is a distinct difference between denial of admission to a selective graduate school and the assignment of a student to an alternative, but functionally equivalent public school. *Bakke*, 438 U.S. at 300 n.39. As noted above, a student does not have a right to attend whatever public school s/he chooses. *Johnson*, 604 F.2d at 515. So long as a school district is providing the equivalent educational opportunity to all its students, a finding made when the 1975 decree was dissolved, it cannot be said that a particular student has been "unduly harmed" by a decision to deny a transfer. There are no zero-sum decisions where one student is accepted and receives the "prize" of higher education while the other is excluded. Rather, all students receive the benefit of a fungible education, and the system in place simply guides the Board's permissible discretion in determining the particular student's placement.

Finally, the evidence suggests that the Board more than met its obligation to undertake "serious, good faith consideration of workable race-neutral alternatives that will

achieve" its goals. *Id.* 539 U.S. at 339. The vast majority of students in Jefferson County never have their race taken into account at any point during the process. A significant number of the students are enrolled in the traditional programs or magnet schools and magnet programs, and these programs have no racial component to their admissions policies. In addition, the vast majority of the students are assigned using school geographic boundaries which help create the "resides" schools, albeit boundaries that integrate a variety of neighborhoods. The fact that these criteria are used to assign the vast majority of Jefferson County students illustrates that the board's motives in creating this system are legitimate. It seeks to increase diversity in the school system while utilizing race in the most limited way necessary to achieve the goal. After over thirty years of experience attempting to desegregate the schools in the County and achieve workable solutions to increasing diversity within the system, the 2001 Assignment Plan reflects the Board's reasoned judgment as to the best method of accomplishing these goals in the most narrowly tailored way possible.

CONCLUSION

Beginning in the mid-1970s, nearly twenty years after *Brown v. Board of Education*, a federal desegregation order was entered in Jefferson County in order to reach the goal of what is now in place: an integrated school system with community-wide support that produced a diverse learning environment for the betterment of all of the county's students. The litigation, political conflicts and social turmoil of the last few decades has amazingly produced a system that, while not perfect, is substantially closer to the mandates of *Brown* and its progeny than many would have ever believed. The Respondents and supporting *amici* simply ask for the ability

to keep that system in place and continue to provide its benefits for students in the future.

For the foregoing reasons, the decision of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE NINTH AND SIXTH CIRCUIT, RESPECTIVELY

BRIEF *AMICI CURIAE* OF THE PROJECT ON FAIR REPRESENTATION, NATIONAL ASSOCIATION OF SCHOLARS, AND LAW PROFESSORS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Project on Fair Representation at the American Enterprise Institute is a public interest organization dedicated to the promotion of color-blind equal opportunity and racial harmony. The Project works to advance race-neutral principles in the areas of education, public contracting, public employment, and voting.

The National Association of Scholars ("NAS") is an organization comprising professors, graduate students, administrators, and trustees at accredited institutions of higher education throughout the United States. NAS has more than 4,300 members and associates, and includes within its ranks some of the nation's most distinguished and respected scholars in a wide range of academic disciplines. The purpose of NAS, among other things, is to encourage, foster, and support rational and open discourse as the foundation of academic life, and to nourish the free exchange of ideas and tolerance as essential to the pursuit of truth in education. NAS thus works to advance race-neutral principles in education.

Amici Law Professors seek to promote learning in an academic environment free from the racial discrimination. *Amici* are committed to the principles of equality that underlie our system of government and therefore oppose racial classifications of any kind.[2]

Amici have a direct interest in this case. *Amici* oppose racial preferences in student admissions and assignment because they

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[1] The parties have filed letters with the Court consenting to all *amicus* briefs. No counsel for a party has written this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A list of the *amici* professors and their academic affiliations is provided as an appendix to this brief. The views expressed in this brief are those of the individual professors and do not necessarily reflect the views of the schools at which they teach.

believe that such preferences are contrary to the principles to which *amici* are dedicated and to the American ideal of individual equality to which *amici* are profoundly committed. For these reasons, *amici* respectfully submit this brief in support of Petitioners and urge the Court to reverse the judgments below.

SUMMARY OF ARGUMENT

The Court has asked whether *Grutter v. Bollinger*, 539 U.S. 306 (2003), should be overruled. The answer is yes. *Grutter* is inconsistent with the text and history of the Fourteenth Amendment, misapplies longstanding precedent, and gives sanction to racial balancing under the guise of viewpoint diversity. No countervailing principle of stare decisis offers a satisfactory basis for retaining this recent and thoroughly misguided decision. Indeed, "[i]t is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, __ U.S. __, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part, dissenting in part).

The Declaration of Independence announced that "all men are created equal" and thereby pledged our unrelenting commitment to the principle of individual equality. The Founders understood that equal treatment under the law is an indispensable component of republican governance. They nevertheless sacrificed this principle to forge a Union among the thirteen Colonies. *See, e.g.*, U.S. Const. art. I, § 2, cl. 3. The judiciary later assisted in sustaining the institution of slavery and eliminated any remaining chance to resolve the question short of armed conflict. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The Civil War thus was a result of our failure to deliver on the Declaration's promise of equality for all.

The Reconstruction Amendments were a prize of this bloody war. The Framers of the Fourteenth Amendment recognized the genesis of the Civil War and drafted the Equal Protection Clause in terms sweeping enough to permanently ensure individual equality: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.

Const. amend. XIV, § 1. The Equal Protection Clause, by its terms, does not admit of state-administered racial classifications that inevitably protect some at the expense of others.

The Framers' expectations were quickly dashed as the courts read the guarantee of equality out of the Fourteenth Amendment in the service of Jim Crow. *See Plessy v. Ferguson*, 163 U.S. 537 (1896). Only the first Justice Harlan stood against the tide of government-sanctioned segregation. In dissent, he captured the true meaning of the Equal Protection Clause in one sentence: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559 (Harlan, J., dissenting). Justice Harlan too understood that the concept of equal protection banned racial classifications without exception.

It took nearly fifty years for Justice Harlan's vision of a color-blind Equal Protection Clause to become law. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The result in *Brown* rejected the rule of *Plessy*, gave life to the Declaration's promise of equality, and charted a return to a color-blind Fourteenth Amendment. After *Brown*, only remedying de jure discrimination, and perhaps the existence of a national emergency, would permit government-endorsed classifications on the basis of race. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Indeed, the rule that the individual right to equal protection forbade racial balancing was thought to be settled. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (Powell, J.).

Grutter undid a half-century's march toward racial neutrality by resurrecting quotas under the guise of diversity. *See Grutter*, 539 U.S. at 329-30. As the dissenters explained, whatever one thinks of true diversity, the University of Michigan simply had no compelling interest in pursuing this goal. *See id.* at 388-89 (Kennedy, J., dissenting). For public schools that use race in the decision-making process, race is not only the predominant factor—it is the only factor. Worse still, by erasing the distinction between diversity and quotas, *Grutter* conferred

legitimacy on blatant racial classifications that should have been rejected long ago. *See, e.g.*, *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005) ("The only relevant criterion . . . is a student's race; individualized consideration beyond that is irrelevant to the compelling interest.").

Stare decisis is not a barrier to overturning *Grutter*. The Court's paramount obligation, especially in constitutional cases, is to reach the legally correct result. *See Smith v. Allwright*, 321 U.S. 649, 665 (1944). The legally correct result here is beyond peradventure. Nonetheless, the Court often will look beyond the merits to institutional considerations before overturning a wrongly decided case. These considerations include, among others, whether the decision is out of step with established precedent, whether it produced significant reliance, or whether it has proven unworkable. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992). All of these considerations counsel in favor of overturning *Grutter*.

Grutter is an outlier decision that is out of step with an established body of equal protection jurisprudence. *See Helvering v. Hallock*, 309 U.S. 106, 119 (1940). In particular, the Court's refusal to apply strict scrutiny plainly is inconsistent with longstanding precedent. *See Adarand*, 515 U.S. at 235-36. Indeed, the Court's unprecedented deference to the University under the guise of First Amendment academic freedom is fundamentally inconsistent with the entire premise of strict scrutiny. *See Johnson v. California*, 543 U.S. 499 (2005).

Grutter also did not engender reliance of sufficient weight to overcome its infidelity to the Constitution. Recent decisions are far less likely to produce reliance interests of any significance. *See Adarand*, 515 U.S. at 232-33. And government-mandated racial classifications, which are time-limited under even the most forgiving view, are particularly unlikely to do so. *See Grutter*, 539 U.S. at 342. Last, by confusing the distinction between quotas and genuine diversity, *Grutter* produced an unworkable system that denies the lower courts any legitimate

basis for distinguishing between the various affirmative action programs according to neutral principles of law. *Grutter* should be overruled.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT ADMIT OF CLASSIFICATIONS ON THE BASIS OF RACE.

A. The Equal Protection Clause Is Color-Blind.

The Declaration of Independence is the moral foundation from which the Fourteenth Amendment ultimately emerged. The Declaration boldly announced the "self-evident" truth "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence (U.S. 1776); *see also Lovett v. United States*, 66 F. Supp. 142, 149-50 (Ct. Cl. 1945) (Jones, J., concurring) ("The principle of equality was written in the Declaration of Independence before we had a constitution. It was the result of a long struggle of English peoples upward toward the plains of liberty. It is one of our proudest traditions."), *aff'd*, 328 U.S. 303 (1946). The Declaration thus pledged our enduring commitment to the principle of individual equality.[3]

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[3] The Massachusetts Declaration of Rights, enacted in 1780, similarly announced that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights," which are, "the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property." Declaration of Rights (Mass. 1780). As the Massachusetts Supreme Court explained, "[i]t would be difficult to select words more precisely adapted to the abolition of negro slavery." *Massachusetts v. Aves*, 35 Mass. (18 Pick.) 193, 210 (1836); *see also* Donald G. Neiman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 Cardozo L. Rev. 2115, 2119 (1996) ("The principles of republicanism and the ideas expressed in the Declaration of Independence were the animating principles of American constitutionalism that entitled all citizens to equal rights regardless of race.").

This promise of equality for all, unfortunately, was not immediately realized. Operating under the belief that a lasting Union was not otherwise attainable, the Founders allowed the evil of slavery to persist. *See, e.g.*, U.S. Const. art. I, § 2, cl. 3 (three-fifths clause); *id.* art. IV, § 2, cl. 3 (fugitive slave clause). That is, although the American Revolution freed us from British rule, the "Constitution of the new Nation, while heralding liberty, in effect declared all men to be free and equal—except black men who were to be neither free nor equal." *Bell v. Maryland*, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, J.) ("Our Nation was founded on the principle that 'all Men are created equal.' Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery.").[4]

The judiciary assisted in further entrenching the institution of slavery. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (ruling that African-Americans were ineligible for citizenship); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858) (holding the Fugitive Slave Act of 1850 constitutional); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (holding state law prohibiting forcible return of escaped slaves

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[4] It would be wrong, however, to suggest that the immorality of slavery was lost on the Founders. *See, e.g.*, Thomas Jefferson, *Notes on the State of Virginia*, 288-89 (Merrill D. Peterson ed., Library of America 1984) (1871-72) ("And with what execration should the statesman be loaded, who, permitting one half the citizens thus to trample on the rights of the other, transforms those into despots, and these into enemies, destroys the morals of the one part, and the *amor patriae* of the other. . . . Indeed [I] tremble for my country when I reflect that God is just; that his justice cannot sleep for ever."); James Madison, Address Before the Constitutional Convention (June 6, 1787), *in* 1 *The Records of the Federal Convention of 1781*, at 135 (Max Farrand ed., Yale Univ. Press 1911) ("We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man.").

unconstitutional). The Court thus extinguished any remaining opportunity for a peaceful resolution through democratic means. *See* William H. Rehnquist, *The Notion of the Living Constitution*, 29 Harv. J.L. & Pub. Pol'y 401, 410 (2006) ("The Court in *Dred Scott* decided that all of the agitation and debate in Congress over the Missouri Compromise in 1820, over the Wilmot Proviso a generation later, and over the Kansas-Nebraska Act in 1854 had amounted to absolutely nothing.").[5]

The Civil War thus was the sad consequence of our failure to heed the Declaration of Independence in the first instance. *See* A. Lincoln, Gettysburg Address (1863) ("Fourscore and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure."); *Bell*, 378 U.S. at 286 (Goldberg, J., concurring) (explaining that the acceptance of slavery "reflected a fundamental departure from the American creed, a departure which it took a tragic civil war to set right").[6] Again, the Supreme Court played no small part in provoking this conflagration. *See Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1073 (Cal. 2000) (Brown, J.) ("In legitimating this pernicious concept [of racial inferiority], the [*Dred Scott*] court set the stage not only for the cataclysm of the Civil War but for the contentiousness that continues to this day over government's proper role with respect to race.").

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[5] *See also* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1024 (2003) (explaining that "the chief evil consequences of *Dred Scott* were the *entrenchment* and *extension* of slavery, the invalidation of the Missouri Compromise, the resulting evisceration of any possibility of political compromise over the expansion of slavery, and the de facto outlawing of the Republican Party platform").

[6] *See also* Michael Novak, *Another New Birth of Freedom: From Lincoln to Bush*, 72 Tenn. L. Rev. 813, 818 (2005) ("The Declaration by itself did not declare war on slavery. Yet, the principle it established had the eventual extinction of slavery as its unmistakable implication.").

The post-Civil War Amendments to the Constitution—"[p]urchased at the price of immeasurable human suffering," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring)—rekindled the ideal of race neutrality embodied in the Declaration. The abolition of slavery was, to be certain, the most immediate and profound post-war objective. *See* U.S. Const. amend. XIII. However, amending the Constitution to outlaw slavery, *see id.*, and to grant the right of suffrage to former slaves, *see id.* amend. XV, without more, would have been insufficient to meet the grander objective. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976) ("[T]he 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.").

The Fourteenth Amendment therefore announced that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause, by its terms, does not admit to racial classifications of any kind—for any reason. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96, 110 (1990) (Scalia, J., dissenting) ("[T]he Fourteenth Amendment's requirement of 'equal protection of the laws,' combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.").

Indeed, the Framers of the Reconstruction Amendments viewed their task as restoring the broader principle of individual equality that, as the Declaration explained, underlies the legitimacy of republican governance: "[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." 3 Cong. Rec. 945 (1875) (Statement of Rep. John Lynch); *see also* Cong. Globe, 42d Cong., 2d Sess.

3193 (1872) (Statement of Sen. John Sherman) (stating that the key to restoring peace in the South was to "[w]ipe out all legal discriminations between white and black"); 2 Cong. Rec. 4083 (1874) (Statement of Sen. Daniel Pratt) (explaining that "free government demands the abolition of all distinctions founded on color and race"). The historical evidence surrounding the framing of the Reconstruction amendments thus confirms the race-neutral command of the Equal Protection Clause.[7]

This Reconstructionist pursuit of race neutrality, however, was short-lived; "[t]he Equal Protection Clause . . . was '[v]irtually strangled in infancy by post-civil-war judicial reactionism.'" *Bakke*, 438 U.S. at 291 (Powell, J.) (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 381 (1949)). The judiciary repeatedly endorsed the proposition that segregation of public schools was compatible with the Equal Protection Clause. *See, e.g.*, *Ward v. Flood*, 48 Cal. 36, 52 (1874) (ruling that "in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other"); *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883) (ruling that the "claim" that "any distinction made by law and founded upon difference of race or color is prohibited by the Constitution . . . leads to startling results and is not believed to be well-founded"); *Lehew v. Brummell*, 15 S.W. 765, 766 (Mo. 1891) (concluding that "the constitution and laws of this state providing for separate schools for colored children are not forbidden by

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[7] *See also Bakke*, 438 U.S. at 293 (Powell, J.) (explaining that "it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application"); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 993 (1995) (stating that the Fourteenth Amendment's framers understood it to mean that "legally enforceable civil rights are the same for all . . . persons . . . without distinction on the basis of race [or] color").

or in conflict with the fourteenth amendment of the federal constitution").

The judicial nullification of the Equal Protection Clause was complete with *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, the Supreme Court—save Justice Harlan—upheld Louisiana's segregation of railroad cars under the rubric of "separate but equal" and thus "validated government-initiated racial restrictions and gave its imprimatur to legally enforced segregation on the theory that '[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.'" *Hi-Voltage Wire Works, Inc.*, 12 P.3d at 1073 (quoting *Plessy*, 163 U.S. at 552). The Court, for good measure, went out of its way to extend its "separate but equal" rationale to the public school context. *See Plessy*, 163 U.S. at 544 (concluding that "the establishment of separate schools for white and colored children . . . [has] been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced").

Standing alone, Justice Harlan articulated the proper meaning of the Equal Protection Clause in simple, eloquent terms that cannot be improved: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559 (Harlan, J., dissenting). As he explained, "all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id.* Moreover, Justice Harlan understood the significance of the Court's decision and presaged the regrettable events of the coming decades. *See id.* (explaining that state-sanctioned racial discrimination was "cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights" and would "have no other result than to render permanent

peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned").[8]

More than fifty years later, the Supreme Court ultimately vindicated Justice Harlan's vision of a color-blind constitution and restored the natural right to individual equality that the Declaration promised nearly two hundred years before. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954). In a terse rebuke of segregation, the Court unanimously held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown*, 347 U.S. at 495; *see also Bolling*, 347 U.S. at 499 ("Classifications based solely upon race . . . are contrary to our traditions and hence constitutionally suspect."); *see also Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) ("Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race.").

As Judge Wisdom later summarized, "*Brown* erased *Dred Scott*, used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution. Freedmen are free men. They are created as equal as are all other American citizens and with the same unalienable rights to life, liberty, and the pursuit of happiness." *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 873 (5th Cir. 1966), *aff'd* en banc, 380 F.2d 385 (5th Cir. 1967); *see also* John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13, 23-24 (1992) ("The self-evident proposition enshrined in the Declaration—the proposition that all men are created equal—is not merely an aspect of social policy that judges are free to accept or reject; it is a matter of

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[8] *See also* McConnell, 81 Va. L. Rev. at 954-55 (explaining that "*Plessy v. Ferguson*, far from being an accurate reflection of the original understanding [of the Fourteenth Amendment], adopted a position more extreme than even most opponents of civil rights could maintain in the early 1870s").

principle that is so firmly grounded in the 'traditions of our people' that it is properly viewed as a component of the liberty protected by the Fifth Amendment.").

Until *Grutter v. Bollinger*, 539 U.S. 306 (2003), the understanding that the Fourteenth Amendment created an individual right to be free from racial classifications was—if not universally adopted—surely on the march. *See Akins v. Texas*, 325 U.S. 398, 410 (1945) ("[W]e of this nation are one people undivided in ability or freedom by differences in race, color or creed."); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("Over the years, this Court has consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality." (citation and internal quotations omitted)); *Bakke*, 438 U.S. at 289-90 (Powell, J.) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." (footnote omitted)); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (The Fourteenth Amendment's "central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race. Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition." (citation omitted)); *Adarand*, 515 U.S. at 230 ("[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.").[9]

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[9] Early post-*Brown* decisions that failed to adhere to the color-blind approach almost universally dealt with the remedial measures designed to undo de jure racial discrimination—a unique Fourteenth Amendment injury. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate

(Cont'd)

These decisions unquestionably stemmed from the principle that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring); *see also Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting), *overruled by Adarand*, 515 U.S. at 227 (explaining that this is a "Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens."). The program validated in *Grutter*, as well as the secondary school assignment plans at issue here, renounce this moral imperative.

The Court should reject the misbegotten, race-conscious model endorsed in *Grutter* and give effect to the true meaning of the Equal Protection Clause. For that matter, any judicial decision that allows public schools to classify students on the basis of race—including the racial "tiebreaker" at issue here—should be overruled. *See Gratz v. Bollinger*, 539 U.S. 244, 281

(Cont'd)
from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*."); *but see Jenkins*, 515 U.S. at 114 (Thomas, J., concurring) (explaining that *Brown II* has allowed the "federal courts to exercise virtually unlimited equitable powers to remedy this alleged constitutional violation. The exercise of this authority has trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm."). And, more recent cases that did not adhere closely to the notion of racial neutrality—except for *Grutter*—have been either undermined or outright overruled. *See infra* Section II.

(2003) (Thomas, J., concurring) ("I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause."); *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting) (explaining that a student "who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner."); *Price v. Civil Serv. Comm'n*, 604 P.2d 1365, 1390-91 (Cal. 1980) (Mosk, J., dissenting) ("However it is rationalized, a preference to any group constitutes inherent inequality.").

"Our nation gave its word over and over again: it promised in every document of more than two centuries of history that all persons shall be treated Equally." *Price*, 604 P.2d at 1390 (Mosk, J., dissenting). Only by interpreting the Equal Protection Clause as color-blind and rejecting all racial classifications can we fulfill this promise. *See* Alexander M. Bickel, *The Morality of Consent* 133 (1975) ("The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."). Failure to heed this call, as Justice Harlan explained, only serves to "keep alive [the] conflict of races" that any classification on the basis of ancestry necessarily assures.

B. *Grutter* Wrongly Enshrined Racial Balancing As A Compelling Government Interest.

The Court has not struck down—despite the Equal Protection Clause's manifest prohibition—all legislation that takes account of race. At least before *Grutter*, however, the Court had limited the use of race to remedial measures necessary to undo de jure discrimination. *See, e.g.*, *Metro Broad., Inc.*, 497 U.S. at 632 (Kennedy, J., dissenting) (rejecting the "use of racial

classifications by Congress untied to any goal of addressing the effects of past race discrimination"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (plurality opinion) ("We have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account."). Simply put: "[m]odern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination." *Metro Broad., Inc.*, 497 U.S. at 612 (O'Connor, J., dissenting).[10]

This limitation is much more than the only interpretation that comports with the text of the Equal Protection Clause and the promise the Declaration of Independence. It is the only interpretation that actually achieves individual equality regardless of race or any other classification. Even if enacted with the best of intentions and thought to be benign, racial classifications and preferences "can be the most divisive of all policies, containing within [them] the potential to destroy confidence in the Constitution and in the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); *see also J.A. Croson Co.*, 488 U.S. at 493 (plurality opinion) ("Classifications

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[10] The Court has recognized that an exigency—such as national security—also qualifies as a compelling government interest. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81 (1943). Justices Thomas and Scalia have argued that such a justification—so long as the classification is narrowly tailored—is the only compelling government interest or "pressing public necessity" that can withstand judicial review. *See Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part, dissenting in part) ("[O]nly those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity." (internal quotations omitted)); *J.A. Croson Co.*, 488 U.S. at 521 (Scalia, J., concurring) (explaining that "only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment" (citation omitted)). Using race in academic admissions as a "plus" or "tiebreaker" certainly is not a pressing public necessity.

based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). To permit the constitutional endorsement of such classifications, for any reason other than to directly remedy de jure racial discrimination, will ensure that the promise of individual equality forever remains unfulfilled. *See id.* at 495 ("[A] watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." (citation and internal quotations omitted)).

While permitting race-conscious remedial measures, this Court, at the same time, has been quite clear that racial balancing is not a compelling government interest and therefore is strictly prohibited. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307 (Powell, J.); *see also Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake."); *Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting) ("An effort to achieve racial balance . . . is . . . patently unconstitutional." (citation and internal quotations omitted)). Racial balancing does not strive to achieve equality in any real sense. Instead, racial balancing operates on the superficial assumption that people are defined, first and foremost, by the color of their skin. Such a pursuit improperly subjugates individual equality to promote numerical aesthetics. Worse still, it plants a badge of inferiority upon those it purports to help. *See Jenkins*, 515 U.S. at 114 (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior.").

At bottom, an interest in racial balancing is nothing more than the imposition of racial quotas. *See, e.g., J.A. Croson Co.*, 488 U.S. at 507 ("[A] 30% quota cannot be said to be narrowly

tailored to any goal, except perhaps outright racial balancing."); *Metro Broad., Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting) ("[T]he Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."); *see also* Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 Cardozo L. Rev. 379, 420-21 (1979) ("To reward some persons for the accident of their race is inevitably to punish others for the accident of theirs."). The Equal Protection Clause is devoid of any value whatsoever if racial balancing is to be permitted.[11]

Grutter claimed to adhere to the ban on racial balancing by endorsing diversity as a compelling government interest instead. *See Grutter*, 539 U.S. at 329-30. Diversity and racial balancing are measurably different concepts. Quotas, as explained above, are designed to achieve numerical balance. Whatever its merit, genuine diversity is a vastly different—and far more nuanced—concept than racial balancing. Genuine diversity "is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students." *Bakke*, 438 U.S. at 315 (Powell, J.). Genuine diversity is not a matter of racial blocs; it does not elevate race over other factors and it is not predicated on meeting an enrollment target from a particular racial or ethnic group. *See id.* at 315 ("Petitioner's

[11] For all these reasons, racial balancing joined a long list of other asserted justifications for racial classifications rejected by the Court. *See, e.g., J.A. Croson Co.*, 488 U.S. at 494 (rejecting racial classifications to promote wider participation by minority business enterprises in the construction of public projects); *Wygant*, 476 U.S. at 274-76 (rejecting discrimination in teacher assignments to provide "role models" for minority students); *Palmore*, 466 U.S. at 433 (rejecting the awarding of child custody to father, after divorced mother entered an interracial remarriage, in order to spare child social "pressures and stresses" due to race).

special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity."); *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (explaining that the university must ensure "that race does not become a predominant factor in the admissions decisionmaking").

Grutter obliterated this important distinction. Neither the University of Michigan nor any other school has shown even an inkling of interest in a system of genuine diversity where race is not a predominant factor. For these schools, race is the only factor. As the dissenters ably explained, the University of Michigan's use of race to achieve "critical mass" was simply a euphemism for racial balancing. *See Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting) ("[T]he concept of critical mass is a delusion used . . . to mask [an] attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."); *id.* at 379 (Rehnquist, C.J., dissenting) ("Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."); *id.* at 346-47 (Scalia, J., concurring in part, dissenting in part) ("[T]he University of Michigan Law School's mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.").

Thus, in one sense, whether genuine diversity is a compelling government interest is decidedly beside the point. The relevant programs in the instant cases have not even sought to advance such an interest. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1177 (9th Cir. 2005), ("[T]he dissent contends [that] the District may only consider race along with other attributes such as socioeconomic status, ability to speak multiple languages or extracurricular talents. We read *Grutter*, however, to recognize that racial diversity, not some proxy for it, is valuable in and of itself."), *cert. granted*, 126 S. Ct. 2351 (2006); *id.* at 1201 (Bea, J.,

dissenting) (explaining that "[a]t oral argument, the District conceded that it is not asserting the *Grutter* 'diversity' interest"); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005) ("Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity." (footnote omitted)), *cert. denied*, 126 S. Ct. 798 (2005).[12]

Yet, in another sense, the vindication of the University of Michigan's brand of diversity in *Grutter* is precisely the issue. By erasing the distinction between racial balancing and genuine diversity, *Grutter* has forced the Court to confront secondary school policies that openly and notoriously make race the operative criteria for assignment. This blatant use of race by the government to distinguish between students should have been put to rest some time ago. *Compare Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998) ("The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden."), *with Comfort*, 418 F.3d at 18 ("The only relevant criterion . . . is a student's race; individualized consideration beyond that is irrelevant to the compelling interest.").

[12] *See also* Terrence J. Pell, *Camouflage for Quotas*, Wash. Post, July 5, 2003, at A5 ("Within hours of the decision, Michigan officials and others made clear they viewed last week's decisions as little more than a fig leaf with which to hide new racial double standards."). The University of Michigan's disguised system of racial balancing remains the common practice of public universities and graduate schools. *See, e.g.*, Tim Grant, *Who Gets In? Admissions Officers Asking Race Question*, Pitt. Post-Gazette, Feb. 15, 2006, at ED7 (discussing the use of race of the University of Pittsburgh); Diane Carroll, *Mining for More Minorities*, Kan. City Star, Aug. 22, 2005, at A1 (discussing race-based admissions at University of Kansas); Kelly Simmons, *UGA: Let Race Count*, Atlanta J. Const., Dec. 2, 2004, at A1 (discussing the University of Georgia's decision to re-introduce race as a factor in admissions in the wake of *Grutter*); Todd Ackerman, *Rice, UT Push Role for Race in Admission*, Hous. Chron., Nov. 25, 2003, at A1 (discussing the University of Texas's and Rice University's respective decisions to adopt admissions policies modeled after the policy upheld in *Grutter*).

Indeed, the secondary school programs before the Court do not even attempt to hide their goal of racial balance. *See, e.g., Parents Involved in Cmty. Schs.*, 426 F.3d at 1169-70 (explaining that "if an oversubscribed high school is racially imbalanced—meaning that the racial make up of its student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole—and if the sibling preference does not bring the oversubscribed high school within plus or minus 15 percent of the District's demographics, the race-based tiebreaker is triggered" (internal quotations omitted)); *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004) (explaining that "the 2001 Plan requires each school to seek a Black student enrollment of at least 15% and no more than 50%"), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006). These programs, like the program at issue in *Grutter*, constitute "a rigid racial governmental grouping of . . . students for the purpose of attaining racial balance in the schools." *Parents Involved in Cmty. Schs.*, 426 F.3d at 1999 (Bea, J., dissenting).

In sum, an affirmative action program seeking genuine diversity has never been before this Court. Rather, both the law school admissions program before the Court in *Grutter* and the secondary school assignment plans at issue here employ racial classifications in the pursuit of racial balance in the classroom. The Court should reverse *Grutter* and make clear that any attempt to use a supposed diversity interest as a proxy for quotas violates the Equal Protection Clause.[13]

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[13] The Court need not decide whether genuine diversity is a compelling government interest until the issue is squarely presented. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998) ("The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—postimplementation litigation."). A theoretical dispute over an issue that has never been before the Court—*i.e.*, the constitutional value of genuine diversity—should not serve as a wedge to divide opinion when agreement is possible on the far more modest question at issue here.

* * *

More than five decades have passed since *Brown* overturned *Plessy* and unmasked the ignobility of state-sanctioned racial classifications. In so doing, the Court fulfilled the promise of the Declaration of Independence and restored the Fourteenth Amendment's guarantee of equal protection. And yet sadly,

> the heart of Jim Crow beats on. The belief that people are first and foremost members of a race is alive and well and living under the rubric 'affirmative action'—or, as we now call it, 'diversity.' Once, affirmative action was seen as a way to promote equal opportunity, to redress generations of discrimination by helping those who had been hurt by it. Today, the goal of affirmative action is racial diversification. . . . But why? When did diversity of skin color become a virtue? Become the virtue? Racial diversity for its own sake is no more or less praiseworthy than racial unity for its own sake. Diversity is a condition, not a state of grace. Sometimes it is good, sometimes bad, usually irrelevant.
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> . . . .
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> Only if the most meaningful thing about each of us is our pigmentation can the quotas and preferences of affirmative action—or the segregated railway cars of Jim Crow—make sense. The truth is that few things matter less than our race. Character matters more. Upbringing matters more. Neighborhood matters more. Work habits matter more. Aptitude matters more. Beliefs matter more.
>
> . . . .
>
> The planted axiom, of course, is that all whites speak one way and all blacks speak another—that there is 'white' thinking and 'black' thinking, 'white'

> viewpoints and 'black' viewpoints. However you slice it, the premise of affirmative action is that above all else, we are black or we are white. Know a man's color, and you know how he thinks, how he acts, what he wants, what he is. Achieving diversity is simply a matter of getting the racial numbers right.

Jeff Jacoby, *We're Still Counting By Race 100 Years After Plessy*, New Orleans Times Picayune, Apr. 27, 1996, at B7.

Time and experience have proven that the public schools—secondary and higher education alike—that employ race as a factor in educational decision-making have absolutely no interest in genuine diversity. At every opportunity, public educators seek instead to bring racial balance to the classroom and, in the face of repeated judicial censure, slyly retreat to "plus" systems and racial "tiebreakers" to hide their unconstitutional agenda. These morally dishonest regimes do not serve a compelling government interest under any moniker.

The Equal Protection Clause does not allow racial classifications absent a most compelling public necessity because "[t]he law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). For the Court to continue to allow public schools to get the racial numbers right—in the euphemistic name of diversity—is to reject the fundamental right to equal treatment under the law that the Fourteenth Amendment affords to each individual. *Grutter* should be overruled.

II. *GRUTTER* IS NOT SETTLED LAW AND SHOULD BE OVERRULED.

The foremost obligation of the Supreme Court is to interpret the Constitution in a manner that is faithful to its text. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803) ("It is emphatically the province and duty of the judicial

department to say what the law is.").[14] The law here cannot be questioned. *Grutter* reached an unconstitutional outcome by permitting racial classification under the Equal Protection Clause. *See supra* Section I.A. And, even if the Court accepted racial preferences in the interest of viewpoint diversity, the use of quotas in the pursuit of that interest is plainly unconstitutional. *See supra* Section I.B.

Grutter should be reversed for this reason alone. *See Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (explaining that reversal is required "if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed"); *Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."); *Payne*, 501 U.S. at 827 ("[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." (citations and internal quotations omitted)).

The Court often will look, however, beyond de novo fidelity to the Constitution in determining whether to retain a wrongly decided case. *See, e.g., Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (explaining that whether to retain follow or depart from precedent "is a question entirely within the discretion of the court, which is again called

[14] *See also South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) ("I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991); *see also* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 408 (1988) (arguing that "judges are oath-bound to rule in accordance with the Constitution, not with prior opinions interpreting the Constitution"); William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949) ("[A]bove all else . . . it is the Constitution which [the judge] swore to support and defend, not the gloss which his predecessors may have put on it.").

upon to consider a question once decided." (citation and internal quotations omitted)); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (requiring a "special justification" before reversing a wrongly decided case). *Grutter* nevertheless is doomed even if the Court views the reversal of a wrongly decided constitutional decision as a discretionary act.

Although the Court will look to a range of factors in assessing the value of a given decision, incompatibility with longstanding precedent, reliance, and workability consistently are at the forefront of the Court's stare decisis equation. *See, e.g., Adarand*, 515 U.S. at 231-32 (examining whether precedent is out of step with "accepted and established doctrine"); *Casey*, 505 U.S. at 854-55 (examining "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 539 (1985) (examining whether the precedent creates a "workable standard" from which the Court can judge future cases). All of these factors counsel in favor of reversal.

First, the decision is out of step with longstanding Fourteenth Amendment precedent. Stare decisis considerations are at their nadir "when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); *Adarand*, 515 U.S. at 231 (retaining such a case "would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete"). On this basis, the Court overturned its decision in *Metro Broadcasting*, which applied a lower level of scrutiny to federal racial classifications. *See Adarand*, 515 U.S. at 231-32 (explaining that "*Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years . . . that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect

the personal right to equal protection of the laws"); *see also id.* at 235 ("[I]t follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling."). Recalling previous cases, the Court explained that *Metro Broadcasting* "lacked constitutional roots" and "was an abrupt and largely unexplained departure from precedent." *Id.* at 232-33 (citations and internal quotations omitted).

Like *Metro Broadcasting*, the Court's refusal to apply strict scrutiny in *Grutter* was a stark departure from established equal protection doctrine—including *Adarand*. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) ("The Court . . . does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents."); *id.* at 379-80 (Rehnquist, C.J., dissenting) (explaining that before *Grutter*, the Court "consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used. . . . Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."). The Court's implicit reinstatement of the deferential standard of *Metro Broadcasting* was without question "an abrupt and largely unexplained departure from precedent." *Adarand*, 515 U.S. at 233 (citation and internal quotations omitted).

In particular, the Court showed unprecedented deference to the University under the guise of First Amendment academic freedom. *See Grutter*, 539 U.S. at 328. Such deference is wildly out of step with the strict scrutiny the Court applied in *Croson* and *Adarand*. *See id.* at 350 (Thomas, J., concurring in part, dissenting in part) (explaining that the Constitution does not "countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny'"); *id.* at 387 (Rehnquist, C.J., dissenting)

("The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws."); *id.* at 388-89 (Kennedy, J., dissenting) ("The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's . . . assurances that its admissions process meets with constitutional requirements."). This newly minted brand of unchecked deference to the wisdom of university admissions officials precludes meaningful judicial review. *See J.A. Croson Co.*, 488 U.S. at 493 ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

The deference the Court afforded to the University also is inconsistent with cases that have since been decided. *See Johnson v. California*, 543 U.S. 499 (2005). In *Johnson*, the Court overturned the Ninth Circuit's decision to uphold racial segregation in prisons under the "deferential standard of review articulated in *Turner v. Safley*, 482 U.S. 78 (1987)." *Id.* at 509. In the Court's view, "such deference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified." *Id.* at 506 n.1. *Grutter* apparently stands for the curious—and ultimately unsustainable proposition—that when it comes to matters of race, the institutional judgments of university administrators are entitled to more deference from the Court than those of prison wardens. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (explaining that reversal is warranted where "changes have removed or weakened the conceptual underpinnings from the prior decision or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." (citations omitted)); *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) ("*Bowers* causes uncertainty, for the precedents before *and after it* contradict its central holding." (emphasis added)).

Second, *Grutter*—a three-year old decision undermining an entire body of equal protection jurisprudence—did not create any reliance interests that warrant its retention despite its clearly wrong result. The Court has repeatedly concluded that recent precedents do not produce the type of reliance that the Court gave significant weight to in *Casey*. *See*, *e.g.*, *Adarand*, 515 U.S. at 233-34 ("[R]eliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event."). As Justice Scalia has explained, "[t]he freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it." *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting).

Indeed, racial preferences, by their nature, do not produce weighty reliance interests. Even if *Grutter* stands, no government institution is required by law to employ racial preferences. *See Bakke*, 438 U.S. at 379 (Brennan, J.) ("[A]ny State . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program."). Moreover, the entire purpose of these programs, according to their proponents, is to bring an end to racial classifications as quickly as possible. *See Grutter*, 539 U.S. at 342 ("The requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter . . ." (citations and internal quotations omitted)). There can be no reliance when the program at issue is not mandated by law and termination is certain.

Last, the decision did not produce a workable regime. *See Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (explaining that a decision "should not be kept on the books in the name of stare decisis once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great").

The murky rationale of *Grutter* simply offers no guidance for future cases—nor could it. *See* Curt A. Levey, *Troubled Waters Ahead for Race-Based Admissions*, 9 Tex. Rev. L. & Pol. 63, 76-77 (2004) ("The difficulty of distinguishing the permissible from the prohibited has the potential to make the diversity rationale, as envisioned by the *Grutter* Court, unworkable in practice, thus hastening its demise."). The substantial discord *Grutter* has produced in the lower courts in only three years proves the point. *See* K.G. Jan Pillai, *The Defacing Reconstruction of Powellian Diversity*, 31 T. Marshall L. Rev. 1, 39 n.188 (2005) ("Justice O'Connor's use of 'diversity' as a cloak for remedial race-based policy has caused substantial confusion among the lower courts. Indeed, in the two years since *Grutter* became law, several courts have struggled to divine the conceptual differences between diversity and remediation.").

In truth, by confusing the distinction between racial balancing and diversity, *Grutter* forces the lower courts to look for imaginary distinctions in an effort to distinguish one unconstitutional program from another. *See* Charles Fried, Op.-Ed., *Courting Confusion*, N.Y. Times, Oct. 21, 2004 ("Swearing allegiance to Justice Powell's principles and delivering a lecture about the evil of quotas, [the Court] nonetheless endorsed the law school's transparent evasion of those principles, emphasizing the necessity of ensuring substantial minority representation not only in the classroom but also in industry, the military and public life—the very purposes he had denounced.").

Accordingly, if the unworkable *Gratz/Grutter* dichotomy is cemented as precedent, the unenviable task of distinguishing between "pluses" and "tiebreakers" is only the beginning. *See, e.g.*, *Petit v. City of Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003) ("[A]s did the University of Michigan, the Chicago Police Department had a compelling interest in diversity . . . to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city."); *Lomack v. City of Newark*, No. 04-6085,

2005 WL 2077479, at *7 (D.N.J. Aug. 25, 2005) (unpublished) (extending "diversity" rationale to firefighter assignments because "exposure to other firefighters of different backgrounds, vocabularies and cultures better prepares a firefighter to work effectively with his colleagues and to perform better on tests for promotional opportunities"). The "Court should not look forward to any of these cases." *Grutter*, 539 U.S. at 348-49 (Scalia, J., concurring in part, dissenting in part).

For purposes of stare decisis, the crucial question remains "whether a principle shall prevail over its later misapplications." *Helvering*, 309 U.S. at 122. *Grutter* upended a long-line of precedent applying strict scrutiny to racial classifications of any kind and therefore "undermines the fundamental principle of equal protection as a personal right. In this case, as between the principle and its later misapplications, the principle must prevail." *Adarand*, 515 U.S. at 235 (internal quotations omitted); *Payne*, 501 U.S. at 842-43 (Souter, J., concurring) ("[W]hen this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent.").

* * *

The Court should not wait twenty-two more years before putting an end to government-endorsed racial classifications. *See Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *see also Bakke*, 438 U.S. at 403 (Blackmun, J.) ("I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most."). More time is not the solution.

Instead, "one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment Never to tolerate in one's own life or in the life or practices of one's government the differential treatment of other human beings

by race." *Price*, 604 P.2d at 1391 (Mosk, J., dissenting) (citation and internal quotations omitted). Moreover, as with *Metro Broadcasting*, retaining *Grutter* does not advance any institutional considerations. Quite the opposite, it irreparably damages the Court by "plac[ing] [its] *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause." *Grutter*, 539 U.S. at 378 (Thomas, J., concurring in part, dissenting in part).

The secondary school cases before the Court prove that waiting for *Grutter* to expire will not bring a satisfactory resolution. Far from it, emboldened by *Grutter*, public schools are aggressively imposing even more destructive quota systems with no end in sight. Indeed, by perpetuating quotas, such programs are both self-defeating in terms of reaching their stated goal and self-sustaining in terms of their purported necessity. Retaining this ill-advised decision is a damaging—and potentially irreversible— step backwards. *Grutter* is not settled law and should be overruled.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioners,

—v.—

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,

Petitioner,

—v.—

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS, RESPECTIVELY

BRIEF OF RELIGIOUS ORGANIZATIONS AND AFFILIATED INDIVIDUALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations and individuals affiliated with a diverse group of religious communities in the United States. The names and individual statements of the *Amici* are contained in the Appendix to this brief. *Amici* historically have been concerned with ensuring that our society is strengthened, rather than fractured, by our racial, religious, ethnic and other differences. We believe that integrated public schools are our foremost asset in educating our children to become full participants in our increasingly diverse country and to lead lives that fulfill the motto on the Great Seal of the United States – *E pluribus unum* – out of many, one. *Amici* respectfully submit this brief to the Court in order to highlight the benefits that diversity and integrated schools can provide to elementary and secondary school students and in order to place these cases in a historical perspective.

SUMMARY OF ARGUMENT

The United States is a diverse country, and our integration of citizens belonging to different racial, religious, and ethnic groups is vital to ensuring we move forward as a unified community rather than break down along lines of division. As religious organizations, *Amici* have seen the strength of the United States in assimilating people of many different religious backgrounds into a cohesive American society. The experience of other developed nations today

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. Pursuant to Rule 37.3, the parties have given general consent to the filing of *amicus* briefs.

presents an ominous contrast. Religious minorities in many nations are alienated from their fellow citizens, living in separate neighborhoods and attending separate schools. Suspicion and resentment in some cases have even turned to violence as largely separate societies exist next to each other but not connected. One remedy recommended for these fractured communities is what *Amici* support in this case – integrated schools where students of all races and religions can develop the tolerance, respect, and understanding necessary to thrive in a diverse society and recognize their common destiny.

These goals are not beyond the scope or the mission of education. Instead, this Court and state appellate courts around the country have recognized that one of the primary goals of education is to enable students to become productive, informed, and active citizens. Substantial social-science research supports the common-sense conclusion that integrated schools better fulfill this mission, educating students to become full participants in our increasingly diverse county by recognizing that our differences can be our greatest asset. Integration of schools therefore serves the compelling interest of furnishing students with diverse, integrated learning environments that provide them with a superior education and better prepare them for their civic duties.

Court decisions also have recognized that integrated schools offer significant benefits. In *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954) ("*Brown I*"), this Court declared that segregated schools are unconstitutional because "[s]eparate educational facilities are inherently unequal." Since that landmark case, federal courts have

ordered the desegregation of formerly segregated school districts in processes that involve consideration of race in student assignment. This remedy of desegregation responds to the inferior education this Court identified in *Brown I* as a harm caused by segregation and recognizes that integrated schools offer a learning environment that promotes cross-cultural understanding and civic engagement.

Race-conscious programs that serve compelling state interests, such as integrated schools, must also be narrowly tailored to further that interest. This Court historically has calibrated the guideposts for determining whether a government program is narrowly tailored based on the context of the program. The lower courts evaluated the assignment systems at issue here using the criteria identified by this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), for affirmative action admissions programs in higher education. But the assignment programs at issue here are different from such affirmative action admissions programs. In the higher education context, schools evaluate the qualifications of prospective students to determine which students merit admission. Under *Grutter*, the schools may consider race among their criteria but may not impose quotas. In the context of the Louisville and Seattle voluntary integration programs, all students are assigned to a school and there are no merit-based assignments in the challenged aspects of their programs. Significantly, no group is particularly "favored," and no student is denied admission to school. Accordingly, *Amici* respectfully suggest that the programs at issue here do not raise the same concerns that underlie the guidelines this Court identified in *Grutter* and that the Court should apply the narrow tailoring test bearing in mind that these programs raise fewer fairness concerns

than programs that prefer one specific group or another in evaluating qualifications for limited-access programs.

ARGUMENT

I. The Assimilation of Minorities Through Integrated Schools Helps Avoid the Alienation of Religious Minorities That Has Resulted in Unrest in Other Nations

The United States is a religiously-diverse country. According to a recent survey, there are more than 50 religions with 25,000 or more adherents in our nation. Barry A. Kosmin et al., *American Religious Identification Survey 2001* 12-13 (2001), *available at* http://www.gc.cuny.edu/faculty/research_studies/aris.pdf. While the focus of diversity in education has often been on racial diversity, *Amici* recognize that religious diversity in our public schools is also critical to the goal of a unified country, as a comparison of our experience with that of the segregated experience of religious minorities in other developed countries demonstrates.

Social-science research points to the value of integrated schools in fostering a sense of community and common destiny, even in communities that have experienced long, violent conflicts along religious lines. For example, a review of research on integrated education in Northern Ireland concluded that "integrated education holds great potential for building social cohesion." *See* Claire McGlynn et al., *Moving Out of Conflict: The Contribution of Integrated Schools in Northern Ireland to Identity, Attitudes, Forgiveness, and Reconciliation*, 1 J. Peace Educ. 147, 156-

59 (2004), *available at* http://www.nicie.org/archive/publications/claire1.pdf. One long-term study of integrated school graduates concluded that integrated education significantly bolstered students' mixed friendships and made them feel "more secure in a mixed working environment." Claire McGlynn, Integration for Reconciliation? The Impact of Integrated Schools in Northern Ireland 2 (Sept. 11–13, 2003), http://www.nicie.org/archive/publications/Indiana%20paper.doc. Similarly, a study in Israel comparing students from a Palestinian-Jewish integrated school with students from segregated schools concluded that the integrated school has shown success in "helping to reduce prejudice and alleviating conflict" and that students from the integrated school showed a deeper understanding of one another's cultures than did students from the segregated schools. Zvi Bekerman & Nader Shhadi, *Palestinian-Jewish Bilingual Education in Israel: Its Influence on Cultural Identities and Its Impact on Intergroup Conflict*, 24 J. Multilingual & Multicultural Dev. 473, 481 (2003), *available at* http://www.handinhand12.org/media/Journal-Multilingual&Multicultural.pdf.

In other communities, the segregated education system has contributed to unrest along racial or religious lines. In much of Western Europe, for example, the Muslim population is highly segregated and isolated. *See* Jytte Klausen, *Counterterrorism and the Integration of Islam in Europe*, 7 Watch On W. (2006), *available at* http://www.fpri.org/ww/0701.200607.klausen.integrationislameurope.html ("Large numbers [of European Muslims] live in highly segregated neighborhoods . . . and send their children to sub-par 'minority majority' schools."); Timothy Garton Ash, *Islam in Europe*, N.Y. Rev. Books, Oct. 15, 2006, at 32

("[T]he profound alienation of many Muslims . . . is one of the most vexing problems facing the continent today."). In the absence of integration programs, residential segregation and school segregation go hand in hand.

> In perhaps 50 towns [in northern England], the enclosed communities [of Muslims] formed their own inward-looking societies . . . . The community's one possible contact with the outside world was Britain's compulsory schooling, but this was subverted by a policy that favored neighborhood schools and restricted dispersal. This resulted in majority, sometimes 100%, Muslim school populations.

Farrukh Dhondy, *East Enders*, Wall St. J., Aug. 15, 2006, at A12. *See also* Philip H. Gordon, *On Assimilation and Economics, France Will Need New Models*, New Republic Online, Nov. 9, 2005, *available at* http://www.brookings.edu/views/op-ed/Gordon/20051109.htm ("[A] key part of the problem is France's failure to integrate the children of Arab immigrants.").

The result, according to reports commissioned to address riots by religious minorities in England, is tension and violence in communities fragmented along racial, cultural, and religious lines. Sir Herman Ouseley, *Community Pride, Not Prejudice: Making Diversity Work in Bradford* 1, 6, 46 (2001), *available at* http://www.bradford2020.com/pride/report.pdf. *See also* Cmty. Cohesion Rev. Team, *Community Cohesion: A Report of the Independent Review Team* 34-35 (2001) (finding that a "significant problem is posed by existing and future mono-cultural

schools"); Oldham Indep. Rev., *One Oldham One Future* 23, 26 (2001) (warning that segregation of schools "is a matter of deep concern, since it lays the foundation for lack of contact with and understanding of people from different ethnic groups. This in turn invites misconceptions and social divides."); *Report of the Burnley Task Force* 49 (2001) ("[E]ducational segregation clearly has an impact on good community relations."). (Links to the Community Cohesion, Oldham, and Burnley reports are available at http://www.bradford2020.com/pride/links.html.). These reports recommend integration of schools to reverse the problems that isolation and alienation have fostered.

Fortunately, up to now, "Muslims in America are unique compared to European Muslims in terms of their integration into the mainstream society." Selcuk Sirin & Michelle Fine, *Hyphenated Selves: Muslim American Youth Negotiating Their Identities* (forthcoming fall 2007) (manuscript at 25, on file with counsel); *see also* Drake Bennett, *Hearts and Minds Drawn to Ballots Not Bombs; America's Muslim Community Shows Few Signs of the Radicalism Seen in Britain*, BOSTON GLOBE, Aug. 20, 2006, at D1 ("American Muslims, by and large, are . . . better integrated into American society than their European counterparts."). While Census data does not include information on religion, an analysis of the data shows that on average, Americans who were born in or whose ancestors came from predominantly Muslim countries live in neighborhoods in which 4.5 percent of their neighbors also have ancestors from predominantly Muslim countries. John R. Logan & Glenn Deane, The Muslim World in Metropolitan America 5-7 (Aug. 15, 2003), http://mumford.albany.edu/census/BlackWhite/ReportPages/Muslims_in_

Metro_America.pdf. *See also* Olivier Roy, *Globalized Islam: The Search for a New Ummah* 100 (2004) (explaining that Muslims "tend to live in more or less 'ethnic' neighborhoods in Europe, but in the United States are more scattered"). Due to their residential integration, Muslim students are generally well integrated into American public schools, as only a small fraction of these students attend private Muslim schools. *See* Zakiyyah Muhammed, *Islamic Schools in the United States: Perspectives on Identity, Relevance, & Governance, in Muslims in the United States: Demography, Beliefs, Institutions* 107 (Philippa Strum & Danielle Tarantolo eds., 2003), *available at* http://www.wilsoncenter.org/topics/pubs/DUSS_muslims.pdf. This greater integration has helped the United States avoid some of the problems experienced in Europe.[2] *See, e.g.*, Lawrence Wright, *For the New Theorists of Jihad, Al Qaeda Is Just the Beginning*, NEW YORKER, Sept. 11, 2006, at 48, 58 (explaining that better integration of American Muslims has contributed to avoiding problems experienced by European countries); Neil MacFarquhar, *Pakistanis Find U.S. an Easier Fit Than Britain*, N.Y. TIMES, Aug. 21, 2006, at A1 (reporting that Pakistani Muslim immigrants in the United States are

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[2] *Amici* recognize that comparisons to other countries are imperfect because each country has a unique history and educational system. The examples and studies cited above show that across these different circumstances, integrated schools have fostered increased connections by religious minorities to other social groups and a shared commitment by all groups to the community as a whole, while the lack of integrated schools has too often coincided with an unfortunate breakdown of the unified community. *Amici* likewise recognize that many parents seek to offer their children an educational experience that incorporates parochial religious instruction and values. Their right to do so is entirely compatible with providing other students with the opportunity to attend integrated schools.

integrating more successfully than those in Britain, and that this integration serves as a bulwark against extremist ideology).

While the examples cited above deal with integration and alienation on religious rather than racial grounds, the principle remains the same: An integrated school system promotes a spirit of shared community and increases civic participation. Religious beliefs are deeply-held values that have contributed to some of the greatest leaders and greatest developments in world history. Unfortunately, this history also includes conflicts that resulted when members of different religious groups have failed to see the common ground they shared and to understand one another as human beings. *Amici* respectfully submit that integrated public schools provide a necessary forum where children of different religious, racial, and ethnic backgrounds can have the interactions that contribute to greater understanding and community.

II. Integrated Schools Serve the Compelling State Interest of Providing a Superior Education by Instilling Democratic Values and Preparing Schoolchildren for a Diverse Workforce and Society

Civic education is one of the most important functions of our schools. This Court has long recognized that public elementary and secondary schools do much more than train children in "the three Rs" – reading, 'riting, and 'rithmetic. As this Court explained in *Brown I*, public elementary and secondary schools serve as the principal civic instrument for preserving our democratic society by providing students the foundation of good citizenship and the

ability to adjust normally to their ever-changing environment:

> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

347 U.S. at 493. Nearly three decades later, in *Plyler v. Doe*, this Court reiterated its special concern with the centrality of public education in maintaining our democratic system of government, recognizing public schooling as "a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests." 457 U.S. 202, 221 (1982) (internal quotation marks and citations omitted).

Like this Court, the highest courts of many states have explained that the education clauses in their state constitutions require schools to teach students to become good citizens. In *Rose v. Council for Better Education, Inc.*, the Supreme Court of Kentucky concluded that education must, among other things, provide a "sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation." 790 S.W.2d 186, 212 (Ky.

1989). Similarly, the Supreme Court of Washington explained that the state's "paramount duty" goes beyond "mere reading, writing, and arithmetic" and instead "embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens." *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978); *see also Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995) (holding that New York constitution entitles all students to education consisting of "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury"); *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993) (holding that Massachusetts constitution entitles all students to an education that "prepare[s] them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts").

These decisions recognize that it is a compelling state interest to provide the education students must obtain in order to become productive citizens, which includes developing an understanding of racial and religious differences as well as an appreciation of those differences. Social-science research demonstrates that integrated education furthers this compelling interest.

A. Exposure to Diverse Schoolmates Fosters Tolerance and Open-Mindedness and Helps Students Move Beyond Stereotypes

As this Court has long recognized, schools play an important role in teaching Americans how "to live in a

pluralistic society," *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971), which in today's diverse America necessarily entails cross-racial understanding and the breaking down of racial stereotypes. *Grutter*, 539 U.S. at 330 (stating that these benefits from diverse student bodies are "important" and "laudable"). Social-science research demonstrates that integrated elementary and secondary education furthers this goal not only by promoting tolerance, respect, and understanding among students of different races, but also by encouraging cross-racial friendships and collaboration between students in school and, years later, in their workplaces.

Research demonstrates that students in integrated schools have more positive attitudes toward different ethnic and racial groups. *See, e.g.*, Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in Handbook of Research on Multi-Cultural Education* 597, 610 (James A. Banks & Cherry A. McGee Banks eds., 1995) (finding white students enrolled in integrated high schools had more positive attitudes toward African-American and Mexican-American students and African-American students enrolled in schools with higher numbers of white students had more positive attitudes toward white students). Not surprisingly, students in integrated schools develop far more cross-racial friendships, *see, e.g.*, Maureen T. Hallinan & Stevens S. Smith, *The Effect of Classroom Composition on Students' Interracial Friendliness*, 48 Soc. Psychol. Q. 3, 13-14 (1985), and are more prepared for diverse work environments. As one scholar concluded, "blacks who had a desegregated school experience[] tend to evaluate white co-workers and employers more positively than blacks with segregated

educational backgrounds." John A. Powell, *An "Integrated" Theory of Integrated Education* 11 (2002), *available at* http://www.civilrightsproject.harvard.edu/research/reseg02/powell.pdf; *see also* Jomills Henry Braddock III & James M. McPartland, *Social-Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. Black Stud. 267, 283-84 (1989) (concluding that African-Americans who attended majority African-American high schools perceive coworkers in majority-white settings as less friendly than do their counterparts who attended more integrated high schools).

One 1999 study of students who had attended desegregated schools offers a clear illustration of how integration better prepares students to deal with a diverse, multicultural environment. The study found that white students who attended desegregated high schools reported having gained a greater appreciation for other cultures and a reduced likelihood of reverting to stereotypes. Amy Stuart Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* 16 (2005), *available at* http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf. In contrast, however, their white spouses and friends "who did not attend diverse schools . . . said [that they] are often frightened in racially diverse and predominantly black or Latino settings." *Id.* The study similarly found that minority students from these integrated schools believed that they were better prepared to function in predominantly white environments and handle any racial prejudice they may encounter. *Id.* These students also indicated that "they were more at ease in a white-dominated society because they had learned that not all whites were racist." *Id.; see also* Civil Rights Project, Harvard Univ., *The*

Impact of Racial and Ethnic Diversity on Educational Outcomes: Lynn, MA School District 7 (2002) (finding that over 89 percent of students in integrated school district believed that diversity in high school population prepared them to work in a diverse job setting); Civil Rights Project, Harvard Univ., *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District* 6-7 (2002) (finding that over 90 percent of high school students attending a racially-diverse high school believed that the diverse population prepared them to work in a diverse job environment).

B. Integrated Schools Enhance Students' and Parents' Civic Involvement and Foster a United, Rather Than Divided, Community and Country

In addition to teaching values and skills that are necessary for cross-racial and cross-religious cooperation, integrated education promotes civic involvement. This Court explained even prior to *Brown I* that our public schools are "at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *Illinois* ex rel. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948). Therefore, "if the dream of one Nation, indivisible, is to be realized," our schools must help ensure the "[e]ffective participation by members of all racial and ethnic groups in the civic life of our nation." *Grutter*, 539 U.S. at 332. Social-science research demonstrates that integrated education offers significant promise in achieving this dream: Integrated educational settings encourage enhanced civic participation by students and parents alike while cultivating a spirit of shared community.

Students of all races who attend desegregated schools report an increased interest in volunteering and assuming leadership roles within their communities as well as participating in elections. Michel Kurlaender & John T. Yun, *Is Diversity a Compelling Education Interest? Evidence from Louisville, in Diversity Challenged: Evidence on the Impact of Affirmative Action* 81, 130-131 (Gary Orfield & Michel Kurlaender eds., 2001) (reporting survey of over 1,100 Jefferson County, Kentucky high school students and finding that white, African-American, and other minority students all reported increased or greatly increased interest in these activities). Long-term studies of students who attended integrated public schools also demonstrate these students' greater likelihood of living in integrated neighborhoods as adults, thereby revealing a desire to live in communities that better reflect the diversity of our country as a whole. *See* Robert L. Crain & Carol Sachs Weisman, *Discrimination, Personality, & Achievement: A Survey of Northern Blacks* 166-67 (1972) (studying black and white adults in Milwaukee, Wisconsin who attended integrated schools); Robert L. Crain & Jack Strauss, *School Desegregation and Black Occupational Attainment: Results from a Long-term Experiment* 18-19 (1985) (reporting results of 15-year study of students of color and their parents in Hartford, Connecticut, some of whom transferred to suburban schools under a voluntary desegregation plan).

Research also shows that integrated elementary and secondary education encourages parents' community involvement as well. For example, the National Research Council found that desegregated schools have higher rates of volunteerism as compared with schools in which minority enrollment exceeds fifty percent. *See* Comm. on the Use of

Volunteers in Schs., Nat'l Res. Council, *Volunteers in Public Schools* 15-16 (Bernard Michael ed. 1990); *see also* Susan E. Eaton & Christina Meldrum, *Broken Promises: Resegregation in Norfolk, Virginia, in Dismantling Desegregation: The Quiet Reversal of* Brown v. Board of Education 136-37 (Gary Orfield & Susan E. Eaton eds., 1996) (reporting that survey of schools conducted by the National Center for Education Statistics concluded that the highest number of parent volunteers "came not in all-white schools, but in schools that were between 5 percent and 50 percent nonwhite"). Conversely, a study of the Norfolk, Virginia school district – the first district in the nation to end its desegregation program among elementary school students – found that within six years parental involvement declined in more than half of the elementary schools that had become almost exclusively African-American. *Id.* at 135 (measuring parental involvement in terms of PTA membership). Additionally, metropolitan areas with integrated school systems also have increased residential integration, as white households will continue to live in racially integrated neighborhoods, even as the minority population approaches or exceeds fifty percent, "if they are confident that their children will continue to attend integrated schools even if the racial mix of the neighborhood changes." Myron Orfield & Thomas Luce, Minority Suburbanization & Racial Change 10 (May 6–7 2005), http://www.irpumn.org/website/conference/materials/MinoritySubn_050605wMAPS.pdf.

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These studies about the positive effects of integration confirm what *Amici* strongly believe based on their own

experiences – integration is vital to ensuring that we are one nation, under God, indivisible, with liberty and justice for all.

III. While "Separate But Equal" Has Been Condemned as Unconstitutional for More Than Half a Century, Courts Have Long Recognized the Converse – Improving Education Through Integration of Students – as a Compelling State Interest

The compelling interest in promoting integrated, racially-diverse student bodies in elementary and secondary schools is not merely a recent construct of social science. For more than 50 years, the jurisprudence of this Court has relied upon and necessarily recognized this compelling interest. Local school districts cannot be running afoul of the Constitution when they are furthering the same compelling interest that underlies the remedies ordered by federal courts and approved by this Court.

A. The Remedy of Desegregation Rests on the Compelling Interest of Integrating Schools

Brown I established that "[s]eparate educational facilities are inherently unequal." 347 U.S. at 495. Since this Court's decision in *Brown v. Board of Education*, 349 U.S. 294 (1955) ("*Brown II*"), federal courts have ordered school districts to remedy unconstitutional segregation by integrating their schools. These orders often explicitly contemplated assignment of students within a school district based largely, if not solely, on race. *See, e.g., Swann*, 402 U.S. at 8-10 (describing district court order requiring school assignment on the basis of race); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455 n.3, 468 (1979) (affirming district

court order requiring all schools in district to be brought roughly within proportionate racial balance). In fact, this Court has recognized that desegregation orders "almost invariably require that students be assigned 'differently because of their race.'" *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971) (citation omitted).

Just as the actions of the executive and legislative branches are subject to constitutional scrutiny, so too are the orders of the judiciary. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) (recognizing that court orders that function as unlawful prior restraints are prohibited by the First Amendment and therefore unconstitutional). The Court has recognized this principle in the context of court-ordered remedies for racial discrimination, in which it has applied strict scrutiny while leaving open the question of the appropriate standard of review. *See, e.g., United States v. Paradise*, 480 U.S. 149, 166-67 (1987); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 480 (1986). The compelling interest underlying the integration of school districts is the superior education provided by integrated schools. *Cf. Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (holding that achieving racial balance for its own sake is unconstitutional). The remedy of integration furthers a compelling state interest because, as this Court recognized in *Brown I*, segregated schools are unequal and provide an inferior education. *Brown I*, 347 U.S. at 493-94. As segregated schools provide an inferior education and are inherently unconstitutional, the converse must necessarily be true: Integrated schools educate students better, and their creation furthers a compelling interest. Indeed, this compelling interest underlies court-ordered desegregation.

B. School Districts May Voluntarily Undertake Measures to Further the Compelling Interest of Improving Education by Integrating Their Schools

School districts must be free to further the same compelling interests that previous court orders seek to further. As this Court recognized in *Swann*, school districts have at least as much authority as courts to act in the area of elementary and secondary education. 402 U.S. at 16 ("Remedial judicial authority does not put judges automatically in the shoes of school authorities *whose powers are plenary*.") (emphasis added). If courts have the authority to further a compelling interest by ordering the integration of schools, then school districts must necessarily have as much, if not more, authority to do the same. As the District Court in *McFarland v. Jefferson County Public Schools* explained:

> In 1975, an integrated school system and all the benefits it promised were thought so essential that various federal courts required [Louisville] to create and maintain it. . . . It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law.

330 F. Supp. 2d 834, 851 (W.D. Ky. 2004).

This conclusion is all the more compelling when looking at school districts that had been under court order to

desegregate. There is no logical reason why policies and practices so compelling that they are required by court order suddenly become unconstitutional the very moment the court order is lifted. The state's interest in maintaining an integrated school is no less compelling than its interest in first achieving one. School districts therefore must be free to continue to voluntarily implement integration plans after the termination of court orders so as to preserve the benefits of integration obtained through those orders. *Cf. Bd. of Educ. v. Dowell*, 498 U.S. 237, 251 (1991) (Marshall, J., dissenting) (recognizing the danger of "the threatened reemergence of one-race schools" in the wake of termination of a desegregation order); Erica Frankenberg et al., *A Multiracial Society With Segregated Schools: Are We Losing the Dream?* 37 (2003) (concluding that the proportion of black students in majority-white schools has decreased by 13 percentage points, or nearly 30 percent, since districts in the South have achieved unitary status).

This Court has expressly recognized that it is within the discretion of school districts to offer a better education through voluntary integration. In *Swann*, this Court recognized that:

> [s]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is

> within the broad discretionary powers of school authorities.

402 U.S. at 16. In *McDaniel v. Barresi*, this Court upheld a school district's voluntary integration plan that employed "geographic attendance zones drawn to achieve greater racial balance" even though there was no court order compelling desegregation. 402 U.S. at 40. The rationale for why voluntary integration serves a compelling state interest even where prior segregation may have been *de facto* rather than *de jure* is simple: Whether or not intentional discrimination caused the segregation of schools, the resultant harm is largely the same.[3] Indeed, in light of this Court's precedents, the principle that states have a compelling interest in providing better education through integrated schools is so apparent that then-Justices Rehnquist and Powell, both of whom dissented from decisions they believed extended the reach of integration too far,[4] had little doubt that school

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[3] The dissent in the Ninth Circuit claimed that this Court has stated that "only the remediation of *de jure* segregation justifie[s] the use of racial classifications." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1197 (9th Cir. 2005) (Bea, J., dissenting). This claim ignores the decisions cited above and confuses the power of the judicial branch with that of the other branches of government. The requirement of a finding of *de jure* segregation prior to a court order compelling desegregation goes to the power of the court to act, not to the government interest at stake. *See Swann*, 402 U.S. at 16 ("[J]udicial powers may be exercised only on the basis of a constitutional violation."). As this Court explained in *Grutter*, "we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." 539 U.S. at 328.

[4] *See, e.g., Penick*, 443 U.S. at 479 (Rehnquist, J., joined by Powell, J., dissenting from opinion approving broad district court desegregation

districts may properly take voluntary measures to integrate their schools beyond what is required by the Constitution. *See Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1383 (1978) (Rehnquist, Circuit Justice) (stating that that he had "very little doubt" that state authorities were permitted by the Constitution to voluntarily implement school integration plans); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part) ("Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."). A decision by this Court to the contrary would call into question more than a half-century of equal protection jurisprudence.

IV. VOLUNTARY INTEGRATION PROGRAMS IN THE PUBLIC SCHOOL SYSTEM CONTEXT DO NOT RAISE THE SAME NARROW TAILORING CONCERNS AS AFFIRMATIVE ACTION PROGRAMS

This Court has applied strict scrutiny to race-based classifications in order "to distinguish legitimate from illegitimate uses of race in government decisionmaking." *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 228 (1995). In *Grutter*, the Court identified criteria by which to measure whether admissions programs for higher education were narrowly tailored to the goal of achieving student-body

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order); *Delaware State Bd. of Educ. v. Evans*, 446 U.S. 923, 927 (1980) (Rehnquist, J., joined by Powell, J., dissenting from denial of certiorari) (advocating review of district court desegregation order and expressing "substantial doubt" that remedy ordered by district court was appropriate).

diversity. 539 U.S. at 334. The Court did not suggest that these criteria would apply to all race-conscious programs. Instead, the Court reaffirmed that "strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker for the use of race *in that particular context*," *id.* at 327 (emphasis added),[5] and the Court explained that it had specifically "calibrated" the narrow-tailoring inquiry to "fit the distinct issues raised by the use of race to achieve student-body diversity in public higher education." *Id.* at 334.

Amici respectfully submit that the assignment of students to schools within a school district does not raise the same degree of narrow-tailoring concern as the use of race to achieve student-body diversity in higher education.[6] *Grutter*

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[5] *Accord Adarand*, 515 U.S. at 228 ("[S]trict scrutiny *does* take 'relevant differences' into account – indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in government decisionmaking.").

[6] Within the interfaith group of *Amici* submitting this brief are groups representing Americans whose participation in higher education was limited by discriminatory quotas in earlier decades. For example, the use of quotas to limit the admission of Jewish and Catholic students to colleges and universities during the early part of the twentieth century is well documented. *See, e.g.*, Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* 130-31 (2005) (describing use of quotas to limit Jewish student admission); Marcia Graham Synott, *The Half-Opened Door: Discrimination at Harvard, Yale, and Princeton, 1900–1970* 17-20 (1979) (describing the use of quotas to limit Jewish and Catholic student selection). As a result of this pernicious discrimination, some

addressed an affirmative action program that included preferences based on race in the context of evaluating the qualifications of applicants to a selective graduate school program that offered admission only to a limited group of applicants. The voluntary integration programs of the Louisville and Seattle school districts do not involve access to selective programs or preferences based on race; instead, these voluntary integration programs involve assignment of students within a system, based primarily on the preferences of the students and their parents. All students have an opportunity to choose among schools and all receive an

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Amici have opposed the use of rigid quotas in admissions programs for higher education but have supported affirmative action and the use of goals in assembling diverse student bodies. *See, e.g.*, Brief for the American Jewish Committee et al. as Amici Curiae Supporting Respondent, Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188015, at *44-45 (Aug. 5, 1977) (supporting the use of methods other than quotas to increase minority enrollment); Brief for the American Jewish Committee et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) & Gratz v. Bollinger, 538 U.S. 904 (2003) (No. 02-516), 2003 WL 536749, at *2 (Feb. 14, 2003) ("The historic Jewish opposition to quotas does not mandate rejection of carefully tailored goals."). This Court has recognized the same distinctions and found quotas unconstitutional while approving narrowly-tailored admissions programs that include flexible goals for participation of underrepresented minorities. *Compare Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 295-98, 316-18 (1978) (invalidating the reservation of a prescribed number of seats for minority applicants while sanctioning an "awareness of the necessity of including more than a token number of black students") *with Grutter*, 539 U.S. at 334-39 (upholding a university admissions program designed to attain a critical mass of underrepresented minority students). All of the *Amici* submitting this brief agree that the Louisville and Seattle programs before the Court fall well on the side of permissible consideration of race in creating diverse learning environments.

assignment, regardless of qualifications. *Amici* respectfully suggest that the Court consider these substantial differences in calibrating its narrow-tailoring test because all students can benefit from integrated schools and the compelling interest of providing an integrated education never sunsets.

CONCLUSION

For the reasons herein, and those set forth by Respondents, *Amici curiae* urge this Court to uphold the decisions below.

October 10, 2006

Respectfully submitted,

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NAMES AND INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

AMERICAN ISLAMIC FORUM FOR DEMOCRACY

The American Islamic Forum for Democracy ("AIFD") is a not-for-profit, public policy research and human relations organization founded in 2003. AIFD was formed in order to serve as a vehicle for promoting the complete compatibility of America's founding Constitutional principles and the very personal faith of Islam practiced by Muslims. AIFD's formative ideology is based upon the central American principle which separates religion from government while promoting pluralism, equality, and the free expression of all faiths. These principles when promoted by American Muslims can serve as the most effective counter and ideological alternative to the dangers posed by Islamism or "political Islam."

AIFD joins in this brief in keeping with our belief that America's pluralism is a product of both its founding principles and its diverse society. America's principled and tangible diversity results from both opportunity and choice. AIFD believes that localities should be unencumbered by federal restrictions in their efforts to promote pluralism, integration, and diversity. Localities should have the freedom to give students and their parents a fair choice which allows them voluntarily to participate in schools which are more representative of the diverse religious mosaic of the United States.

AMERICAN JEWISH COMMITTEE

The American Jewish Committee ("AJC") is a national, not-for-profit, human relations organization, founded in 1906 for

the purpose of protecting the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the rights of all Americans are equally secure. AJC maintains 32 regional offices in major cities nationwide and has more than 150,000 members and supporters. In furtherance of its goal to strengthen the basic principles of pluralism around the world and at home as the best defense against anti-Semitism and other forms of bigotry, AJC has actively advocated for integration in American education. For example, AJC sponsored the study demonstrating the psychological impact of prejudice and discrimination upon children cited by this Court in its landmark *Brown v. Board of Education* decision. AJC also filed an amicus brief with this Court in 2003 in support of the University of Michigan's efforts to achieve diversity in its student bodies. We file in the cases presently before the Court out of the continuing belief that integration not only provides all students with a richer educational experience, but also prepares them for participation in our pluralistic democracy.

ANDOVER NEWTON THEOLOGICAL SCHOOL

Andover Newton is the oldest graduate theological school in the United States. Founded in 1807, the school has been a pioneer in training congregational leaders, creating the model that is now the standard for almost every seminary in the country. In recent years Andover Newton moved to share its campus with Hebrew College and Rabbinical School. Together the two schools have created a unique laboratory of interreligious education and community. Central to this relationship is a firm belief in the necessity of nurturing religious "border crossing" skills for the new generations of moral and spiritual leaders in our nation and the world. We join this *amici curiae* brief because we believe that only

through meaningful and regular engagement with the "other" will children have the opportunity to learn the insights and skills that will enable them to help build a more tolerant and just world.

CENTER FOR ISLAMIC PLURALISM

The Center for Islamic Pluralism ("CIP") is a tax-exempt charity that promotes moderate Islam and education about moderate Islam in the U.S. and globally. CIP recognizes that the complicated and difficult history of the American civil rights movement, as well as that of American religious diversity, have involved significant encounters with Islamic and Islamic-influenced traditions and conceptions. CIP is committed to full equality in the U.S. and supports the maintenance of essential civil rights law and precedent in public education and other public institutions, and the advancement and broadening of civil rights safeguards.

FATHER ROBERT F. DRINAN

Father Robert F. Drinan, S.J., entered the Society of Jesus in 1942 and was ordained as a Roman Catholic priest in 1953. After serving as a professor at and dean of the Boston College Law School, Father Drinan was a member of the United States House of Representatives from 1971–1981 and served on the House Committee on the Judiciary. Currently, Father Drinan is a Professor of Law at Georgetown University Law Center, teaching courses in fields including constitutional law and civil liberties. Throughout his career, he has worked extensively in the areas of civil rights and civil liberties and served as Chairman of the Advisory Committee for Massachusetts of the United States Commission on Civil Rights. Father Drinan supports the rights of school districts to voluntarily integrate their students.

HEBREW COLLEGE

Hebrew College is a small, specialized university training primarily graduate and professional students but also several thousand adult learners and others in all areas of Jewish tradition, culture, and civilization. A key to understanding the institution is its inclusiveness, reaching within the Jewish community to every religious denominational group as well as to secular and cultural Jews, and beyond the Jewish community through its Interreligious Center on Public Life, its International Summer School on Religion and Public Policy, and its Interreligious Collaborative with its neighbor, the Andover Newton Theological School. Inclusiveness is the key to understanding the College's mission: to contribute to transforming religion from a contributor to the pathologies of our fractured world into an instrument of healing and repair of relationships between peoples. These two foci, education and social repair, explain our commitment to the centrality of the public school as an instrument for fostering mutual respect, civility, peaceful discourse, and mutual understanding. The public school is a key to instilling the value of diversity as a blessing rather than a threat, and the role of the public school in forging the civil society needs to be strengthened by such programs as voluntary integration. This is a value to which Hebrew College is committed in all its work, and it explains our decision to join as *amicus curiae* in this matter.

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA

Since its founding in 1950, the National Council of the Churches of Christ in the USA has been the leading force for ecumenical cooperation among Christians in the United States. The NCC's member faith groups - from a wide

spectrum of Protestant, Anglican, Orthodox, Evangelical, historic African American and Living Peace churches - include 45 million persons in more than 100,000 local congregations in communities across the nation.

The NCC works for peace and justice in the United States, addressing issues ranging from poverty and racism, to the environment, family ministries, and much more. It serves churches through a wide variety of educational ministries. The NCC strongly supports the right of local school districts to voluntarily integrate their schools.

NATIONAL MINISTRIES, AMERICAN BAPTIST CHURCHES USA

National Ministries is the home mission agency of the American Baptist Churches USA. National Ministries has been doing the work of home mission since 1832 when the American Baptist Home Mission Society was founded to meet the spiritual needs of people on the frontier of an expanding nation. Baptist women established the Women's American Baptist Home Mission Society in 1877 to "proclaim the Christian faith and to minister to people in special need." These two organizations worked cooperatively from the start and then in 1955 joined together to form one organization which, since 1972, has been engaged in mission and ministry as National Ministries. In 2003, National Ministries added to its work responsibility for the denomination's ministries of discipleship, education, and publishing. From their inception, the home mission societies were engaged in public and social advocacy. After the Civil War the home mission societies supported the establishment of 27 institutions of higher learning for freed people, recognizing then, as now, the urgency of providing a quality education for all. We are of the conviction that we must

continue to address the issues of race and class which prevent many children from realizing their God-given potential and which threaten both public education and democracy in the United States. To this end we encourage innovative and carefully monitored reform efforts in the public school system, giving particular attention to matters of access and justice in governance, financing, and selection of students.

REVEREND DR. EMILIE M. TOWNES

The Reverend Dr. Emilie M. Townes was ordained in the American Baptist Church USA in 1980. From 1989–1999, she served as a professor of Christian social ethics and Black church ministry at Saint Paul School of Theology, and was the Carolyn Williams Beaird Professor of Christian Ethics at Union Theological Seminary from 1999–2005. She is currently the Andrew W. Mellon Professor of African American Religion and Theology at Yale University Divinity School and teaches in the areas of Christian ethics, social policy, the African-American religious experience, and the religious experiences of African-American women. The Reverend Dr. Townes supports the right of school districts to voluntarily integrate their students.

SHALOM CENTER

The Shalom Center, founded in 1983, is rooted in the search for peace, justice, and the healing of the wounded world that is taught by Jewish religious tradition. In that process, we have found ourselves exploring how to connect with those Christians and those Muslims who share similar visions of the future that we seek. Again and again, we have found that Jewish wisdom becomes even richer when it comes into relationship with other traditions. As we achieve depth and perspective in our physical vision only because we have two

eyes, so exploring life questions with two or three or even more approaches to wisdom leads to a deeper understanding of our lives. This applies as well to the educational value for our children of sharing in our public schools the experiences and the teachings of different cultures, whether defined by different religious or different racial and ethnic backgrounds. For these profound educational reasons, we support the cultural integration of our schools, so that different perspectives can enrich our search for shared values and well-grounded knowledge.

SIKH COALITION

The Sikh Coalition works to 1) defend civil rights and liberties for all people; 2) promote community empowerment and civic engagement within the Sikh community; 3) create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination; and 4) educate the broader community about Sikhism in order to promote cultural understanding and create bridges across communities. Ensuring schools are integrated and diverse is a key part of our mission to combat prejudice and discrimination. We join in this brief out of the belief that diversity in schools prepares students for participation in our pluralistic democracy and is a critical component in combating unlawful discrimination.

SOJOURNERS/CALL TO RENEWAL

Sojourners/Call to Renewal is a national organization, founded in 1971, whose mission is to articulate the biblical call to social justice, inspiring hope and building a movement to transform individuals, communities, the church, and the world. Our constituency includes Christians from across the political and theological spectrum who are committed to

promoting public policies that advance the common good of society. We believe that policies that value diversity within our public education system are crucial. When steps are voluntarily undertaken to integrate our school systems, those systems and our communities are strengthened. We believe that the experience of a diverse student body learning from and with each other is key to a unified society.

UNION FOR REFORM JUDAISM

The Union for Reform Judaism, founded in 1873, is the central body of the Reform Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. The Reform Jewish Movement comes to this issue out of our longstanding belief in the value of diversity in education and our country generally. The Jewish tradition has always been sensitive to the plight of the stranger. Despite remedial efforts, a long and unfortunate history of injustice and prejudice has made African-Americans, Latinos, women, and other oppressed groups strangers in society's mainstream. As Jews deeply committed to the prophetic imperatives of our tradition, the Reform Movement is dedicated to those policies that will create justice for all people. The importance of equality in the Jewish tradition is based on the concept that all of God's children are "created in the image of God" (Genesis 1:27). History teaches that all people benefit when the barriers to true equality are removed.

UNITARIAN UNIVERSALIST ASSOCIATION

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States and North America. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the

Association has adopted numerous resolutions affirming racial justice and the importance of integration in American education. Most relevant to the case at the bar are the Association's resolutions which specifically condemn both formal and *de facto* school segregation and which call on government on all levels to work to correct discriminatory racial imbalances in the public schools.

UNITED CHURCH OF CHRIST JUSTICE AND WITNESS MINISTRIES

The United Church of Christ Justice and Witness Ministries ("UCCJWM") coordinates and implements the denomination's justice advocacy mandates on behalf of 1.2 million members in 6,000 congregations in the United States. In the tradition of its forebears who brought community schooling and higher education to the New England colonies, the UCC's history includes the founding of numerous schools for freed slaves throughout the South during and after the Civil War. The UCC has historically worked to strengthen public schools, to ensure they are funded equitably, and to promote diverse school settings where children of all racial, ethnic, and economic groups come together to learn from each other. In 2001, the UCC's General Synod, its highest denominational governing assembly, called upon its members and congregations to work to safeguard public education as a basic and fundamental civil right.

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Nos. 05-908 & 05-915

IN THE

Supreme Court of the United States

Parents Involved in Community Schools,
Petitioner,
v.
Seattle School District No. 1, *et al.*,
Respondents.

Chrystal D. Meredith, Custodial Parent and Next Friend to Joshua Ryan McDonald,
Petitioner,
v.
Jefferson County Board of Education, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

Brief of *Amicus Curiae* Walt Sherlin In Support of Respondents

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October 10, 2006

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INTEREST OF AMICUS[1]

Walt Sherlin worked for thirty years in the Wake County public schools, first in the former Raleigh city system, where he started as a teacher in 1974, and then for the consolidated city-county Wake County Public School System, now the 22nd largest school system in the nation. During his tenure, Mr. Sherlin served for many years as an administrator, first at the school level and then in central administration. In 1999-2000, while serving as Lead Area Assistant Superintendent, Mr. Sherlin was responsible for student assignment. During that time, Mr. Sherlin and a team of other administrators, school board members and the district's legal counsel began discussions about changing the district's student assignment plan from a race-conscious plan to a race-neutral plan. On January 10, 2000, the school board adopted a new plan that eliminated the use of race in student assignment decisions. Mr. Sherlin had chief responsibility for the implementation of the new, race-neutral plan which governed pupil assignments beginning in the 2000-2001 school year.

Petitioners' *amici* point to Wake County's current plan—which sets targets capping the number of low-income students per school—as an example of a race-neutral way to achieve racial diversity. Although Mr. Sherlin is proud of the success of the Wake County plan, he believes it is important to explain that racial diversity is not a goal of the Wake County assignment plan, that the district has experienced a decline in racial diversity under the current plan, and that, insofar as the plan has fostered some degree of racial diversity in Wake County schools, many school districts, including most North Carolina school districts, cannot expect to achieve similar

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[1] All parties have filed letters of consent to the filing of briefs *amicus curiae* in these cases. No counsel for a party authored this brief, in whole or in part, and no one other than *amicus* or his counsel contributed to the cost of the brief's preparation or submission.

racial diversity through the use of a socio-economic status (SES) plan.

SUMMARY OF ARGUMENT

As part of their argument that school districts have no legitimate need to use narrowly tailored race-conscious student assignment plans to achieve racial diversity in public schools, petitioners' *amici* note that several school districts have successfully implemented race-neutral school assignment plans. *E.g.*, Br. of *Amicus Curiae* United States (U.S. Br.) in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 05-908, at 25; U.S. Br. in *Meredith* v. *Jefferson County Board of Education*, 05-915, at 22. The Wake County Public School System ("Wake County") is one of the districts featured prominently in the studies cited by petitioners' *amici*.

Wake County's school assignment plan was designed to promote student achievement, not racial diversity. The plan, which considers students' socio-economic status and academic performance—and does not consider students' race—has been very successful at improving student achievement. It has also been fairly successful at maintaining racial diversity, even though racial diversity was not a sought-after goal of the plan. Because of Wake County's particular demographic characteristics, the substantial majority of its low-income students are minorities and the district's efforts to integrate based on socio-economic status have necessarily led to some correlative racial integration.

Nevertheless, racial diversity in Wake County schools has declined since the district stopped using a voluntary, race-conscious desegregation plan in favor of a race-neutral assignment plan. Moreover, should Wake County's student population shift to include more low-income white students, its assignment policy cannot ensure that the district will maintain racial diversity. Simply put, Wake County's system is not a helpful model for school districts that wish actively to

encourage racial diversity through the school assignment process, particularly where those districts do not share Wake County's unique demographics.

ARGUMENT

I. The Wake County School System No Longer Uses Race as a Factor in School Assignment Decisions

As a result of years of pressure from the United States Department of Health, Education, and Welfare (HEW), in 1976 the Raleigh City Schools merged with the Wake County School System to expedite racial integration of the schools in the county. In 1982, again under pressure from HEW, the merged Wake County system adopted a voluntary desegregation plan. Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* 66, 69 (2004). Under that plan, each school was required to have a minority enrollment between 15% and 45%, and the district created programs, including magnet schools, to encourage further voluntary desegregation. Todd Silberman, *Wake County Schools: A Question of Balance*, DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 147 (2002), *available at* http:// www.tcf.org/Publications/Education/Silberman.pdf; Susan Flinspach & Karen Banks, *Moving Beyond Race*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 265-67 (Jack Boger & Gary Orfield eds., 2005). As a result of these voluntary desegregation efforts, by the late 1990's, Wake County enjoyed a relatively well-integrated school system.[2]

Although Wake County's race-conscious assignment policy never faced a serious legal challenge, challenges elsewhere, like those in *Tuttle* v. *Arlington County School Board*, 195

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[2] In 1999, 70% of the nation's black students attended schools that were predominantly minority, while only 21% of Wake County's black students attended schools with a minority enrollment over 50%. Silberman, *supra*, at 149.

F.3d 698 (4th Cir. 1999), *Eisenberg* v. *Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999), and the *Belk* litigation in Charlotte, North Carolina, *see Belk* v. *Charlotte-Mecklenburg Board of Education*, 269 F.3d 305 (4th Cir. 2001), cert. denied, 535 U.S. 986 (2002), led Wake County school officials to revisit the district's assignment policy. Silberman, *supra*, at 143-44.

In 2000, Wake County adopted a new assignment policy that eliminated race from consideration. The new policy establishes goals that no more than 40% of a school's total enrollment will be comprised of students eligible for free-and-reduced-price lunch ("FRL") and no more than 25% of its enrollment will be comprised of students performing below grade level on the state's end-of-year exams. *Student Assignment Process*, Wake County Public School System website at http://www.wcpss.net/growth-management/student-assign-process.html (last visited October 4, 2006). Significantly, the current plan was designed solely to improve student achievement. *Id.* Wake County's current assignment policy therefore differs markedly from the voluntary desegregation plan it followed from 1982 through 1999. The purpose of the voluntary desegregation plan was to achieve racial diversity in the public schools, while the current policy focuses on improved student performance..

II. Wake County's Current Assignment Plan Has Maintained Some Racial Diversity, But This Is A Result of Wake County's Unique Characteristics and Is Not Necessarily Replicable

A. Racial diversity is a coincidental by-product of Wake County's current school assignment plan

Under the current plan, Wake County's schools remain relatively racially diverse, often falling within the 15% to 45% minority enrollment range required under the former

voluntary desegregation plan.[3] Flinspach & Banks, *supra*, at 275. Although students attending Wake County schools have likely benefited from the multi-racial and multi-cultural competencies gained from attending racially diverse schools,[4] this result was a consequence of the plan, but not its objective. Wake County has maintained racial diversity under its current assignment policy because, although its overall rate of poverty is the lowest in the state[5], in Wake County, African-American and Latino students are nearly ten times more likely to be eligible for FRL than white students.[6] Put simply, Wake County has relatively few white students who come from low-income families and relatively few African-American and Latino students who come from more affluent families.

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[3] By all accounts, student performance has improved across all demographic categories (*e.g.*, students receiving FRL, African-Americans, etc.) under the new plan. Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* 68 (2004).

[4] Indeed, the Wake County schools recognize the benefits of diversity, even though the current assignment policy was not designed to achieve that goal. *Student Assignment Process*, Wake County Public School System website, at http://www.wcpss.net/growth-management/student-assign-process.html (last visited October 4, 2006) ("While the school district believes strongly that racial diversity within its schools enhance the education of all students, *race is not a factor* in assignment of students.") (emphasis in original).

[5] UNITED STATES CENSUS BUREAU, Census 2000 Summary File 3 at http://www.census.gov (last visited Oct. 6, 2006)

[6] In the 2000-2001 academic year, the first of Wake County's current assignment plan, only 5% of white students were eligible for FRL, while almost 50% of black and Latino students qualify for FRL. Flinspach & Banks, *supra*, at 275.

Despite Wake County's overwhelming correlation of race with family income, Wake County's schools are more socio-economically diverse than they are racially diverse, and that trend is increasing. Flinspach & Banks, supra, at 276 (noting that under the new assignment plan Wake County is maintaining racially desegregated schools, "albeit at a lower rate than [under the voluntary desegregation plan]"). For example, in 2003, 39% of African-American students in Wake County attended a school that had 50% or more minority enrollment,[7] almost double the 21% of African American students attending such a school under the voluntary desegregation plan in 1999. *see* Silberman, *supra*, at 149.

B. Racially diverse schools are not an inevitable by-product of Wake County's assignment plan

Since Wake County considers only diversity in income and achievement when making assignment decisions, nothing in the plan will prevent socio-economically diverse, but racially-homogenous schools. Because Wake County's black students are currently ten times more likely to be eligible for FRL, *see supra* at 5, economic integration has naturally resulted in racial integration as well.[8] However, if the district's demographics shift and more low-income white students enroll, racial diversity will no longer be a by-product of the assignment plan.

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[7] Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 39 (January 2005), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf (last visited Oct 5, 2006)

[8] This happens because of the high correlation between FRL eligibility and race: most of the students reassigned away from "high-poverty" schools in Wake County are likely to be black, and the schools to which they are likely to be assigned, that have disproportionately low numbers of "poor" children, are likely to be overwhelmingly white.

C. Other districts across North Carolina would not be racially diverse under Wake County's assignment plan

Wake County's demographic profile, which includes convergence of a low family poverty rate with a significant racial disparity between poor and non-poor families, is unusual within the State of North Carolina. According to the latest data available from the U.S. Census Bureau,[9] Wake County had the lowest rate of family poverty (5.29%) among the State's one hundred counties. In addition, only 11.9% of Wake County's poor families had a white head of household, while 88.1% of poor Wake County families had a non-white head of household.

While neither of these characteristics, standing alone, is unique in North Carolina, their convergence in one county is rare. For example, nearly one-half of North Carolina counties (48 of 100) had a family poverty rate below 10%, and in 23 of the State's majority-white counties, at least 85% of poor families were non-white. Yet, only six North Carolina counties, including Wake County, share both characteristics. Because only six counties in the State have low poverty coupled with a very high concentration of minorities among its poor, Wake County's method of student assignment could be expected to achieve similar success with promoting racial diversity in only a small number of North Carolina counties.

Therefore, although Wake County's race-neutral school assignment policy has been successful *in Wake County*, it will predictably lead to racially diverse schools only in districts that share the demographic trends present in Wake County.

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[9] The data discussed below is derived from an analysis of Census Bureau's data from North Carolina's 100 counties. UNITED STATES CENSUS BUREAU, Census 2000 Summary File 3 (SF 3), at http://www.census.gov (last visited Oct. 6, 2006).

III. Wake County's Success Cannot be Generalized Categorically

The discussion in Part II, *supra*, highlights why it is irresponsible to compare the assignment plans of other school districts to that of Wake County without considering the specific demographic features of the other school district as well as taking into account whether that district is attempting to foster racial diversity through its school assignment plan.

Even with demographic factors that tend to link racial diversity to socio-economic diversity, Wake County has experienced a decline in racial diversity since it adopted a race-neutral assignment policy. It is reasonable to expect that most school districts, in which the distribution of poverty does not fall so heavily along racial lines, would experience even less success achieving racial diversity through the use of a plan based on family income. School districts desiring actively to promote racial diversity through their school assignment policies would simply be unable to achieve that goal if forced to adopt a race-neutral plan similar to Wake County's.

In sum, the racial diversity of Wake County's schools, which has actually *declined* under the race-neutral plan, is not likely to be replicated under a similar plan in the vast majority of school districts, and therefore such plans do not offer a viable option for school districts that, unlike Wake County, desire to actively promote racial diversity through school assignments.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully Submitted,

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Nos. 05-908 and 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE SWANN FELLOWSHIP, FORMER SCHOOL BOARD MEMBERS, PARENTS AND CHILDREN FROM THE CHARLOTTE-MECKLENBURG SCHOOLS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici are local school board officials, involved citizens, students and parents in Charlotte, North Carolina who have directly experienced, over the past 40 years, the successive consequences of *de jure* segregation, court-ordered desegregation, and "post-unitary" re-segregation of a major school system.[1]

The Swann Fellowship is a non-profit organization, formed by religious congregations in 1997. Its mission is to be a witness to the value of diversity and to challenge the people of Charlotte-Mecklenburg to demand, sustain and participate in a quality, equitable, integrated public school system. The Swann Fellowship provides forums for community dialogue about diversity, excellence and equity in education. It has a significant interest in ensuring that school boards have the discretion to use all reasonable measures to achieve integrated schools, including taking race into account in student assignment plans.

Amici Sarah Stevenson, Arthur Griffin, and Louise Woods are former members of the Charlotte-Mecklenburg Board of Education. Ms. Stevenson, elected in 1980 and re-elected in 1984, was the third African American ever elected to serve on the school board. Previously Ms. Stevenson had served as the district's first African-American president of the integrated Council of PTAs. Mr. Griffin was elected to three terms on the school board, serving from 1988 until 2003, from 1999 to 2003 as the board's Chairperson. Ms. Woods, who is white, served three terms on the school board, from 1995 until 2005. These *amici* have a

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[1] All parties have granted blanket consent to the filing of briefs *amicus curiae* by letters of consent on file with the Court. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for a party. No person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief.

longstanding interest in promoting the quality of public education in Charlotte-Mecklenburg Schools (hereinafter "CMS") and in safeguarding the capacity of school boards to implement policies responsive to the needs of students, families and communities.

Amici Clifton Jones, Clifton Matthew Jones, Donna Jenkins Dawson, Neisha Dawson, Tyler Hough-Jenkins, Denise H. Jordan, Shaundra Jordan, Burrell Jordan, Terry Belk, Kimberly Smith, Susan Strong, Tracey Strong and Ashley Strong are students who now attend CMS schools, and their parents. The children have an immediate interest in an equal opportunity to a sound, basic education. That interest has been denied in the past seven years, and these *amici* have consequently intervened as plaintiffs in an educational adequacy lawsuit filed against CMS.

Amici also have an interest in being able to attend public schools that enroll students of racially diverse backgrounds so that students of all races can avoid the negative consequences of racially isolated schools and can receive the benefits of racially integrated schools. *Amici* assert that we will forestall, not promote, the realization of "one nation" tomorrow by refusing to recognize the salience of race in our nation and in the lives of our citizens today. The Court should not take from school boards all power to consider race in a carefully implemented and narrowly tailored program that democratically controlled school boards may seek to implement.

SUMMARY OF ARGUMENT

It is important to individuals and to society as a whole that children are taught how to interact with people of different racial backgrounds. Only a select few attend elite universities, while the majority of citizens attend public elementary and secondary schools. Since those schools are the only educational experience for those who do not attend

college, and the place where students spend their formative years, districts such as those in Seattle and Jefferson County have a compelling interest in promoting racial diversity in their schools.

Moreover, districts that maintain racially isolated schools lose public support because parents believe that they are in battle against each other for the best schools and the most resources. School districts need local public support to continue receiving the funding they need. They have a compelling interest in adopting school assignment policies that foster integrated schools in order to maintain strong and unified public support for the school system.

The experience of the Charlotte community demonstrates that racially diverse public schools promote social cohesion. That benefit can quickly be lost when schools resegregate. After litigation eventually required the integration of CMS, the schools enjoyed high levels of community participation and vigorous public support. Students have articulated the many benefits they enjoyed by attending school with children from different racial backgrounds.

However, once CMS decided to implement an assignment plan that did not take into account in any fashion whatsoever the racial demographics of its schools, the number of racially isolated schools in the system increased dramatically. At the same time, public support for the school system significantly declined. Despite an "equity plus" plan to improve the lowest performing schools, the most racially isolated black schools are perceived as inferior, while the nearly all-white schools in the suburbs are the most highly sought after and perceived to be the best schools.

This Court previously held in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) that school districts may voluntarily decide that in order to prepare students to live in a pluralistic society they must provide racially diverse educational opportunities. School

boards around the country have relied on that holding to fashion voluntary school assignment plans that seek to accomplish a mix of goals, including racially integrated schools. Principles of *stare decisis* are applicable here. The promise of *Swann* should not be abandoned.

The CMS experience also vividly demonstrates that race-neutral policies cannot, in many circumstances, avoid racially isolated schools and do not achieve the benefits of integrated schools. Many of the interventions designed to help failing schools were implemented by CMS when it abandoned all consideration of race in its student assignment policies. Nevertheless, the schools quickly resegregated and goals for reducing the achievement gap between white and black students were not met. Seattle and Jefferson County schools are wise to conclude that race-neutral alternatives will not result in racially diverse schools. Their limited use of race in making school assignment decisions is well-justified by the compelling governmental interests in fostering social cohesion and support for public education, and it is narrowly tailored to achieve that interest because race-neutral alternatives will not succeed.

ARGUMENT

I. SCHOOL DISTRICTS HAVE A COMPELLING INTEREST IN PROMOTING RACIAL DIVERSITY IN K-12 EDUCATION

In 1954 this Court recognized that "separate educational facilities are inherently unequal." *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). In 2003, the Court concluded that American colleges and universities have a compelling governmental interest in promoting racial diversity. Public colleges that enroll a "broadly diverse" class—including students who are racially diverse—offer their students the "substantial" benefits of "cross racial

understanding," and better preparation to work and live in "an increasingly diverse workforce and society." *Grutter v. Bollinger*, 539 U.S. 306, 330-332 (2003) (citations omitted). The dangers of racially isolated, separate schools are still real and the benefits of racially diverse schools are not limited to higher education.

Hence, our nation's public elementary and secondary schools continue to have a compelling interest in promoting racial diversity. For many students, such public schools are their only opportunity to learn the skills necessary to be effective in racially diverse settings. In North Carolina, only 41 of every 100 ninth graders will attend college immediately after high school. Nat'l Ctr. for Pub. Policy and Higher Educ., *Policy Alert: Education Pipeline Success Rate* (2004), *available at* http://www.highereducation.org/reports/pipeline/success.shtml. On the other hand, 92 of every 100 students in North Carolina attend public schools, N. C. Dep't of Admin., Div. of Non-Pub. Educ., *Non-public and Public School Enrollment Comparisons*, 2004-05, http://www.ncdnpe.org/hhh510p.htm, just as nine out of ten children in the United States attend public schools. Charles T. Clotfelter, *After Brown: The Rise and Retreat of School Desegregation*, 105 (Table 4.1) (2004).

The Court has long recognized that public elementary and secondary schools are "the very foundation of good citizenship," *Brown*, 347 U.S. at 493, and a "primary vehicle for transmitting the values on which our society rests." *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citations omitted). Indeed, the inculcation of civic values is "truly the work of the schools." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (citations omitted).

Public school systems have an even greater interest in maintaining racial diversity than do colleges. Unlike selective institutions of higher education, local school systems must have robust parental and community approval to maintain the political and financial support they need to

survive. Broad multi-racial support for CMS rose when the community united behind a system of responsive, racially diverse schools; support among whites, African Americans, and other racial minorities has plummeted with the substantial racial resegregation that followed CMS's 2002 adoption of a post-unitary assignment system based on neighborhood schools.

Achieving and preserving racial diversity within a public school system enables school authorities to retain "legitimacy in the eyes of the citizenry" by showing that every school is serving "all segments of society," *Grutter*, 539 U.S. at 331-32. In particular, the choice of locally elected school boards to establish and maintain diverse elementary and secondary schools preserves public support for their community's public schools. This Court should reaffirm that school districts have a compelling interest in maintaining racially diverse schools.

A. The Desegregation of Charlotte's Schools Promoted Genuine Democratic Participation and Social Cohesion for Students and the Community

1. Pre-*Swann* Experience was Marked by Racially Isolated Schools. After the Court decided *Brown v. Board of Education* in 1954, the desegregation of Charlotte's public schools was neither willing nor expeditious. From 1957 to 1961, Charlotte City Schools grudgingly pursued "integration" by allowing annually no more than four African-American students—out of 18,000—to attend otherwise exclusively-white schools. Davison M. Douglas, *Reading, Writing and Race: The Desegregation of Public Schools*, 72-75, 81 (1995). No African-American student attended a Mecklenburg County school with white students until after the county and city schools merged in 1961. *Id.* at 75. From 1954 until 1969, moreover, school authorities placed most new schools deep within single-race

neighborhoods to facilitate "race-neutral" neighborhood pupil assignments that, as late as 1969, resulted in the assignment of 14,000 African American students (out of 24,000) to schools which were "all black or very nearly all black." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358, 1360 (W.D.N.C. 1969).

Even though the affirmative duty of CMS to desegregate became clear in 1968, when *Green v. County School Board*, 391 U.S. 430 (1968), called on southern school boards to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools," *id.* at 442, Charlotte schools remained effectively segregated by race—led by state and county political leaders who supported unlawful resistance, *see, e.g.*, Douglas, *supra*, at 153, 180, 203, and by tens of thousands of white Charlotteans who also opposed the federal district court's desegregation orders. *See, e.g.*, Douglas, *supra*, at 144, 174, 178. Despite four orders between April and November 1969 directing the school board to devise an acceptable plan to desegregate its schools,[2] the school board returned each time with either no plan or with a plan which failed to eliminate segregation. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F. Supp. 1299, 1303 (W.D.N.C. 1969) (criticizing plan leaving 82 of 106 schools "readily identifiable" as either white or black schools).[3]

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[2] *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358 (W.D.N.C. 1969); 300 F. Supp. 1381 (W.D.N.C. 1969); 306 F. Supp. 1291 (W.D.N.C. 1969); 306 F. Supp. 1299 (W.D.N.C. 1969).

[3] The school board also invariably crafted desegregation plans that egregiously put the desegregation burden on African-American students and communities by proposing mass closings of schools in African-American neighborhoods and one way busing of African-American students long distances to white schools surrounded by trailers to accommodate the resulting oversubscription. *Swann*, 328 F. Supp. 1346, 1347, 1350-51 (W.D.N.C. 1971); *see also, Swann*, 306 F. Supp. at 1303-04 (deeming approved "interim plan" an "affront to the dignity and pride

A fifth district court Order, issued in February 1970, was unanimously upheld by this Court's decisive opinion in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Chief Justice Warren Burger approved a broad plan to desegregate the system's schools using district wide busing that paired many opposite race schools. *Id.* at 29-32.

Under the district court's plan, CMS became "the most fully desegregated urban school system in the nation's history," as half of the district's enrollment—20,000 more riders than in 1969—rode buses to school in 1970-71. Douglas, *supra*, at 203-04. One year earlier, 14,086 African-American students attended schools that were 99-100% African-American schools and the racial isolation was similar for white students. *Swann*, 300 F. Supp. at 1368. In 1970-71, *no* African-American student was assigned to a majority African-American school, and white students were also less isolated. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265, 271 (W.D.N.C. 1970) (showing 6 of 10 high schools were 80-100% white in 1969, compared to only 3 of 10 in 1970).

2. Racial Integration Stimulated Healthy Democratic Participation That Led To Far Greater Parental and Community Support for Schools. CMS parents experienced monumental changes as a result of the student reassignments that reconstituted their children's schools. *See Swann*, 311 F. Supp at 271-79 (charting, per school, the substantial changes, by race, that were initiated in

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of the black citizens" and prohibiting future plans from placing "burden of desegregation primarily upon one race"); *see also* Stephen S. Smith, *Boom for Whom: Education, Desegregation, and Development in Charlotte*, 70 (2004) (discussing absence of clear support of majority of African American community until after 1971 desegregation plan lessened inequities in busing plan).

107 CMS schools between Fall 1969 and Fall 1970).[4] Over time, the thousands of parents who involved themselves in their children's new schools emerged as a perhaps unanticipated force in CMS affairs.[5] Schools benefited from the advocacy of integrated PTAs, *see, e.g.,* Gaillard, *supra* n.5 at 121-24; Smith, *supra,* n.3 at 76, and grassroots advocacy—much of it bi-racial—helped tilt school board policies toward more equitable outcomes for African American and less affluent white students. Gaillard, *supra,* at 135; Douglas, *supra,* at 240. School officials came to rely on increasingly sophisticated community input regarding the administration of CMS schools. *See* Douglas, *supra,* at 235-36, 240-41; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 379 F. Supp. 1102, 1103-04 (W.D.N.C. 1974) (ratifying a long term desegregation plan and suggesting the district resolve future problems "with input as needed from ... community 'ombudsmen'").

Increased parental and civic involvement in CMS schools coincided with changes in voting patterns affecting the nine-member CMS school board. Whereas in the spring primary of 1970, the electorate had appeared immovably opposed to significant desegregation measures—installing three anti-busing candidates to fill three school board vacancies—just two years later, it reversed its 1970 votes to

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[4] By most accounts, Charlotte-Mecklenburg's acceptance of busing was "remarkably peaceful." A call to boycott the schools failed to materialize, the defection to private schools was "much smaller" than in other urban districts adopting similar busing plans, and bomb threats, while made, were thankfully never carried out. Douglas, *supra,* at 204-05.

[5] In 1970 alone, 4000 parents volunteered in CMS schools, "wherever they were needed—mothers and fathers unloading new furniture or cleaning up playgrounds, stacking new books on the library shelves" and "every year, the ranks of the volunteers grew larger" while "many of those parents, though apprehensive initially, were not at all disappointed with what the schools had to offer." Frye Gaillard, *The Dream Long Deferred* 121 (2nd ed. 1999.

defeat three anti-busing candidates in favor of moderates willing to work out a better desegregation plan. Gaillard, *supra*, at 83; Douglas, *supra*, at 224. After three more moderates were elected in 1974, a new board majority was able to settle on a long term student assignment plan that was accepted both by the *Swann* plaintiffs and the district court. Douglas, *supra*, at 224; *Swann*, 379 F. Supp. at 1103 (welcoming adoption of new assignment plan "as a clean break with the essentially 'reluctant' attitude which dominated Board actions for many years").[6] After 1970, no anti-busing candidate was elected to the school board for the next eighteen years. Smith, *supra*, at 68.

Other changes in voting patterns occurred as Charlotte-Mecklenburg's mostly white electorate began to cast winning votes—all races were at-large—for African-American candidates for the school board.[7] Before 1972, no African American had ever been elected to serve on either the previous city or county school boards, or the consolidated Charlotte-Mecklenburg School Board. Douglas, *supra*, at 224. However, beginning in 1972, African Americans henceforth were elected to serve on every school board. Smith, *supra*, at 71. Finally, school board policies began to change as white business interests, initially seeking only to temper anti-busing hardliners, Gaillard, *supra*, at 126, ultimately became a major source of support for an integrated school system. Smith, *supra*, at 69.[8]

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[6] CMS followed this plan until the 1991-95 administration of Dr. John Murphy, who introduced a vast system of magnets to replace most busing. Smith, *supra*, at 113.

[7] CMS school board races were at-large until single-member district representation was enacted in 1995. Smith, *supra*, at 24, 182; *Swann*, 300 F. Supp. at 1364.

[8] Hugh L. McColl Jr., CEO and chairman of the Charlotte-based Bank of America, has reflected on Charlotte's previous three decades:

> I believe public school desegregation was the single most important step we've taken this century to help our children. Almost immediately after we integrated

To the degree that desegregation in Charlotte-Mecklenburg provided a new context for increased racial, social and political cohesion, this cohesion likely would not have materialized if integrated schools had failed to serve the educational needs of CMS students. However, the evidence shows that CMS students benefited both academically and socially from racially diverse schools. After desegregation the performance of both African-American and white students improved, with African-American students experiencing the most dramatic progress.[9] In particular, the academic gains made by African-American students vindicated the widespread belief—expressed by over 80% of African American parents in a 1974 poll of CMS parents—that integrated schools offered African American students superior educational opportunities. Douglas, *supra,* at 156.

3. Racial Integration and Diverse Learning Environments Exposed All CMS Students to Important New Ideas and Experiences. In *Swann,* the Court expressly assumed that local school boards, exercising local control, might constitutionally choose to pursue racial diversity for its compelling benefits, absent any remedial justification. *Swann,* 402 U.S. at 16 (observing that school authorities

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> our schools, the Southern economy took off like a wildfire in the wind. I believe integration made the difference. Integration—and the diversity it began to nourish—became a source of economic, cultural and community strength.

Smith, *supra,* at 1.

[9] For example, between 1978 and 1986, math and reading scores for African-American third graders increased from the 20th percentile to the 48th percentile on nationally-normed tests, scores for African-American sixth graders increased from the 22nd to the 50th percentile (reaching the national average), and scores for African-American 9th graders jumped from the 20th to the 46th percentile. Gaillard, *supra,* at 186; *see also,* Smith, *supra,* at 78 (reporting "steadily increasing test scores and the narrowing of the black/white gap" in early 1980s).

"might well conclude ... that in order to prepare students to live in a pluralistic society," schools should be racially diverse). Such educational policies can plausibly be seen to increase racial tolerance, decrease resort to racial stereotypes, and prepare students to live and work together in an increasingly diverse world. *Grutter*, 539 U.S. at 329-33.

These insights are confirmed by former CMS students whose racially diverse schooling experiences were collected in interviews on file at the Southern Historical Collection at the University of North Carolina at Chapel Hill. These interviews share deeply personal reflections of students who experienced integrated education under *Swann*. They include Ned Irons, who graduated from West Charlotte High School in 1990 expressing gratitude that he, a white person, was "able to be around people who can verbally express what racism is like. Like what being black in America is like, ...instead of ...the preconceived notions that we all have."[10]

John Love, an African-American man who graduated from West Charlotte in 1980, gained "a more realistic sense of how the world works outside of my own community," including "how to deal with a variety of different people."[11] For John, the "lessons were pretty huge," as he came to understand "the importance of ... remaining true to my ideals" and of "being brave and challenging the things that need to be challenged or need to be thought about."[12]

May Johnson, a white woman who graduated in 1980, participated in student theater with African American

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[10] Interview with Ned Irons by Pamela Grundy, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill (K-170) (Mar. 26, 1999).

[11] Interview with John W. Love, Jr. by Pamela Grundy, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill. (K-172) (Feb. 17, 1999).

[12] *Id.*

and white students.[13] May and her friends "were interested in the same stuff and would get to be close when we do things in the theater, put on plays and stuff like that. You get to be close."[14]

William Hamlin was one of the first African-American students to integrate a white school.[15] Before integration, William's conversations with his friends "basically centered around the fact that we were just as good as any other students at Charlotte-Mecklenburg if we were given the opportunity to compete."[16] After integration, Hamlin saw people in the white community take steps to help desegregation work.

> [I]n the later 70's things began to start mellowing out. There was an initiative throughout the whole community that, 'We want to make this situation work.' In talking with children of affluent parents, at the time, their parents really made a sacrifice. They said, 'Look. If I'm going to be a leader in Charlotte-Mecklenburg, I'm going to lead not only in the white community but I'm going to lead on social issues. And they derived in a way mechanisms by which their children would be bused just like any other kid and they were going to be going to those schools. And, I think that's when it began to turn a corner.

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[13] Interview with May McNich Johnson by Matt West, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill (K-462) (Apr. 29, 2001).

[14] *Id.*

[15] Interview with William Hamlin by Pamela Grundy, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill (K-169) (Mar. 29, 1998).

[16] *Id.*

> I really did get a wellspring of pride to see what was going on....Viewed from the black community seeing it inching itself back to a point that now is being accepted in the community in general. That was a really good feeling.[17]

Latrelle McAllister, a 1976 African-American graduate of West Charlotte, believed integration was "an excellent growth experience," as she was "exposed to ... people from different neighborhoods or different socioeconomic status."[18] Latrelle, who later became a human resources director at a local college, saw through her experiences at West Charlotte that racial diversity is "very important in building, not only appreciation for people's differences, but tolerance for those differences. ... [A] lot of problems ... exist ... because people haven't developed tolerance or appreciation for ... differences."[19]

In the twelfth grade in 1976, Latrelle was likely a contemporary of James Swann, the six-year old for whom his father in 1965 had sought admission to an integrated school. Latrelle, and the other students in these interviews, ultimately did experience the educational environment sought by Darius Swann:

> We believe that an integrated school will best prepare young people for responsibility in an integrated society. Having lived practically all of his life in India, James has never known the meaning of racial

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[17] *Id.*

[18] Interview with Latrelle P. McAllister by Pamela Grundy, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill (K-173) (June 25, 1998).

[19] *Id.*

> segregation. We have been happy to watch him grow and develop with an unaffected openness to people of all races and backgrounds and we feel it our duty as parents to ensure this healthy development continue.

Douglas, *supra*, at 107; Gaillard, *supra,* at 52 (citing 1964 letter to the CMS School Board from Darius Swann, a Presbyterian missionary whose family had recently returned to the United States).

These students' perceptions are confirmed by a recent comprehensive study comprised of nearly 550 interviews with 500 students who graduated from six integrated high schools around the country. *See,* Amy S. Wells, et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* 2, 9 (Mar. 30, 2004) *available at* http://cms.tc.columbia.edu/i/a/782_ASWells 041504.pdf. West Charlotte High School was one of the schools included in the study. *Id.* at 11. The study found that, regardless of racial and ethnic background, all of the high school graduates interviewed were grateful that they attended racially diverse high schools. "They said these schools provided them with one of their only opportunities – or their only opportunity – to mix with people of other racial or ethnic backgrounds. ... [T]his experience yielded a valuable social education not otherwise available through books, videos, or field trips..." *Id.*, at 16.

Amici speak now for school authorities, communities and parents who wish for their students this same ability "to develop ... an unaffected openness to people of all races and backgrounds." School boards should be allowed to create diverse schools as a matter of sound educational policy and to take into account the race of students in making school assignments to the extent necessary to achieve that goal.

4. Resegregation Has Sharply Eroded Public Support for Public Education. In 1997, a successful legal challenge to CMS's continued federal judicial supervision began with an equal protection claim challenging CMS's magnet school admissions policy that aimed for an enrollment of 40% African American students and 60% students of other races. *See Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F.Supp.2d 228, 239, 287 (W.D.N.C. 1999), *aff'd in part, rev'd in part sub nom. Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001) (*en banc*), *cert. denied*, 535 U.S. 986 (2002). Introduced by CMS Superintendent John Murphy in 1992, the program converted 58 of the district's 126 schools to magnet schools and eliminated most busing (especially for white students), all on assurances from Dr. Murphy that these measures would maintain racial diversity and significantly improve academic outcomes. *Id.* at 321, 339; Stephen S. Smith and Roslyn A. Mickelson, *All That Glitters Is Not Gold: School Reform in Charlotte-Mecklenburg*, 22 Educ. Evaluation & Pol'y Analysis, 101, 107-08, 117 (2000). Failing to meet *either* objective, the program instead generated the highest levels of public anxiety CMS had experienced since 1970. *Id.* at 107-08, 117 (showing that, except in some higher level high school courses, the magnet program did not improve SAT scores, dropout rates, or proficiency in core high school subjects, and outcomes in grades 3-8 reading and math declined).

Public criticism of the program focused on its destabilizing effects, as magnet schools drained resources, active PTA members and high performing students from the non-magnet African-American schools, and exacerbated the increasing number of non-magnet schools that, without busing, were becoming racially imbalanced. Smith, *supra*, at 98-100, 119, 163; *see also* Douglas, *supra*, at 206-21. By 1995, widespread public dissatisfaction prompted voters, for the first time since before desegregation, to defeat a comprehensive school bond referendum and elect a school

board so aligned against Murphy that he departed office the day before CMS's new school board was sworn in.[20] Smith and Mickelson, *supra*, at 102.

Public support for CMS began to collapse in the 1990s when resegregation pitted school against school and communities against communities. This gulf worsened significantly after 2002, when CMS—compelled to abandon its desegregation plan by a "unitary status" decree from the federal courts—adopted instead a new plan promising most students the opportunity to attend "neighborhood schools" with magnet school options. Roslyn A. Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from Charlotte Mecklenburg Schools*, 81 N.C.L.Rev. 1513, 1522 (2003). Because of the widespread residential segregation throughout Mecklenburg County, 48% of all African-American students soon found themselves in racially identifiable African-American schools. *Id.* at 1558; *see also*, Ken Godwin, et al., *Sinking Swann: The Resegregation of Charlotte Schools*, 23 Rev. of Pol'y Res. 983, 990 (2006) (stating that the "most obvious outcome of the policy change to mandatory choice was the increase in the number of segregated schools in the district"). CMS was forced, moreover, to remove any promise of "choice" and transfers when white families overwhelmingly chose schools in their largely segregated white neighborhoods, resulting in such overcrowding that these predominantly white, middle- and upper-middle class schools quickly became effectively closed to non-white students who lived outside these privileged neighborhoods. *See id.* As a result, African-American families, who disproportionately sought transfers for their children,

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[20] Smith & Mickelson, *supra*, at 102; see also, Smith, *supra*, at 121, 125 (reporting that in September 1995—before school board elections in November but after the May 1995 rejection of the bond referendum—Murphy announced that he would resign sometime "before the end of the 1995-96 academic year").

effectively lost access to high performing, majority white suburban schools. *Id.* at 990.

The option of neighborhood choice, combined with a perception that majority African American schools offer unequal educational opportunities—a perception corroborated by achievement data showing inferior academic outcomes in these schools[21]—motivated parents of students in majority white schools to stay put and demand that CMS prioritize new construction in the suburbs. *See, e.g.*, Ann D. Helms, *School Bonds Rejected First Time in Ten Years*, Charlotte Observer, Nov. 9, 2005, at A1 (quoting suburban parent seeking modified bond package to make "more happen in the north more quickly"). Parents of students in majority African-American schools, angry over the low performance in their students' schools, demanded by contrast that the school district focus its limited resources on their schools. Editorial, *Blacks Decry Inter-City Schools*, Charlotte Observer, Feb. 20, 2005, at 1B. In November 2005, united only by their anger, voters from Charlotte's segregated white suburbs and its segregated African American center city together defeated $427 million in school bonds because each group had come to distrust the

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[21]Notwithstanding the district's contention that "the achievement gap has narrowed" since its return to neighborhood schools, *See, e.g.*, Charlotte-Mecklenburg Schools, End-of-Grade Tests: 2002-03 Results at 2 (http://www.cms.k12.nc.us/news/stories/EOG-TestResults%20.pdf) (last visited on Oct. 8, 2006) (focusing on general proficiency designations but not raw scores), a closer examination of achievement data reveals that racial gaps in the *raw scores* on end of year tests have actually widened. For example, in a study examining the impact on students of the change from CMS's race conscious assignment policy to its neighborhood schools policy, researchers at the University of North Carolina-Charlotte determined that the change led to a statistically significant and substantively meaningful drop in the *raw* math test scores of African American and Latino students and a statistically significant increase in test score gaps between whites and minorities. Godwin, et al., *supra*, at 990-94 (attributing increase in gaps to concentration of poverty in predominantly minority schools).

district's priorities. Helms, *supra.* Meanwhile, millions of dollars of reform efforts targeting academic performance in majority African American schools have failed to achieve the targeted results[22]

In the late 1980s, rapid growth in Charlotte's suburbs exerted increasing pressure on CMS to accept an increase in resegregation.[23] School authorities, backed by public support, resisted this pressure. They knew that the experience in Nashville, Memphis, and other similarly-sized cities was that "white flight *accelerated* with resegregation....and cities [allowing resegregation] could

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[22] In response to the legal challenge brought against CMS in the State's education adequacy litigation, CMS set targets for 2005-06 improvements on standardized test scores in its ten lowest performing high schools. The board of county commissioners had also appropriated a $4.9 million emergency "Challenge Grant" for improvement efforts in three of the four lowest performing schools—Garinger, West Charlotte and West Mecklenburg High Schools—all three racially isolated minority schools. *See* Letter from Hon. Howard E. Manning, Jr., Wake County Superior Court, to June St. Clair Atkinson, State Superintendent, North Carolina Department of Public Instruction and Howard N. Lee, Chairman, State Board of Education, March 3, 2006, *available at* http://www.ncforum.org/resources/hoke_county.html (reviewing CMS targets for low performing high schools). The three Challenge Grant schools did not come close to meeting their 2005-06 targets, Charlotte-Mecklenburg Schools, *High School Challenge Reform Executive Summary,* https://extranet.cms.k12.nc.us/news/stories/internetNews/pdf/9A28A200653810PM.pdf (last visited Oct. 6, 2006) (providing 2005-06 scores for Challenge Grant schools).

[23] These pressures—which prompted the Murphy-era changes and continue today to affect school policies—embody the very real challenges local authorities must have discretion to address. For example, the population of metropolitan Charlotte has nearly doubled since the 1980s, spawning both suburban expansion and school construction far from central city areas where most African-American families reside. As a result, school authorities face constant temptations to use the district's most integrated "middle ring" neighborhoods to enhance student diversity in the outer suburbs and inner city, thus penalizing the very neighborhoods that reflect the ideal of racially integrated neighborhoods. Smith, *supra,* at 24, 97, 119.

expect to pay a price." Gaillard, *supra*, at 188. Today, Charlotte is paying the price. Suburban white activists have begun to argue for "secession" from CMS, taking their cause as far as the State legislature, Staff Editorial, *Wrong Answer: Splitting from CMS Wouldn't Solve Overcrowding Problems*, Charlotte Observer, Feb. 20, 2005 at 2P; *see also*, Ann D. Helms, *Legislature Kills Bill on Break Up, Officials Hushed*, Charlotte Observer, Apr. 13, 2005 at A1, while private school use has *increased* with race-neutral student assignment. Peter Smolowitz and Ted Mellnik, *Private Schools On Rise: Analysis Shows Trend Among Better-Off Families in Mecklenburg*, Charlotte Observer, Sept. 8, 2006, at A1. White flight, the anguish of African American parents who desire better educational opportunities for their children, the failure of a comprehensive school bond, and the critical loss of intercommunity cooperation, all have contributed to CMS's current inability, after resegregation, to maintain robust community and parental support for Charlotte's system of public schools.

B. The Promise of *Swann*, that Local School Authorities Have Broad Discretion to Implement Educational Policies Designed to Prepare Students to Live in a Pluralistic Society, Should Not be Abandoned.

The Court in *Swann* drew a careful distinction between the powers of a federal court and the discretion of a local school board. *Swann*, 402 U.S. at 16. It is clear the distinction was not mere dicta, for in a companion case, the Court relied expressly upon this language as a basis for invalidating North Carolina's anti-busing statute. *N. C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971). Most significantly, in another case decided on the same day, the Court relied on this principle to find that a school board's voluntary student-assignment plan that took into account the

race of students in drawing attendance zones was not a violation of the Equal Protection Clause of the Fourteenth Amendment, nor a violation of Title IV of the Civil Rights Act of 1964. *McDaniel v. Barresi*, 402 U.S. 39, 41-42 (1971).

In later cases this key distinction was reaffirmed. For example, in *Keyes v. School District No. 1*, 413 U.S. 189, 242 (1973), Justice Powell wrote:

> In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.

Granting broad educational latitude to local school boards is consistent with the Court's repeated insistence that local control of educational policies is a fundamental value. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (citations omitted). *See also Freeman v. Pitts*, 503 U.S. 467, 506 (1992) (Scalia, J., concurring) (noting that "[w]e must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition . . . that public schooling, even in the South, should be controlled by locally elected officials acting in conjunction with parents.").

School districts over the years have properly and judiciously relied on the principle announced in *Swann* and *McDaniel*, recognizing their considerable authority to take

race into account in order to promote racial diversity in student assignments. *See, e.g., Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 750-51 (2d Cir. 2000) (relying on *Swann*, the companion cases, and subsequent decisions to conclude that school districts may act voluntarily to counter *de facto* segregation and to seek the benefits of education in a racially integrated setting); *Willan v. Menomonee Falls Sch. Bd.*, 658 F.Supp. 1416, 1422 (E.D. Wisc. 1987) (relying upon "well-settled . . . federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination."); *National Assn. for Neighborhood Schools, Inc. v. Board of Pub. Educ,* 497 F.Supp. 471, 477 (D. Pa. 1980) (upholding Pittsburg's student assignment plan on the well-defined principle of *Swann* and *McDaniel*, that school boards may voluntarily act to provide for integrated schools); *Moss v. Stamford Bd. of Educ.*, 356 F.Supp. 675, 686 (D. Conn. 1973) (same)

In the Fourth Circuit alone, "hundreds of [such voluntary] public student assignment plans, ... have been crafted carefully over the past thirty years by school boards and superintendents, with the input of thousands of interested parents and teachers, under the authority of leading Supreme Court decisions, federal executive guidelines, and state directives." John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools,* 78 N.C.L. Rev. 1719, 1721 (2000).

It is difficult to fathom a reliance interest greater than that of a local district which has pursued the use of a voluntary, race conscious desegregation plan. "[T]he classic case for weighing reliance heavily in favor of following the earlier rule" is where "advance planning of great precision is most obviously a necessity." *Casey v. Planned Parenthood*, 505 U.S. 833, 856 (1992). By definition, voluntary desegregation plans require vast investments of time, expertise and planning.

Perhaps most significantly, the Seattle School District was entitled to rely on this principle after the Court itself, in earlier litigation over the city's voluntary efforts to integrate their schools, recognized that "[a]ttending an ethnically diverse school may help accomplish this goal [of student success] by preparing minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473 (1982) (citations omitted). In fact, in 1982 the Court expressly noted that Seattle's ability to adopt race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation, was a well-established principle. *Id.*, at 472 n.15 (citations omitted).

II. RACE-NEUTRAL ASSIGNMENT POLICIES CANNOT ACHIEVE THE BENEFITS OF DIVERSITY IN MANY SCHOOL DISTRICTS

The experience of public schools in Charlotte-Mecklenburg during the years since federal courts enjoined the further use of race in student assignment policies — a dismal record of rapid resegregation by race, sharp socioeconomic isolation by class, and troubling performance outcomes in lower-income African-American and Latino schools — is powerful evidence that CMS has not been able to employ race-neutral measures to achieve educationally successful, diverse educational settings. Although CMS uses a variety of methods generally touted as race-neutral solutions, such as magnet schools and special resources for underperforming schools, the school system has resegregated at an astonishing rate, with disastrous results for the ability of the school board to maintain public support for its schools.

A state court judge, reviewing statewide accountability scores in Charlotte's resegregated schools, has condemned the "academic genocide" he finds in many CMS high schools. *Hoke County Bd. of Ed., et al. v. State of North Carolina, et al*, 95 CVS 1158, Report from the Court: The High School Problem, 23, (Wake County Superior Court May 24, 2005) (stating "the most appropriate way to describe what is going on academically in CMS's bottom '8' high schools is academic genocide for the at-risk low income children"). The court cited "no overall progress" in black achievement in 2002, 2003, and 2004, with black students remaining constant at a 60% failure rate on state accountability tests, contrasted with white students remaining constant at a 23% failure rate. *Id.* at 21.

A. Race-Neutral Assignment Policies in Charlotte-Mecklenburg Have Resulted in Racially Isolated Schools

In the first year after the 2002 CMS plan was implemented, the number of Charlotte-Mecklenburg schools with minority enrollment of 91% to 100% more than doubled, John C. Boger, *Education's "Perfect Storm"? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C.L.Rev. 1375, 1395 (2003), and the district's number of racially imbalanced schools[24] jumped from 47 to 81 schools.[25] Two years later, in 2004-05, this number had

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[24] Defined as plus or minus 15% of the school district's black and white student populations for each year.

[25] Godwin, et al., *supra*, at 990 (discussing "results [which] show clearly that the change from the policy designed to encourage desegregation to the race-neutral policy led to substantially greater ethnic sorting"); *see also*, Mickelson, *supra*, at 1557 (showing elementary, middle and high schools in Charlotte declined by 19.4%, 8.8% and 14.7% respectively during the first year of the choice plan).

increased to 87 schools. Charlotte-Mecklenburg Schools, School Profiles, 2005-06, http://www.cms.k12.nc.us/allschools/allschools.asp (last visited Sept. 1, 2006) (providing enrollment data on 150 CMS schools).

The CMS system has failed to ensure equality in its racially resegregated black schools, despite implementing precisely the sorts of interventions that various *amici* for Petitioners champion as race-neutral ways to improve student achievement. *See, e.g.*, Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, No. 05-908, 23, 25-26 (filed Aug. 2006). Race-neutral interventions, of course, do not ensure that school districts can provide students with the benefits of racially integrated school environments, since experience shows they lead to racially separate schools. Compounding that shortcoming, Charlotte's experience with race-neutral policies that ostensibly drive greater resources to predominantly minority schools is that students at even the resource-favored, but racially segregated, schools continued to experience troubling, unremedied achievement gaps. The prospects for separate-but-equal in 2006 are no more promising than they were in 1896.

B. Student Achievement Does Not Improve in Racially Isolated Schools

Charlotte's former superintendent, Dr. John Murphy, has suggested to the Court that, during his tenure with CMS, he was able to dramatically improve student performance "without resort to racial balancing." Brief of *Amici Curiae* Drs. Murphy, Rossell and Walberg in Support of Petitioners, *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, No. 05-908, 10 (filed Aug. 2006). He is mistaken. Dr. Murphy's reform program for CMS "had the worst of both worlds: Its success in improving Black academic

achievement was minimal and the racial imbalance within CMS increased." Smith and Michelson, *supra,* at 121. Indeed, Dr. Murphy's own associate superintendents reported to him a year before his resignation that in comparison to other urban districts in North Carolina, including Durham, Guilford Co.[Greensboro], Wake Co. [Raleigh], and Winston-Salem/Forsyth, on the 1994 State Report Card reporting standardized test results, CMS's overall performance was well below the average, and that the district's improvement rate from 1993 to 1994 was generally lower than that of other cluster districts. Smith, *supra,* at 144.

The further experience in Charlotte since the *Belk* decision in 2001 shows that the district continues to fail to meet its goals with regard to reducing the achievement gap between white and black students. In March 1999, CMS adopted a strategic plan it called *Achieving the CMS Vision: Equity and Student Success*, in which it set out "CMS Goals 2005" that included "eliminating the achievement gap in performance among White, African-American and Hispanic/Latino students" so that by 2005, performance gaps were "to be no more than ten percentage points." Charlotte-Mecklenburg Schools, Status Report, January 2003, http://www.cms.k12.nc.us/discover/goalsequityScorecard/ntroduction.pdf. (last visited Oct. 8, 2006). However, every "Equity Scorecard" subsequently released has reported multiple instances of targets "not met" in reducing achievement gaps between white students and students of color. *See,* Charlotte-Mecklenburg Schools, Equity Scorecards: Student Achievement/Disparity, 2003, 2004, and 2005 http://www.cms.k12.nc.us/discover/goals/balancedScorecard.asp (last visited Oct. 8, 2006). Moreover, in Spring 2005, the performance gap between white and African American high schoolers on end of year tests was 33.5 percentage points and between white and Hispanic high schoolers it was 27.2 percentage points, and the performance

gap among 3rd-8th graders in reading was 18.3 percent points between white and African American students, and 19.5 percentage points between white and Hispanic students. Charlotte-Mecklenburg Schools, *School Performance: School Year 2005-06 Results* http://www.cms.k12.nc.us/departments/instrAccountability/schoolPerformance.asp (last visited Oct. 8, 2006). Overall, the return to racially segregated schools has not met CMS' own expectations of narrowing the achievement gaps between white, black and Hispanic students. Godwin, et al., *supra,* at 994.

Thus, the Seattle and Jefferson County school districts are fully justified in concluding that race-neutral alternatives will not achieve the compelling governmental interest they have in providing educationally effective and racially integrated learning environments for students. Indeed, the Charlotte-Mecklenburg experience since 1966 provides a cautionary tale and a well-studied example of the negative consequences in school districts that ignore the connections between racial integration, public support for schools and quality educational opportunities for all students.

CONCLUSION

The judgments of the Court of Appeals in both cases should be affirmed.

Respectfully submitted,

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Nos. 05-908 and 05-915

IN THE
SUPREME COURT OF THE UNITED STATES

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE URBAN LEAGUE OF METROPOLITAN SEATTLE AND THE NATIONAL URBAN LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE URBAN LEAGUE OF METROPOLITAN SEATTLE AND THE NATIONAL URBAN LEAGUE

The Urban League of Metropolitan Seattle ("the Urban League"), an affiliate of the National Urban League, appeared as Amicus Curiae in favor of the Seattle school assignment plan before the Washington State Supreme Court. Counsel for the Urban League participated in oral argument before the Washington State Supreme Court to emphasize the League's historic and abiding commitment to racial diversity in Seattle public school classrooms, and to support the Seattle plan.. Subsequently, Petitioner has cited a plan proposed by the Urban League but not adopted by the Seattle School Board as a superior alternative to the Seattle plan. The Seattle plan and the Urban League plan share diversity in Seattle classrooms as a critical goal, and use diversity as a tiebreaker to achieve it.

The National Urban League was established in 1910 to advocate for housing, jobs, and educational opportunities for African-Americans and other persons of color. An affiliate of the National Urban League, the Urban League of Metropolitan Seattle, was established in 1929. The National Urban League and its affiliates have actively promoted equal education opportunities since the 1960s. Since the late 1960s, the Urban League has advocated various school assignment changes with the goal of eliminating segregation in the public school system.

The Urban League has worked actively with the Seattle School District to promote understanding and racial diversity in the Seattle public schools. In partnership with the District, the Urban League has provided academic enrichment programs to

disadvantaged students and has provided school counselors at alternative schools within the Seattle School District. The Urban League has been instrumental in developing the Youth Congress Program – a 10 week youth leadership development program – aimed at curbing teen violence and promoting cross-racial understanding among youths. The Urban League also provided in-service training for teachers and counselors, and developed a curriculum on minority history and race relations for the Seattle schools. The Urban League has been involved in promoting access to equal education in the African American community at every level, from leading community outreach programs regarding new high school graduation requirements to providing a daily after-school program with a safe and nurturing environment to Kindergarten through Twelfth grade youth.

The Urban League's support for integrated Seattle high school classrooms spans four (4) decades. Not surprisingly, the Urban League plan had integration as a goal and utilized diversity as a tiebreaker.

ARGUMENT

A. The Effects of Racial Segregation Demonstrate the Need for Diversity.

The benefits of an integrated education for majority and minority students are undisputed. A recent Harvard study demonstrates the advantages of a racially diverse student body at the high school level:

> A recent study of elite law schools shows, for example, that almost all of the black and Latino students who made it into those

schools came from integrated educational backgrounds. Minority students with the same test scores tend to be much more successful in college if they attended interracial high schools. In addition, recent surveys show that both white and minority students in integrated school districts tend to report by large majorities that they have learned to study and work together and that they are highly confident about their ability to work in such settings as adults. Students report that they have learned a lot about the other group's background and feel confident about the ability to discuss even controversial racial issues across racial lines. In other words, students report great confidence about skills many adults are far from confident about. Longitudinal research at the college level shows long term gains in understanding complexity from integrated educational experiences. Studies exploring the life experiences of black students attending suburban white high schools show that such students experience far higher graduation and college-going rates than those left in central city schools, frequently attain an

> ability to be fluently bicultural, and, as adults, are often able to work with and offer guidance on issues that require these skills.

Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, The Civil Rights Project, Harvard University (July 2001), p. 9.[1] Most black professionals attended integrated high schools and colleges. Peter Irons, *Jim Crow's Children: The Broken Promise of the Brown Decision*, Viking Press, New York, 2002, p. 341.

The impact of racial segregation in the public school system is as harmful today as it was at the time of the United States Supreme Court decision in *Brown v. Board of Education.*

> When the Supreme Court said that separate schools were "inherently unequal" it was discussing the impact of discrimination, not the talent of minority students. Although there is a great deal of debate about the scale of the benefits produced by desegregation, there is no doubt that segregated schools are unequal in easily measurable ways. To a considerable degree this is because the segregated minority schools are overwhelmingly likely to have to contend with the educational impacts of

[1] This report may be found on the internet at: http://www.law.harvard.edu/civilrights/publications/resegregation01/schoolsseparate.pdf

> concentrated poverty (defined as having 50% or more of the student population eligible for free or reduced lunch), while segregated white schools are almost always middle class. This study shows that highly segregated black and/or Latino schools are many times more likely than segregated white schools to experience concentration of poverty. This is the legacy of unequal education, income, and the continuing patterns of housing discrimination.

Schools More Separate, p. 10. See, also, *Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000,* Report by the Lewis Mumford Center, Revised March 29, 2002[2] ("racial segregation works to the benefit of white students, placing them in very different schools from minority students, and particularly in schools with less class disadvantage. Mainly black and Hispanic children pay the price of racial segregation."); Erica Frankenberg and Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts,* The Civil Rights Project, Harvard University, August 2002, p. 22.[3] ("The

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[2] This report may be found on the internet at http://mumford1.dyndns.org/cen2000/SchoolPop/SPReport/page1.html

[3] This report may be found on the internet at: http://www.law.harvard.edu/civilrights/publications/reseg_districts02/Race_in_American_Public_Schools1.pdf

isolation of blacks and Latinos has serious ramifications: this isolation is highly correlated with poverty, which is often strongly related to striking inequalities in test scores, graduation rates, courses offered and college going rates.")

As the respected constitutional and civil rights scholar, Peter Irons, stated in his recently published book *Jim Crow's Children: The Broken Promise of the Brown Decision*:

> Singling out one factor to explain a multitude of complex social problems may appear simplistic and reductionist. But there is no denying that the system of Jim Crow schooling has given millions of America's black residents inferior education as children, has consigned them to unskilled jobs as adults, and has made it difficult to escape the urban ghettos into which rural migrants were confined by poverty and white hostility.

Jim Crow's Children, supra, p 339.

The Seattle school district has long recognized the problem of school segregation was not confined to the South. Neighborhoods in Seattle and across the country were segregated. Thus, by definition, neighborhood schools were segregated.

As the 2000 Census showed, neighborhood residential patterns with regard to race have remained stagnant.

> There has been little change in community integration despite

> growing ethnic diversity in the nation since 1990. The average white person continues to live in a neighborhood that looks very different from those neighborhoods where the average black, Hispanic, and Asian live. This conclusion holds even more strongly among children. . . .
>
> Children of all groups are being raised in environments where their own group's size is inflated, and where they are under-exposed to children of other racial and ethnic backgrounds. And if their neighborhoods are segregated in this way, so will be their schools, their clubs, their sports teams, and their friendship networks.

Separating the Children, Lewis Mumford Center Report, December 2001.[4]

Despite the fact that residential patterns have remained relatively unchanged, school districts underwent a renaissance beginning in the late 1960s that altered the racial demographic of the nation's schools, and diminished the affects of residential isolation on the public school system. *Race in American Public School,* supra, p. 2. From the late 1960s through the early 1980s, school districts in all parts of the country implemented plans to promote racial diversity and integration in public schools. Id.

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[4] This report may be found on the Internet at: http://mumford1.dyndns.org/cen2000/Under18Pop/U18Preport/MumfordReport.pdf.

> The peak of the effort to desegregate the schools came in the late 1960s and early 1970s. The only period in which there was active positive support by both the courts and the executive branch of the government was the four years following the enactment of the 1964 Civil Rights Act. During this period, federal education officials, the Department of Justice, and the high courts all maintained strong and reasonably consistent pressure for achieving actual desegregation. During this period desegregation policy was transformed from a very gradual anti-discrimination policy to one of rapid and full integration.

Schools More Separate, supra. The move toward desegregation of the nation's public schools was not an isolated policy change but was part of the broader recognition of the need for economic and social racial parity.

> The struggle was never just for desegregated schools, nor was it motivated by a desire on the part of black students to simply sit next to white students. It was an integral part of a much broader movement for racial and economic justice supported by a unique alliance of major civil rights organizations, churches,

> students, and leaders of both national political parties.

Id., p. 3.

Neither the United States Constitution nor the Washington Constitution creates a constitutional right to neighborhood schools. This is especially true if neighborhood schools, by definition, mean segregated schools. Segregated schools are inherently unequal. Residential segregation existed in Washington at the time of the enactment of the state constitution, and it still exists today. The Framers of the Washington Constitution took what was then an enlightened stance of placing an affirmative duty on the State to educate all of its children equally, thereby refusing to allow the color of a child's skin to dictate the quality of his education. PICS wants precisely the opposite: PICS wants a school system that allows skin color to dictate the quality of education. Segregated schools will provide demonstrably inferior educational opportunities to black students, and thus will result in the state failing to perform its "paramount duty" under the Washington State Constitution – the ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, cast or sex. Washington State Constitution, art. 9, § 1.

As ample social science evidence shows, the whiter the school, the better the school – not because of intellect or creativity or any of the other attributes that make a good student, but because white communities are wealthier and have more resources. By contrast, schools that are comprised of mostly minority students provide inadequate preparation for college and for life. As noted in a recent Harvard study:

> Patterns of segregation by race are strongly linked to segregation by poverty, and concentrations are strongly linked to unequal opportunities and outcomes. Since public schools are the institutions intended to create a common preparation for citizens in an increasingly multiracial society, this inequality can have serious consequences.

Race in American Public Schools: p. 3 (footnotes omitted). The recent book, Jim Crow's Children, reached a similar conclusion:

> . . . The failure of school integration, largely a consequence of the broken promise of the *Brown* decision, becomes an even more bitter pill to swallow in light of the clear evidence that integration works. More precisely, attending school with substantial numbers of white students improves the academic performance of black children. This reflects, of course, the advantages that majority-white schools have in terms of better-trained, more experienced, and more highly paid teachers, with access to better laboratory and library resources, a wider range of courses, particularly the Advanced Placement courses that challenge students and prepare

> them for college-level work, and a greater number and variety of extracurricular activities.

Jim Crow's Children, supra, p. 340-41.

It would be a fallacy to suggest that by not considering race at all – i.e., by ignoring *de facto* neighborhood segregation – the Seattle School District would somehow be acting in a "race neutral" fashion when a return to a school system that does not take race into account would mean that the schools would be distinguished solely by race. PICS pretends that segregation does not exist and at the same time seeks a ruling from this Court that would almost ensure a return to segregation and racial inequality in Seattle's public schools.

B. Both the Urban League Plan and the Seattle Plan Have Integrated Schools as a Goal, and Use Diversity as a Tiebreaker.

At page 18 of Petitioner's brief PICS asserts that the Urban League's proposal was one where "race plays a lesser role." Petitioner minimizes the extent to which the Urban League plan recognized the critical role played by racial diversity in our educational system. Urban League President James Kelly described the goal of the plan as achieving "choice, quality, equity and diversity." ER 376. Mr. Kelly also indicated that the Urban League plan was based on a model from Cambridge, Massachusetts because it was the most successful in achieving "diversity and academic performance." ER 377.

The Urban League plan described nine elements that should be present for the achievement of high-quality programs in Seattle high schools. Included

among those elements were teacher sensitivity to multiethnic people, and assuring a dynamic, multiethnic student and faculty environment. ER 380. The Urban League plan also set nine goals for its student assignment plan, the second of which was the integration of students within all high schools. ER 381. Finally, the Urban League plan used diversity as the third tiebreaker. ER 382. Petitioner's characterization of the Urban League plan provides no support for its claim that the Seattle plan is unconstitutional.

The Seattle School Board decided that the Urban League plan would require extensive gerrymandering of attendance zones in order to achieve schools with comparable racial compositions. SER 438-39; SER 426. The fact that the school board disagreed with elements of the Urban League plan, and ultimately adopted another plan does not diminish the Urban League's support for the Seattle plan.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

DATED: October 10, 2006.

Respectfully submitted,

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Nos. 05-908 and 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN McDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH AND NINTH CIRCUITS

BRIEF OF VARIOUS SCHOOL CHILDREN FROM LYNN, MASSACHUSETTS, WHO ARE PARTIES IN COMFORT v. LYNN SCHOOL COMMITTEE, FILED IN SUPPORT OF THE PETITIONERS

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STATEMENT OF CONSENT

This brief is filed with the consent of all parties, who have lodged their universal letters of consent with the Clerk of this Court.

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The *amici* consist of school children from the City of Lynn, Massachusetts who were the Plaintiffs/Petitioners in *Comfort, et al. v. Lynn School Committee, et al.*, 418 F.3d 1 (1st Cir. 2005), USSC No. 05-418 (Petition for Writ of Certiorari denied December 5, 2005, motion for leave to file out-of-time petition for rehearing denied, July 31, 2006). The plaintiffs in the *Comfort* case are a multi-ethnic group of parents of school age children who have been denied – on the basis of their race – full participation in the benefits of a school choice program adopted by the Lynn Public Schools.

Through this brief, the *amici* will address the impact on third parties caused by the continued use of assignment plans like the ones sanctioned by the Sixth and Ninth Circuits in the cases at bar.

The school children of Lynn are currently subject to race-based restrictions on school assignments. The *amici* have been subject to the racial stigmatization caused by race-based denials of school assignments. Their families have confronted the practical harms that are caused when a child is denied a desired school assignment for having the wrong skin color.

The continued use of the racial barrier to which the *amici* are subjected will be controlled by this Court's decision in these cases. The Seattle assignment plan is similar to that used by the Lynn Public Schools. The decision of the *en banc* panel of the Ninth Circuit at issue in *Parents Involved in Community Schools* 426 F.3d 1162 (9th Cir. 2006) (*PICS*) closely mirrors the decision of the

en banc panel of the First Circuit in the *Comfort* case, which sustained the Lynn Plan four months prior to the Ninth Circuit's decision in *PICS*.

While the Jefferson County assignment plan at issue in *Meredith* does not use the same model as the Lynn and Seattle plans, the case raises identical constitutional questions concerning the appropriateness of racial balancing as an objective of public education and concerning the use of mechanically applied racial quotas to achieve that goal. The *Comfort* Plaintiffs participated as *amici* in the *Meredith* matter before the Court of Appeals for the Sixth Circuit.

It is the hope of the *amici* Lynn school children that this Court, through these cases, will end the use of non-remedial racial balancing plans in public schools.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has addressed the use of voluntarily-adopted race-based student assignment plans that create *de jure* segregated schools, *see e.g., Brown* v. *Brd. of Education*, 347 U.S. 483, 493 (1952), but the question of whether *de jure* discriminatory assignment plans can be utilized to address *de facto* "segregation" within public school systems has not been answered by this Court.[1]

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[1] The use of the description "segregated" to describe either the housing patterns or racial makeup of the schools in Seattle and Jefferson County is not truly appropriate because the uneven racial composition of these neighborhoods and schools does not result from any law or action of the local governmental defendants – requirement for meeting the definition of segregated. A neighborhood or school cannot be "segregated" unless government caused a separation the races in those neighborhoods or schools. The findings in both cases are that no such *de jure* action to separate the races caused these patterns. The term *de fact* segregation was used by the lower courts and is used here simply as a means of addressing those findings.

In endorsing *de jure* discrimination to address naturally occurring housing patterns ("*de facto* segregation"), which result in limited *de facto* "segregation" within public schools, the Sixth and Ninth Circuits approved of the very practices rejected by this Court in *Gratz* and *Grutter* – the use of inflexible, mechanically-applied quotas to achieve racial balancing. *Grutter* v. *Bollinger*, 539 U.S. 306, 316 (2003) ("The [law school] policy does not define diversity 'solely in terms of racial and ethnic status'"); *Gratz* v. *Bollinger*, 539 U.S. 244, 270 (2003) (a policy that automatically benefits an "applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity").

The experience of Seattle after the suspension of its Plan, as well as the similar experiences of other cities, proves that race-based plans are ineffective providing the educational or social developmental goals attributed to them. School systems that have ended the use of racial barrier to school assignments have suffered no ill effects, other than a reduction in racial proportionality within the school system, as a result of the suspension or termination of race-based plans.

While these race-based plans have proven ineffective, their harm to individual children and families is very real. Children are being denied access to educational programs and the ability of parents to participate in their child's schools have been diminished. Further, children turned away from schools because they were born with the wrong skin color are being taught a destructive life lesson about the race. These children are being taught that their race supercedes all other individual characteristics and skills they posses. Children are also being taught – through example – that it is appropriate to judge individuals based on their race. The erroneous lesson is also being taught that minority children cannot be adequately educated unless they are split up and surrounded by a sufficient number of white children.

ARGUMENT

I. Racial balancing is inherently inconsistent with the Equal Protection Clause

The decisions of the Sixth and Ninth Circuits typify efforts by some to stretch this Court's decision in *Grutter* to permit the use of racial classifications in order to maintain racial balancing. The efforts squarely conflict with this Court's precedent. In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, this Court held:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

402 U.S. 1, 24 (1971). Racial balancing is inappropriate because "the first remedial responsibility of school authorities is to eliminate invidious racial distinctions." *Id.* at 18. Racial balancing perpetuates racial distinctions, rather than eliminating them because children are taught that race dictates how they will be treated, rather than their individual needs or characteristics.

After holding that perpetual racial balancing would exceed even the remedial power of courts, this Court explained: "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23. Regardless of how "pupil of a racial minority" is defined (children classified as "white" make up only 40% of Seattle's student population), children in Jefferson County and Seattle are excluded from certain public schools because of their race.

The impact of expanding *Grutter* so as to eliminate the general prohibition against assigning children by skin color cannot be overstated. Racial balancing, as a

compelling interest, would not be limited to school systems that have identified some particular constitutional failing that needs to be remedied through the temporary use of a racial classification. This interest is so expansive as to permit the virtually limitless use of race-based assignments in public schools. If maintaining racial diversity justifies the inflexible mechanical use of race-based assignment processes, as held in the present cases, then it is hard to conceive of any public school system across the country that would not be free to make school assignment based on skin color.

Racial diversity is not the same as viewpoint diversity. The "true educational diversity" or "viewpoint diversity" endorsed by this Court in *Grutter* is based on improving academic discourse among college students by ensuring a diversity of views, and was not based on racial balancing. *Grutter*, 539 U.S. at 308 ("Enrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional").

The justification for racial diversity interest adopted by the First, Sixth and Ninth Circuits cannot be found in *Grutter*. The interest in multifaceted viewpoint diversity accepted as compelling in *Grutter* is rooted in the First rather than the Fourteenth Amendment. *Grutter*, 539 U.S. at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"), *citing*, *Regents of University of California* v. *Bakke*, 438 U.S. 265, 312 (1978).

Measuring diversity by race does not advance the First Amendment interest in the "expansive freedoms of speech and thought" within academia. Attempting to utilize school assignments based soley on race as a tool to advance "the robust exchange of ideas" assumes, in the

case of Jacksonville County, that all blacks think alike, or in the case of Seattle, it assumes that all "minorities" think alike or will all contribute to a classroom in the same way. *Contra*, *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993) ("the perception that members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same candidates at the polls [amounts to impermissible racial stereotypes]"), *citing*, *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury") and *Holland* v. *Illinois*, 493 U.S. 474, 484, n.2 (1990). The *Shaw* Court went on to note that policies, which perpetuate such stereotypes, run the risk of exasperating the racial divisions within our society. *Shaw*, 509 U.S. at 648-49.

II. Race-based student assignment plans cause harm to children and to their families

A. The denial of a school assignment based on a child's race inflicts real harm on the child and on the child's family

School systems like the ones at issue in the *Meredith*, *PICS* and *Comfort* cases, must offer attractive choices to entice parents to make certain assignment choices. At the same time, these plans also deny access to these enticements in order to control racial composition of the schools. The resulting assignments are in many cases very burdensome to the families. Because these racial balancing plans are implemented in urban areas, the families affected are typically in the lowest income levels with the least ability to overcome the obstacles.

The factors that motivate choices in schools can be varied. Among the parents of Lynn students involved in

the *Comfort* case, issues such as availability of special programs, partnerships between schools and community groups, proximity to work, availability of after school programs or proximity to child care all played a role in choice of schools. Other factors that make a particular school valuable to a parent or child can include the presence of a family members in the school,[2] or the proximity of the school to the parent's workplace.

One of the *Comfort* parents sought a school assignment so that her daughter could attend the after school program Girls, Inc.,[3] which was located next to one of Lynn's public schools. But because her daughter was born with the wrong skin color for the desired school, she was initially denied the ability to participate in the Girls, Inc. program.[4] Another parent wished her child to attend a school at which a relative was employed.

Several parents wanted their children to attend schools located in safer neighborhoods. One family sought

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[2] While most assignment plans allow for transfers to unit siblings, regardless of race; some race-based plans are so stringent in their racial balancing that they will even keep apart brothers and sisters. *See e.g.* student assignment policy for Lowell, Massachusetts: http://www.lowell.k12.ma.us/depts/parent_info_center/index_html/?searchterm=assignment (last visited on August 14, 2006) ("Sibling Preference (brothers and/or sisters) - all students whose parents make timely application to a particular school and already have other children attending that school are given priority of assignment to that school for their racial group" (emphasis added)).

[3] Girls Incorporated is a national nonprofit youth organization dedicated to inspiring all girls to be strong, smart, and bold. With roots dating to 1864, Girls Inc has provided vital educational programs to millions of American girls, particularly those in high-risk, underserved areas. Today, innovative programs help girls confront subtle societal messages about their value and potential, and prepare them to lead successful, independent, and fulfilling lives.

[4] As a result of the *Comfort* litigation, this plaintiff and the other plaintiff children were granted temporary transfers to their schools of choice and she was able to enroll in Girls, Inc.

a transfer because, in order for their son to walk to his current school, he had to walk past streets populated by drug dealers, crack houses and a building known in the community to house prostitution. There had even been a murder on the street her son had to walk down every day to get to his school. Participating in Lynn's school choice program would allow their son to take a different path to school, but race limited the transfers available.

Another plaintiff had been physically assaulted in his current school. His mother could not use Lynn's school choice program to move her son because of his race.

Some students were denied access to schools offering special programs partnering the school with local businesses or with a local theater company. These academic programs were denied to children because of their race.

In school systems where these race-based assignment policies force children into schools located considerable distances from their homes, the ability of parents to participate in their child's education can be dramatic. The school systems in the Northeast may be smaller because they are based on municipalities rather than counties. However, the difficulty of urban travel can make assignment to distant schools, even within the same city, nearly impossible for a parent to attend parent-teacher conferences or to simply attend their child's sporting events. Inner-city children who attend public schools often come from single parent homes or both parents work making it impractical to expect any real or meaningful involvement by the parents in the school.

Choice of schools can be for reasons as simple as proximity to the parent's workplace. If the child's school is not located near either home or their workplace, parents often cannot be involved in their child's school. These race-based programs are often used by urban school systems, which include many children whose parents lack the means for traveling the considerable distance the

school buses transport their children. These children, who are often most at risk, are denied the involvement of their parents in their educations.

School choice programs must offer choices that parents find valuable in order for school choice programs to be effective. Those tangible benefits are being denied to children and their parents. When those denials have the effect of discouraging parental involvement in schools, the school system as a whole also suffers.

Race does not need to be this disruptive force in our public schools. As explained in the discussion of race neutral alternatives below, Boston's experience (albeit after several lawsuits) with school choice ***without*** racial barrier shows that choice without racial classifications can be an effective tool for maintaining racial diversity in the classroom.

B. Defining diversity by race relies on stereotypes and thereby stigmatizes children

Using race-based student assignments to achieve diversity based purely on race assumes that a child will contribute in a certain way to the classroom, without any examination of the individual child. By using the broad classifications minority and non-minority or Black and White, the level of diversity achieved by these programs is extremely limited. For example, under Seattle's Plan a recent Cambodian immigrant, who would be classified simply as a "minority," would be denied an assignment to a school that is populated predominately by native-born minority students, regardless of the individual contribution the recent immigrant could bring to disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society. That same child would be classified as an Other under Jefferson's rules and would be assigned as a white.

As this Court has previously noted, "the simple act of granting benefits based on a quota or other mechanical use of race will breed cross-racial tension." *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.). Recently this Court again recognized the harm caused when government uses race to distinguish between individuals. "[R]acial classifications 'threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility' . . . By perpetuating the notion that race matters most, racial segregation of inmates 'may exacerbate the very patterns of [violence that it is] said to counteract.'" *Johnson* v. *California*, 543 U.S. 499, 507 (2005) (emphasis in original), *quoting*, *Shaw*, 509 U.S. at 643.

While the defenders of racial balancing argue that assigning children by skin color will reduce stereotyping, this Court has previously recognized that racial stereotypes usually underlie the mistaken belief that racial hostility can be cured through using racial classifications. *See Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns"); *Watson* v. *Memphis*, 373 U.S. 526, 536 (1963) ("neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials").

Under the Jefferson County and Seattle assignment plans, race is the sole determinative factor. An assignment request that violates the racial restrictions will be denied regardless of the child's other characteristics. When a child sees a neighbor being admitted to a school to which they are denied access, there is no doubt that race is the reason. Or, as occurred with one pair of sisters of biracial parents in the *Comfort* case, when one sister (who was listed in school records as white) was permitted a transfer, but the other sister (who

was listed as black) was not; there could be no doubt in the mind of these two girls that race makes all the difference as to how they will be treated.

This use of *de jure* discrimination against school children as a means of addressing naturally occurring (*de facto*) housing patterns does as much to stigmatize children as any other discriminatory policy used by government. It teaches the lesson that race matters more than any other individual characteristic and that traits can and should be attributed to an individual based on nothing more than the color of that person's skin.

III. Individualized Consideration

A. The individualized consideration test for narrow tailoring is not uniquely applicable to higher education or viewpoint diversity.

The justification for racial diversity cannot be found in *Grutter*, which explicitly did not adopt diversity measured by race alone as a compelling interest. *Grutter*, 539 U.S. at 336 ("each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application"). While *Grutter* does not support the racial diversity interest adopted by the First, Sixth and Ninth Circuits, the basic requirements of narrow tailoring applied in *Grutter* are applicable to all racial classifications.

> [T]he hallmarks of a narrowly tailored plan [is that there be] truly individualized consideration [in which race is only] used in a flexible, nonmechanical way. [The plan cannot] insulate applicants who belong to certain racial or ethnic groups from the competition for admission.

Grutter, 539 U.S. at 334. Despite this, the First and Ninth Circuits held that these fundamental requirements of narrow tailoring are not applicable to racial diversity.

These Circuits mistakenly viewed individualized consideration as a unique feature added to the narrow tailoring analysis in *Grutter* and only applicable in like cases. This ignores this Court's previous application of the requirement in other settings unrelated to viewpoint diversity. Individualized consideration ensures the longstanding requirements that racial classifications be applied in a flexible manner and in a way that minimizes their impact on innocent third parties. *United States* v. *Paradise*, 480 U.S. 149, 171 (1987). This requirement has been applied in cases wholly distinguishable from the discussion of viewpoint diversity in *Grutter*.

In *Croson*, this Court rejected the use of a ridged numerical quota where individualized consideration of applicants could have been used to determine which businesses has been disadvantaged by prior discrimination. 488 U.S. at 507-08. Again in *Adarand Constructors* v. *Peña*, this Court used individualized consideration as a measure of narrow tailoring when reviewing a policy that presumed that all minority owned businesses were socially and economically disadvantaged. 515 U.S. 200, 207, 238 (1995).

Requiring individualized consideration in contract set-aside cases is not intended to ensure a diversity of viewpoints among contractors. Individualized consideration is required to ensure flexible application of racial classifications and to minimize their impact on third parties – *i.e.*, it ensures that race is only used narrowly.

This requirement is based on the principle that the Equal Protection Clause "protect[s] *persons*, not *groups*." *Grutter*, 539 U.S. at 326, *quoting*, *Adarand*, 515 U.S. at 227 (emphasis in original). When a racial classification does not include individualized consideration, it can only be based on consideration of the group at the expense of the individual.

> [A]dmissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.

Grutter, 539 U.S. at 337.

Such group-based decision-making is necessarily based on stereotyping in that it assumes that predominantly minority schools are inherently inferior or that minority children cannot learn and develop without sufficient exposure to white children.

> After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve.

Missouri v. *Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).

B. Racial diversity is incompatible with individualized consideration

Proponents of race-based school assignments argue that individualized examination of students is not necessary because, in their view, it is beneficial that schools evaluate their students based on nothing but their race. The First and Ninth Circuits concluded from this that individualized consideration (*e.g.*, flexible application and minimizing the impact) should not be applicable to an interest in racially balanced schools.[5] But this is the fatal

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[5] As addressed in section IV.A.2 below, the Sixth Circuit has created a new, hollow, form of the individualized consideration prong of strict scrutiny for race-based assignments in public schools.

flaw of racial diversity. Individualized consideration is incompatible with racial diversity because racial diversity is inherently incompatible with the Equal Protection Clause, which is designed to protect against government distinguishing between citizens based on nothing more than their race.

The purpose of the individualized consideration requirement is to ensure that government does not choose between individuals based on nothing more than the color of their skin. For example, in *Adarand* and *Croson*, it ensured that the benefits of a remedial contract preference (had one been properly established) would not be distributed solely on race. Individualized consideration ensures that such a remedial benefit would only be distributed to those who had been victims of discrimination within the relevant industry. *Adarand*, 515 U.S. at 207, 238; *Croson*, 488 U.S. at 507-08. In *Grutter*, the individualized consideration requirement prevented the law school from selecting applicants simply for belonging to the right race and required that they be selected based on how the applicants would contribute to viewpoint diversity. *Grutter*, 539 U.S. at 316.

When the goal is nothing more than racial balancing for its own sake, examination of the individual child loses much of its value as a tool for minimizing the impact of the racial classification. But that is only if you first accept the idea that exposing our youngest citizens to racial decisionmaking is a compelling interest; that it is permissible and even beneficial for government to view children as nothing more than members of a race and not as individuals with individual characteristics that are not dictated by skin color. But, if the objective is an educational one, then examining how a child will or will not contribute to that interest is necessary in order to avoid the trap of racial stereotypes and to narrow the impact of the racial quota.

Under a racial diversity compelling interest, individualized consideration cannot fulfill its role of ensuring flexibility and minimizing the impact of the racial classification on third parties because maintaining racial diversity requires doing exactly what narrow tailoring is meant to prevent – selecting individuals based on nothing more than the color of their skin.

IV. Analysis of the individual cases

Both assignment plans lack the main indicator of narrow tailoring: individualized consideration. The Ninth Circuits failed to apply this essential element of the Narrow Tailoring test.

The Sixth Circuit recognized the applicability of the individualized consideration standard, but then failed to apply it. At the point in the assignment process that Jefferson County rejects assignments based on the Plan's mandatory racial percentages, no individualized examination of the child is made. The decision is based simply on the racial classification listed for the child. This is precisely the type of mechanical policy prohibited by the Court in *Gratz*, *Adarand* and *Croson*.

A. *Meredith* v. *Jefferson County Board of Education*

1. Background

The litigation below addressed two separate provisions of Jefferson County's student assignment Plan, one governing "traditional" assignment zone based schools. The other governs assignments to certain "non-traditional" schools that use innovative curricula and are not restricted based on geographic assignment zones. Both portions of the assignment plans had the same objective of maintaining a predetermined level of racial balancing (*i.e.* racial diversity).

The portion of the assignment plan that governed traditional schools was found unconstitutional by the U.S.

District Court for the District of Western Kentucky. The portion of the assignment plan that controlled "non-traditional" magnet schools was sustained as being narrowly tailored to achieve an interest in maintaining racial diversity. The Petitioners appealed to the Court of Appeals for the Sixth Circuit. The school system did not cross appeal as to the portion of the plan governing traditional schools. In a brief *per curium* decision, the Sixth Circuit sustained the decision of the District Court as to both elements of the plan. Only the portion of the plan governing assignments for "non-traditional" magnet schools is at issue before this Court.

The Jefferson Plan divides students into two racial classifications for assignment purposes, Black and White (minority children of races other than African-American are designated as "Others" and are assigned under the White assignment rules). *McFarland* v. *Jefferson County*, 330 F.Supp.2d 834, 840 n.6 (W.D.Ky 2004). The Plan is designed to adjust the racial composition of all schools so that their "Black" student populations fall within 15% to 50%. *Id.* at 842. The non-traditional schools use a number of criteria to determine admission, but all other criteria are subordinate to the race of the child. *Id.* at 845.

In seeking its diversity goal, the Jefferson Plan uses terms for "racial diversity" that are as imprecise as the Plan itself. The treatment of "Others" (minorities other than African-Americans) as White for assignment purposes bears no rational connection with the stated goal of maintaining a racial diverse classroom. This imprecision of the Jefferson Plan puts it in conflict with this Court's previous recognized that the use of broad, ill-defined classifications evidences a lack of sufficient narrow tailoring. *Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267, 284 n. 13 (1986) ("defin[ing] minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan").

2. The Sixth Circuit failed to correctly apply the individualized consideration prong of the narrow tailoring test

While the Sixth acknowledged that individualized consideration is constitutionally required, that Court also had to confront the inherent incompatibility of racial diversity with this requirement. The Sixth Circuit's solution was to apply a hollow version of the analysis. None of the factors listed by Sixth Circuit consider an individual child's effect on the classroom environment or act to minimize the impact of the racial quota.

While the Court below found that, in addition to race, "[m]any factors determine student assignment, including address, student choice, lottery placement" (*McFarland*, 330 F.Supp.2d at 859), even a cursory review of these other factors reveals that they are unrelated to any examination of the characteristics of the individual child. If a parent chooses a school for their child, and that child is of the wrong race for that school, no other characteristic possessed by the child will override the color of their skin. None of these factors are considered along with race in determining if an assignment will be granted. Race is a stand-alone determinative factor. The most important thing about these "individualized factors" is that they in no way examine how a child will, or will not, contribute to any purported educational objective of the Plan.

Put simply, the Jefferson Plan relies on stereotypes. It assumes based on the broad and ill-defined classifications of White and Black that a child will contribute in a certain way, without any examination of the individual child.

3. It is irrelevant that the Jefferson Plan mandates a range rather than a single racial percentage

The Court below incorrectly held that Jefferson County's student assignment plan does not constitute a

quota where the mandated racial percentages are defined by a range rather than a single number. *McFarland*, 330 F.Supp.2d at 857. "[A] 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Grutter*, 539 U.S. at 335 (emphasis added). *See also, Id.* at 335 (quotas "insulate the individual from comparison with all other candidates for the available seats"); *Gratz*, 539 U.S. at 251 (to the extent that viewpoint diversity can be considered a compelling interest, the use of a quota is not a narrowly tailored way of achieving that interest).

The strained effort to parse the language it uses to describe the Plan's mandated racial percentages does not immunize the Jefferson Plan from the general prohibition against race-based assignments. At a certain point in its application process the Plan relies on race and ethnicity, and nothing else, to select a subset of entrants. *McFarland*, 330 F.Supp.2d at 859.

The Jefferson Plan determines whether an assignment will or will not be made based on the race of the child. Assignments are denied where the child's race would put the school outside of a desired racial percentage. *Id.* at 859. The rigors of strict scrutiny cannot be avoided simply by setting a racial range rather than a single racial percentage.

4. The Jefferson Plan is a non-remedial quota

The Jefferson Plan is not remedial. Any lingering effects of the previous dual school system operated by Jefferson County have been eliminated. *Hampton* v. *Jefferson County Board of Education*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000) ("To the greatest extent practicable, the Decree has eliminated the vestiges associated with the former policy of segregation and its pernicious effects").

The "segregation" Jefferson County seeks to address through its *de jure* discrimination in student assignments is not the result of any action by its school system. The limited *de facto* "segregation" that would occur in Jefferson County's student population without the Plan's racial barrier would be the result of housing patterns not some constitutional violation of the school system. *McFarland*, 330 F.Supp.2d at n. 5.

5. Plus factor versus mechanical application

In *Gratz* the Court made clear that a policy that automatically benefits an "applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity." *Gratz*, 539 U.S. at 270. The District Court considered the Jefferson Plan as using race as only one of several characteristics. This misstates the actual operation of the racial restrictions. Race does not act as a "plus fac or" as in the *Grutter* policy. Race is not even used as a mechanically-applied plus factor of the type rejected in *Gratz*. In the Jefferson Plan, race completely overrides all other factors. A child who belongs to the "wrong" race cannot overcome his pedigree by receiving "points" for other characteristics as in the unconstitutional *Gratz* Plan. This makes the Jefferson Plan more harmful than the admissions plan rejected in *Gratz*. A student rejected by the University of Michigan would not know if race was the reason for their rejection. Under Jefferson's Plan, a rejected child knows they are being excluded for being the wrong color.

The Jefferson Plan explicitly hinges the availability of a transfer on a student's race. There is no individualized consideration of a student's qualifications, no head-to-head comparison of one student to another, and no weight given to a student's other potential contributions to education within the particular classroom.

B. *Parents Involved in Community Schools* v. *Seattle School District No. 1*

1. The Ninth Circuit eliminated the critical individualized consideration prong from its narrow tailoring analysis

In apparent recognition of the inherent incompatibility of racial diversity with the Equal Protection Clause's requirement of individualized consideration, the Ninth Circuit eliminated Strict Scrutiny's protections of innocent third parties and requirement that the impact of the racial classification be minimized. The elimination of these constitutional protections was necessary in order to sustain racial diversity as a compelling interest because that interest cannot coexist with the concept of the Equal Protection Clause as an individual right, rather than a group right.

2. The +/-15% range is tailored to naked racial balancing and no other interests

The Ninth Circuit held:

> [W]e conclude that the District's 15 percent plus or minus variance is not a quota because it does not reserve a fixed number of slots for students based on their race, but instead it seeks to enroll a critical mass of white and nonwhite students in its oversubscribed schools in order to realize its compelling interests.

PICS, 426 F.3d at 1184. The holding flies in the face of logic. First, the +/-15% is a quota. It insulates children from comparison with children who belong to the disfavored race for a particular school. *Grutter*, 539 U.S. at 334 (quotas "insulat[e] . . . applicants with certain desired qualifications from competition with all other applicants"). If, in Seattle's view, there are not enough minority children in a particular school, assignments to that school will be limited by race until the desired minimum percentage of minorities is meet. The quota

may change from year to year, but for each school there is a desired racial percentage. If a child's assignment would be contrary to that racial percentage, it was rejected so as to maintain a minimum of the favored race for that school. This is a quota.

Second, plans that ensure proportional representation within +/-15% of the system wide minority population are not designed to maintain a critical mass. Seattle's +/-15% range is not tied to maintaining some minimum level of minority and non-minority children in each classroom, it is an arbitrary range that changes as the racial composition of the City changes.

Under its plan, Seattle did not reject assignment request based on a negative impact on "critical mass." It rejected requests based on impact on proportional representation. As noted by the Ninth Circuit, one Seattle school would have been 41.1% minority without the race restrictions. *PICS*, 426 F.3d at 1171. Despite this considerable number minority students in that school, the Plan +/-15% racial restriction rejected assignment requests in order to move the school closer proportional representation of the system wide average, making the school 55.3% minority. *Id.* Those children rejected from the Roosevelt School were not rejected in order to maintain a "critical mass," they were rejected to create proportional representation. *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972) ("Statutes affecting constitutional rights must be drawn with 'precision.' and must be 'tailored' to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means").

If the goal was maintaining some ill-defined critical mass, the Seattle Plan strikes far to broadly. By denying assignments based on impact on proportional representation, children are rejected whose assignments

would not impact "critical mass" and would only impact the goal of move all schools closer to the system wide racial makeup. This sledgehammer approach to "ensuring a critical mass in oversubscribed schools" fails to minimize impact on innocent parties.

> Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose."

Grutter, 539 U.S. at 334 (emphasis added), *quoting*, *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The +/-15% range used by Seattle has only one use: maintaining racial balance. Such a plan is not narrowly draw to achieve any other purpose.

3. The experience of Seattle and other cities that have stopped their race-based assignments demonstrates the ineffectiveness of these programs

Seattle has had the same experience as other cities that have abandoned race-based student assignments. Seattle suspended use of the plan at issue in the *PICS* case following the 2001-02 school year. *PICS*, 426 F.3d at 1195 ("the plan was put on hold, and at least one class has entered and will have completed its entire high school career without ever being affected by it"). Despite the lack of race-based assignments, Seattle's schools apparently have not descended into racial anarchy. *See* Seattle Public Schools Data Profile: District Summary, SISO – DECEMBER 2005, http://www.seattleschools.org/area/siso/disprof/2005/DP05testach.pdf ("All grade levels scored above the national average of 50 in all subtests in 2005. High school test scores rose in all three subtests, by

2 points in Reading and 1 point in both Language and Mathematics" (last visited on August 14, 2006)).

Seattle's lack of a negative educational consequence mirrors the experience of other communities like Boston, which abandoned its use of race-based school assignment in the face of litigation. Following the elimination of race as a factor in assignments, Boston experienced only a negligible drop in the level of racial diversity in its schools. *Anderson* v. *City of Boston*, 375 F.3d 71, 85 (1st Cir. 2004) (noting the testimony of the Boston Public Schools' Superintendent that "the New Plan maintained approximately the same racial balance within the schools as the Old [race-based] Plan"). Schools in Boston and Seattle remain racially diverse and as educationally effective (or ineffective) without their former racial restrictions.

If there has been no demonstrable educational impact from the elimination of race-based assignments in school systems like Boston and Seattle, then the effect of race-based plans cannot be said to have a demonstrable educational benefit. The most that can be said is that the elimination of these plans has an impact on racial balancing. But this Court has long held that racial balancing cannot be an objective for its own sake. *Grutter*, 539 U.S. at 330 ("outright racial balancing [ ] is patently unconstitutional"); *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Swann*, 402 U.S. at 24 (an order requiring "any particular degree of racial balance or mixing . . . would be disapproved and we would be obliged to reverse").

V. Availability of race neutral alternatives

"Narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. The respondents in both matters failed to prove that the race-neutral alternatives like those

examined by the Department of Education or endorsed by the First Circuit would not achieve their proffered interest of maintaining racial diversity/racial balance.

The United States Department of Education has conducted an in-depth study of whether diversity in education can be effectively maintained through race-neutral means. The Department of Education published its findings in ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION, U.S. Dept. of Ed., February, 2004, http://www.ed.gov/about/offices/list/ocr/raceneutral.html. The Department of Education study reviewed several race-neutral programs proven to be successful at achieving and maintaining diversity in the public elementary and secondary schools. *See Id.* at 66-71 (noting in particular the effectiveness of socio-economic based assignment processes); *Id.* at 78-79 (reviewing examples of successful race-neutral lottery programs in maintaining diversity in public elementary and secondary schools).

Another race-neutral alternative for maintaining diversity in public schools was examined by the First Circuit in *Anderson* v. *City of Boston*, 375 F.3d 71 (1st Cir. 2004). Boston's policy of assigning half of the seats at each school to neighborhood children and the other half through school choice, without racial restrictions, drawn from assignment zones each representing 1/3 of the City has proven to be as effective at maintaining racial diversity as its earlier quota-based assignment policy had been. *Anderson*, 375 F.3d at 85.

Boston's earlier race-based plan shared several characteristics of the plan used by Seattle and Jefferson County. Boston's earlier quota-based student assignment plan used parental choice, geographic preferences and sibling preferences to assign students. Applicants to each school were ranked based on randomly assigned numbers, but assignments would be rejected if they would cause a

school to deviate from the desired 30% range for racial make-up of each school. *Anderson*, 375 F.3d at 75.

Boston abandoned its old plan when the city was sued. Boston then adopted its new choice plan, which lacked the racial restrictions of the old plan. After reviewing this new race-neutral plan, the First Circuit found that its has been equally as effective at maintaining racial diversity as the old, race-based, plan. *Anderson*, 375 F.3d at 85.

VI. This Court has limited racial balancing to the remedial context

Courts exercising their remedial power to make whole an injured party may impose remedies that would be unconstitutional if adopted voluntarily in a non-remedial setting. *See e.g., National Soc'y of Professional Eng'r, Inc.* v. *United States*, 435 U.S. 679 (1978) (court may impose remedy that would otherwise violate First Amendment freedom of speech if imposed under other circumstances). Given this broad remedial power, this Court has permitted the limited use of racial balancing as a remedial tool. But even when utilized in this remedial context, the Court has shown disfavor for racial balancing. In *Pasadena Bd. of Educ.* v. *Spangler*, this Court held that it would be beyond the remedial authority of the district court to require the annual readjustment of school attendance zones to counteract changes in the racial makeup of the schools. 427 U.S. 424, 433-34 (1976) ("'it must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school system"). Again, in *Freeman* v. *Pitts*, this Court held that courts are prohibited by the Equal Protection Clause from adopting limitless racial balancing.

> Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no

> duty to remedy imbalance that is caused by demographic factors.

503 U.S. 467, 494 (1992). Earlier, in *Swann*, this Court held that a remedial order that required "any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Swann*, 402 U.S. at 24.

Under this Court prior decisions, racial balancing is only permissible for the limited purpose of remedying lingering effects of discrimination. Once those lingering effects have been cured, the racial balancing must stop. The First, Sixth and Ninth Circuits permit this use of perpetual racial balancing for a non-remedial purpose.

VII. No deference is owed when government chooses to utilize racial classifications

The educational context of this litigation does not diminish the heavy burden of justifying applicable to the use of a racial classification. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973) ("the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation").

Even in the context of the deference given by this Court to the University of Michigan Law School, the Court made clear that it would not have accepted just any interest offered by the University as being educationally required. Had the University of Michigan made the educational judgment that racial balancing justified the use of race in admissions decisions, the Court would have rejected that educational judgment. *Grutter*, 539 U.S. at 308 ("Enrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional"); *Gratz*, 539 U.S. at 270 ("In *Bakke*, Justice Powell reiterated that '[p]referring

members of any one group for no reason other than race or ethnic origin is discrimination for its own sake'").

More recently, the Court refused to pay deference to the experience and expertise of prison administrators because, "such deference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified." *Johnson*, 543 U.S. at 499, n.1. *See also*, *Adarand*, 515 U.S. at 224 ("Any person of whatever race has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

CONCLUSION

Reduced to its essence, the issue before this Court is whether the Equal Protection Clause of the Fourteenth Amendment protects individuals or groups. In holding that racial diversity in public schools is a compelling governmental interest, the First, Sixth and Ninth Circuits have removed the Equal Protection Clause's requirement that government view its citizens as individuals rather than members of a race. These Courts have established a new standard for racial classifications, which is based on a zero-sum-game analysis. So long as each race is equally benefited and burdened by the racial discrimination, there is no constitutional injury to the individuals who suffer from that discrimination.

> The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.

Powers v. *Ohio*, 499 U.S. 400, 410 (1991), *citing*, *Loving* v. *Virginia*, 388 U.S. 1 (1967).

The decisions at bar remove the requirements of flexible application and minimization of the impact of the racial classification and permits a return to widespread assignment of children to schools based on skin color.

For each of these reasons and the reasons state in Petitioners Briefs, the *amici* school children from Lynn, Massachusetts pray that the decisions of the Sixth and Ninth Circuits be reversed in the hopes of ending the racial barrier to which they are subject.

Respectfully submitted,

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Nos. 05-908 and 05-915

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In The
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PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,
v.
SEATTLE SCHOOL DISTRICT NO. 1 ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN McDONALD,
Petitioner,
v.
JEFFERSON COUNTY BOARD OF EDUCATION ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PROFS. AMY STUART WELLS, JOMILLS HENRY BRADDOCK II, LINDA DARLING-HAMMOND, JAY P. HEUBERT, JEANNIE OAKES AND MICHAEL A. REBELL AND THE CAMPAIGN FOR EDUCATIONAL EQUITY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The individual *amici* are: Amy Stuart Wells, Professor of Sociology and Education at Teachers College, Columbia University; Jomills Henry Braddock II, Professor of Sociology at the University of Miami; Linda-Darling Hammond, Charles E. Ducommun Professor of Education at Stanford University; Jay Heubert, Professor of Law and Education at Teachers College, Columbia University; Jeannie Oakes, Presidential Professor in Educational Equity at the University of California, Los Angeles; and Michael A. Rebell, Professor of Law and Educational Practice at Teachers College, Columbia University. All have conducted research and written widely on issues concerning race and education. *Amici*'s qualifications are listed in the Appendix.

The Campaign for Educational Equity at Teachers College, Columbia University seeks to promote excellence in education and to overcome the gap in educational access and achievement between advantaged and disadvantaged students throughout the United States. The Campaign is committed to strengthening the movement for quality public education by providing research-based analysis of key education policy issues and demonstrations of improved policy and practice.

Amici present a wealth of evidence regarding the positive, long-term benefits of K-12 integration for students and society.[2] Should the Court determine that the

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[1] This brief supports the Respondents in Nos. 05-908 and 05-915. Pursuant to Rule 37.3(a), the parties have consented to the filing of all *amicus* briefs. No party or its counsel authored this brief in whole or in part, and no person or entity other than *amici*, their members or their counsel made a monetary contribution to the preparation and submission of this brief. The individual *amici* appear in their personal capacities and do not intend to convey the views of their affiliated institutions on the questions presented. The Campaign for Educational Equity similarly appears on its own behalf and does not necessarily convey the views of Teachers College or Columbia University.

[2] In considering the benefits of diversity in higher education, the Court has relied on social science evidence presented by *amici curiae*, including evidence outside the record. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

Seattle and Louisville school assignment plans must survive strict scrutiny, this research establishes that school districts have a compelling interest in promoting racial integration in elementary and secondary schools.

SUMMARY OF ARGUMENT

The purpose of *Brown v. Board of Education* – so simple and yet so remarkable – was to end "root and branch" the forced separation of the races in elementary and secondary education. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968). The *Brown* Court based its watershed rejection of "separate but equal" on the undeniable evidence of the profound, lifelong effects of segregation on African American students. *Brown v. Board of Educ.*, 347 U.S. 483, 494 & n.11 (1954). This research led the Court to conclude, rightly, that the years children spend in K-12 education are critical, and that segregation during these years "may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494. That conclusion inexorably led to the Court's holding that segregation deprived African American students of equal protection of the laws. *Id.* at 495. It also gave rise to a new hope: that exposure to integrated settings early in life would improve opportunities for all students, break the cycle of racial separation in the United States, and yield generations of Americans more apt to construct an equal, open society.

Decades of social science research have vindicated that promise, demonstrating that *Brown*'s purpose remains vital. That purpose will erode substantially if, as Petitioners contend, school districts cannot safeguard the integrated setting *Brown* recognized as crucial. Petitioners challenge the Seattle and Louisville plans as racial classifications that must satisfy strict scrutiny by furthering a compelling interest. *Amici* note, however, that the plans are not the kind of race-based policies that treat people of different races differently and therefore trigger strict scrutiny; rather, the plans are the kind of local, positive integration effort that the Court expressly has endorsed. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

Should this Court nevertheless apply strict scrutiny, it should hold that school districts have a compelling interest in ensuring that K-12 schools are racially integrated. In past cases, the Court has recognized the numerous benefits of integrated educational environments, which help foster the robust exchange of ideas essential to academic inquiry, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.), and better prepare students for work and citizenship, *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). The Court also has emphasized the pivotal role of education in "maintaining the fabric of society." *Id.* at 331. These considerations "apply with added force to children in grade and high schools," *Brown*, 347 U.S. at 494, but a constitutional barrier to voluntary integration will mean, in many districts, that students of different races may never occupy the same classroom. That outcome would be catastrophic: "[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

These were not just rhetorical flourishes by past Courts and Justices, nor is the support for a compelling interest in K-12 integration limited to theoretical musings. The precedents reflect and are confirmed by decades of social science research – both quantitative, survey-based research and qualitative, in-depth interview-based studies – on the long-term individual and societal benefits of integrated education. The research demonstrates, at least in the context of K-12 schools, that school districts have a compelling interest in promoting integrated education.

The research shows, *first*, that there is a significant difference between higher education and K-12 education when it comes to fostering the intergroup-relations skills needed to function in a diverse society and global economy. Because *all* children must attend elementary and secondary schools, the potential mix of students in these schools is more diverse than in college, where student access often is limited by prior achievement and ability to pay. Moreover, cross-racial understanding develops more easily and more completely in younger minds than it does even in early adulthood. Students who attend integrated schools

before entering higher education or the workforce are more likely to function effectively in diverse settings as adults. By comparison, their peers who lack similar childhood experiences frequently are less comfortable and function less effectively with people of different racial backgrounds.

Second, there are profound long-term benefits for students who attend a racially mixed public school. As noted above, integrated school experiences better prepare students to function in the complex, multicultural world that they will inherit. Many beneficiaries of integrated K-12 education attribute their success in the workplace to their ability to interact with co-workers and clients of different cultural backgrounds; by learning to adapt to diverse environments when they are young, students enjoy increased life opportunities as adults. In this regard, it bears note that the Court recently expressed the view that in twenty-five years affirmative action should no longer be necessary. *Grutter*, 539 U.S. at 343. Because K-12 integration improves the future life chances and job effectiveness of students, barring positive integration efforts like those in Seattle and Louisville will undermine rather than accelerate progress toward that goal.

Third, and strongly related to the above points, the personal benefits for students who attend integrated K-12 schools translate into *societal* benefits. The development of intergroup-relations skills helps ease the potential tensions inherent in our increasingly diverse democracy and improves the strategic position of U.S. corporations within the global economy. School districts that fail to promote integration at the elementary and high school level are thus doing their local constituents *and* the larger society a disservice.

The research supporting these findings has unfolded in phases. The original body of research on the long-term effects of integration was survey-based and focused on the life opportunities of African American graduates of desegregated schools. More recent quantitative and qualitative research has broadened this inquiry to examine how attending an integrated school affects the racial attitudes and life opportunities of students of all races. The qualitative

research includes one study of particular relevance here – extensive interviews of graduates of integrated high schools in Louisville and Seattle. Together, the research demonstrates that the long-term benefits of integration not only flow to all students regardless of race but also carry over to improve the health of our economy and our democracy. In light of these benefits, school districts clearly have a compelling interest in fostering integration in K-12 education.

ARGUMENT

Petitioners begin from the premise that the Seattle and Louisville plans are "presumptively invalid" racial classifications that must survive strict scrutiny. Brief for Pet'r at 23, *Parents Involved in Cmty. Schs.* ["*PICS*"] *v. Seattle Sch. Dist. No. 1* (No. 05-908). They then argue, among other things, that the plans fail the threshold test of strict scrutiny because there is no compelling interest supporting voluntary, as opposed to judicially enforced, K-12 integration. *Id.* at 33-38; *cf. Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (stating the requirements of strict scrutiny) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

At the outset, *amici* note that Petitioners' premise is faulty. The Seattle and Louisville plans are not affirmative-action programs such as those at issue in *Gratz* and *Adarand*, and thus warrant only rationality review rather than strict scrutiny.[3] But even assuming that strict scrutiny

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[3] The plans are "'fundamentally different from almost anything that the Supreme Court has previously addressed'" under strict scrutiny. *PICS v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1193 (9th Cir. 2005) (en banc) (Kozinski, J., concurring) (quoting *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 27 (1st Cir. 2005) (en banc) (Boudin, C.J., concurring)). The plans do not prefer one racial group over another, but merely assign students noncompetitively to schools within their respective districts: "That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. The program[s] do[ ] use race as a criterion, but only to ensure that the population of each public school roughly reflects the city's racial composition." *Id.* at 1194. Each

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applies, the Seattle and Louisville plans further the compelling interest of local school districts in fostering integrated educational environments for K-12 students. This conclusion flows not only from judicial precedents but also from decades of social science research demonstrating that all students, regardless of race, experience lifelong benefits from attending integrated schools that, in turn, yield economic and social benefits for the United States. Given the unique importance of K-12 public education and the incontestable benefits of integrated schools, the Court should have no reluctance in holding that Respondents' plans further a compelling interest.

I. Should the Court Apply Strict Scrutiny, Precedent Supports Finding a Compelling Interest in K-12 Racial Integration.

Brown rejected "separate but equal" in part because of the long-term negative effects of forced segregation on African American students. *See* 347 U.S. at 493-94 ("To separate them from others of similar age and qualifications

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plan thus is nothing more, and nothing less, than a proper exercise of local authority to promote integration. *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("[L]ocal autonomy of school districts is a vital national tradition."). The Court previously has endorsed this kind of local, positive integration effort:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . .

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); *see also Keyes v. School Dist. No. 1*, 413 U.S. 189, 242 (1973) (Powell, J., concurring) ("Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."). The Court, therefore, may affirm on the basis of the districts' plainly rational purpose in safeguarding integration.

solely because of their race generates a feeling of inferiority as to their status in their community that may affect their hearts and minds in a way unlikely ever to be undone."). The continued racial segregation of many public schools suggests that *Brown*'s promise of equal educational opportunity remains unfulfilled, even if *de jure* segregation is no longer the proximate cause. Indeed, the Court's jurisprudence has evolved to offer a positive justification for promoting K-12 integration rather than simply a negative reason to undo *de jure* segregation.

In the context of university admissions, the Court has recognized the compelling benefits of racial diversity. Almost thirty years ago, Justice Powell noted that diversity helps promote the "robust exchange of ideas" essential to academic inquiry. *Bakke*, 438 U.S. at 312 (Powell, J.) (internal quotation marks and citation omitted). The Court recently adopted Justice Powell's diversity rationale, recognizing that a diverse educational environment improves "cross-racial understanding, help[ing] to break down racial stereotypes." *Grutter*, 539 U.S. at 330 (internal quotation marks and citations omitted). The result is a learning environment that "'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Id.* (quoting Brief for Am. Educ. Res. Ass'n et al. as *Amici Curiae* at 3). Diversity thus contributes to the "pivotal" role of education in "preparing students for work and citizenship" and "maintaining the fabric of society." *Id.* at 331.

If diversity in *higher* education has value, then these concerns operate even more strongly in the context of K-12 integration. As the Court recognized in *Brown*, the K-12 years are a critical formative period in the development of young minds and future citizens. *See* 347 U.S. at 494. Demographics also confirm the point: While less than 43 percent of all 18-24-year olds in the United States are enrolled in college or have earned a postsecondary degree,[4]

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[4] *See* U.S. Census Bureau, *Table 3: Educational Attainment of the Population 15 Years and Over, by Marital Status, Age, Sex, Race, and Hispanic Origin: 2003*, *at* http://www.census.gov/population/www/socdemo/education/cps2003/tab03-01.pdf (last modified June 29, 2004).

the American public education system serves almost 90 percent of the school-age population.[5] Meanwhile, the K-12 student population is becoming more diverse every year. In the 2004-05 school year, only 57 percent of students enrolled in public schools were white, down from 78 percent thirty years ago.[6] Children enrolled in public schools today will grow up in a society that is far more diverse culturally and racially than the environment of their parents. Learning to function effectively within an integrated environment, therefore, is one of the most important lessons schools can teach our next generation of leaders, workers, parents and community members.

II. Social Science Evidence Overwhelmingly Confirms the Compelling Benefits of Racially Integrated Elementary and Secondary Schools.

In his ground-breaking work *The Nature of Prejudice*, published just months before *Brown*, Gordon W. Allport argued that prejudice arises and persists in the absence of meaningful contact among people with disparate racial backgrounds. Allport "challenged the notion that simple encounters among different people would be sufficient to reduce prejudice."[7] Instead, he wrote, "contact must reach below the surface. . . . Only the type of contact that leads people to *do* things together is likely to result in changed attitudes."[8] Allport's "contact hypothesis" predicted that certain situational conditions would be necessary for intergroup contact to reduce prejudice: (1) equal status of

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[5] Nat'l Ctr. for Educ. Stats., U.S. Dep't of Educ., *What Are the Enrollment Trends in Public and Private Elementary and Secondary Schools?*, http://nces.ed.gov/fastfacts/display.asp?id=65 (last visited Oct. 7, 2006) (citations omitted).

[6] *See* NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2006 IN BRIEF 5 (2006), *available at* http://nces.ed.gov/pubs2006/2006072.pdf (last visited Oct. 7, 2006).

[7] Biren (Ratnesh) A. Nagda et al., *Looking Back as We Look Ahead: Integrating Research, Theory and Practice on Intergroup Relations*, 62 J. SOC. ISSUES 439, 440 (2006).

[8] GORDON W. ALLPORT, THE NATURE OF PREJUDICE 276 (1954).

group participants; (2) common goals that transcend differences; (3) an atmosphere in which cooperation outweighs competition; and (4) support for intergroup contact from authority, law or custom.[9] As others noted, given the segregated nature of U.S. housing,[10] this kind of contact was most likely to occur in an institution like the public school.[11] Indeed, Allport believed that intergroup contact among school-age children would be highly effective in overcoming prejudice.[12] Early integration, he argued, would give students a comfort level with people of different backgrounds that would yield lifelong benefits.[13]

The arrival of desegregation provided nearly ideal conditions for testing Allport's contact hypothesis. With decades of data, social scientists have confirmed its validity, particularly as it pertains to the *long-term* effects of integrated public education. Policy makers and courts often focus on the short-term outcomes of desegregation, such as student achievement and young students' racial attitudes. But adult graduates of integrated schools – and the researchers who study them – are better able to assess the lifelong impact of integrated educational experiences on students and society. It is only after these graduates have gone to college or into the workforce that they fully

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[9] Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCHOL. 65, 66-67 (1998); *see also* ALLPORT, *supra* note 8, at 276; Nagda et al., *supra* note 7, at 440.

[10] *See* David M. Cutler et al., *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455 (1999); John E. Farley & Gregory D. Squires, *Fences and Neighbors: Segregation in 21st Century America*, CONTEXTS, Winter 2005, at 33, 34.

[11] Sidney H. Aronson, *Review: The Nature of Prejudice*, 2 SOC. PROBS. 113, 114 (1954); *see generally* RAYMOND W. MACK, OUR CHILDREN'S BURDEN: STUDIES OF DESEGREGATION IN NINE AMERICAN COMMUNITIES (1968).

[12] ALLPORT, *supra* note 8, at 510-11.

[13] *Id.* at 310, 511; *see also* Tamara Towles-Schwen & Russell H. Fazio, *On the Origins of Racial Attitudes: Correlates of Childhood Experiences*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 162 (2001).

appreciate how integration made it much easier for them to live and work in a diverse democracy.[14]

Early quantitative long-term effects research focused on African American students' life opportunities and racial attitudes, and found that graduates of integrated schools were more likely as adults to enter into, and thrive in, integrated college, work and social environments. More recent quantitative research has broadened the inquiry to examine the racial attitudes of all graduates who experienced K-12 integration; it confirms that, even controlling for other relevant factors such as family background, integrated schooling has a direct, significant effect in improving graduates' racial attitudes and ability to interact with persons of other races. Qualitative, in-depth interview-based research has examined *how* integrated education helps bring about these outcomes. Comprehensive nationwide case studies – including studies of Louisville and Seattle public school graduates – make clear that the simple act of "being there" in an integrated environment on a daily basis yields benefits that students carry throughout their lives, particularly in their ability to function in a diverse society and competitive economy. These findings demonstrate the compelling interest in safeguarding K-12 integration.

A. Quantitative Research Has Demonstrated That Attending Integrated Schools Improves the Racial Attitudes and Life Opportunities of Students.

Early Quantitative Analyses. The first studies of the long-term effects of school integration were quantitative analyses of survey and other outcome data from

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[14] *See* SUSAN E. EATON, THE OTHER BOSTON BUSING STORY: WHAT'S WON AND LOST ACROSS THE BOUNDARY LINE 37 (2001); AMY STUART WELLS ET AL., BOTH SIDES NOW: THE STORY OF DESEGREGATION'S GRADUATES (Harvard Univ. Press, forthcoming Spring 2007) (manuscript at 247, on file with Wells).

African American graduates of desegregated schools.[15] The research showed that African American graduates of integrated K-12 schools were more confident in their ability to navigate racially diverse settings.[16] As adults, these graduates tended to move into more racially integrated settings and, consequently, experienced enhanced social mobility.[17] According to one review of long-term effects literature, African American students' experiences in racially diverse public schools "provide[d] the socialization for aspirations and entrance to higher[-]level occupations, development of the interpersonal skills useful in interracial contexts, and reduced social inertia leading to increased tolerance and willingness to participate in desegregated environments."[18]

This research supports Braddock's "perpetuation theory,"[19] which explains why segregation tends to repeat

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[15] Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994); *see also* Jomills Henry Braddock II & James M. McPartland, *Assessing School Desegregation Effects: New Directions in Research*, 3 RES. SOC. EDUC. & SOCIALIZATION 259 (1982); Jomills Henry Braddock II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259 (1984); Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994).

[16] *See* Wells & Crain, *supra* note 15; *see also, e.g.*, Jomills Henry Braddock II, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 SOC. EDUC. 178 (1980).

[17] *See* Dawkins & Braddock, *supra* note 15; Wells & Crain, *supra* note 15; *see also* Jomills Henry Braddock II et al., *Applicant Race and Job Placement Decisions: A National Survey Experiment*, 6 INT'L J. SOC. & SOC. POL'Y 3 (1986); Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue To Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. SOC. ISSUES 5 (1987).

[18] Dawkins & Braddock, *supra* note 15, at 395-96.

[19] *See generally* Braddock, *supra* note 16; James M. McPartland & Jomills Henry Braddock II, *Going to College and Getting a Good Job:*

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itself "across the stages of the life cycle and across institutions when individuals have not had sustained experiences in desegregated settings earlier in life."[20] It posits that segregated groups will tend to overestimate the degree of hostility they will encounter in integrated settings or underestimate their skill at coping with interracial tensions.[21] Consequently, segregated groups will avoid integration, thereby perpetuating segregation.

In a review of twenty-one early long-term effects studies, Wells and Crain[22] found demonstrable support for both the contact hypothesis and perpetuation theory. By analyzing outcome data across the studies, they showed that African American graduates of racially mixed schools were much more likely than their segregated peers to make choices that placed them in integrated and, in some circumstances, more advantageous environments. They also found that graduates of integrated schools generally had higher – but also more realistic, given their prior educational achievement – occupational aspirations than graduates of segregated schools.[23] These findings underscored the importance of access to the kinds of occupational

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The Impact of Desegregation, *in* EFFECTIVE SCHOOL DESEGREGATION: EQUALITY, QUALITY AND FEASIBILITY 151 (Willis D. Hawley ed., 1981).

[20] McPartland & Braddock, *supra* note 19, at 149.

[21] Braddock, *supra* note 16, at 181.

[22] Wells & Crain, *supra* note 15.

[23] *Id.*; *see also* Marvin P. Dawkins, *Black Students' Occupational Expectations: A National Study of the Impact of School Desegregation*, 18 URBAN EDUC. 98 (1983); William W. Falk, *Mobility Attitudes of Segregated and Desegregated Black Youths*, 47 J. NEGRO EDUC. 132 (1978); Robert K. Gable et al., *The Effects of Voluntary School Desegregation on Occupational Outcomes*, 31 VOCATIONAL GUIDANCE Q. 230 (1983). The evidence was stronger as to the finding regarding realism than to optimism; one of the four studies that addressed this issue found African Americans who attended racially diverse schools to have slightly lower occupational expectations. *See* Jon W. Hoelter, *Segregation and Rationality in Black Status Aspiration Process*, 55 SOC. EDUC. 31 (1982).

information that then flowed through predominantly white institutions and networks.[24]

Wells and Crain also found that, controlling for key variables such as social class and test scores, African American graduates of desegregated high schools were more likely to attend predominantly white universities.[25] They completed more years of education, earned higher degrees and majored in more "nontraditional" occupations than graduates of all-black schools.[26] Similarly, they were more likely to have racially diverse social and professional networks, and they were more likely to work in professional jobs in integrated corporations and institutions.[27] Each outcome translated into enhanced social mobility and income.

Recent Quantitative Work. While early studies focused on the life chances of African Americans, more recent work has broadened the inquiry to include the

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[24] *See, e.g.*, W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1938); Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973).

[25] Wells & Crain, *supra* note 15. This set of studies included, most notably, Braddock, *supra* note 16, but also Robert L. Crain, *School Integration and the Academic Achievement of Negroes*, 44 SOC. EDUC. 1 (1971); Julie E. Kaufman & James E. Rosenbaum, *The Education and Employment of Low-Income Black Youth in White Suburbs*, 14 EDUC. EVALUATION & POL'Y ANALYSIS 229 (1992); and Kenneth L. Wilson, *The Effects of Integration and Class on Black Educational Attainment*, 53 SOC. EDUC. 84 (1979).

[26] *See* Robert L. Crain & Rita Mahard, *School Racial Compositions and Black College Attendance and Achievement Test Performance*, 51 SOC. EDUC. 81 (1978). There was one exception to this finding: Crain and Mahard found that, in the South, African American graduates of desegregated schools were slightly less likely to attend college or earn a college degree. The opposite was true in the North.

[27] Wells & Crain, *supra* note 15. This set of studies included, most notably, ROBERT L. CRAIN & JACK STRAUSS, SCHOOL DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT (Ctr. for the Soc. Org. of Schs., Report No. 359, 1985); Braddock et al., *supra* note 17; Braddock & McPartland, *supra* note 17; and Robert L. Crain, *School Integration and Occupational Achievement of Negroes*, 75 AM. J. SOC. 593 (1970).

racial attitudes of students of *all* races. It confirms that improvements in racial attitudes and intergroup skills are not limited to African American attendees of integrated schools.

Wood and Sonleitner[28] examined whether "equal-status contact"[29] in a school environment, "particularly during the formative years, would engender more positive racial attitudes among young persons that would endure into adulthood."[30] Analyzing survey data from 292 white adults in Oklahoma City, they found that school-age interracial interaction not only "disconfirmed negative racial stereotypes, but had a direct, significant effect on levels of adult antiblack prejudice *even controlling for other relevant factors*" such as family income and education level.[31] Their findings were especially significant because they included a control group of white adults who had experienced little childhood exposure to African Americans.[32]

Towles-Schwen and Fazio also studied adult racial attitudes as they related to childhood contact with other racial or ethnic groups. They asked undergraduates at a large Midwestern public university to match judgmental adjectives – e.g., "good" or "bad" – to pictures of faces of African Americans and members of other minority groups. The study included as independent variables the subjects' degree of contact with members of other races in elementary, middle and high school, as well as their parents' racial attitudes.[33] There was a direct, significant

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[28] Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. INTERCULTURAL REL. 1 (1996).

[29] *Id.* at 1 (noting equal-status contact as one of Allport's four conditions for contact that ameliorates prejudice).

[30] *Id.*

[31] *Id.* (emphasis added).

[32] *Id.*

[33] Towles-Schwen & Fazio, *supra* note 13, at 162-67.

correlation between the frequency of childhood intergroup interaction and positive racial attitudes[34] – and the earlier the interaction, the better the student's attitude.[35] The study also concluded that childhood interactions had the potential to ameliorate or negate parental influence: "[E]arly positive experiences with Blacks are critical to overcome the awkwardness and anxiety felt by people whose parents are prejudiced."[36]

This research provides empirical, statistically significant evidence that multiracial exposure in elementary and secondary schools enhances the life opportunities of students, helps break the cycle of segregation, and negates prejudice and stereotypes.[37]

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[34] *Id.* at 167 ("[R]espondents who reported more positive interactions with Blacks in high school had significantly more positive attitudes . . . .").

[35] *See id.* at 171-72.

[36] *Id.* at 170-71.

[37] Some have criticized this research because of the potential for "self-selection" bias. Brief of David J. Armor et al. as *Amici Curiae* in Support of Pet'rs at 22, *PICS v. Seattle Sch. Dist. No. 1* (No. 05-908) & *Meredith v. Jefferson County Bd. of Educ.* (No. 05-915) (arguing that study subjects were more likely to come from families who were more open to integration in the first place, and that therefore the long-term effects might be the result of factors other than integrated schooling). Many early researchers, however, employed strong control variables, including parents' racial attitudes, to tease out the impact of desegregated schools. *E.g.*, Towles-Schwen & Fazio, *supra* note 13, at 162-67. In addition, Crain and Strauss examined students who had been selected randomly to participate in an integration plan and compared their outcomes to those who were not selected. CRAIN & STRAUSS, *supra* note 27. This study, free of any self-selection bias, demonstrated that African American participants were more likely to go to college, and that female participants who did not go to college were much more likely to be working with mostly white co-workers in higher-status jobs. Finally, the overwhelming preponderance of the evidence, across a wide variety of studies, so favors the Allport hypothesis as to minimize any self-selection concerns.

B. Qualitative Research Confirms That K-12 Integration Enhances Students' Ability To Function and Succeed in a Diverse Workforce and Society.

Several important qualitative studies have expanded upon the quantitative analyses discussed above by examining the *how* and *why* behind the positive outcomes that result from integrated education. In the late 1990s, Eaton conducted in-depth interviews of sixty-five African American graduates of METCO, a voluntary transfer program that assigned urban Boston students to predominantly white, affluent suburban schools.[38] From 1999 to 2004, Wells, Holme, Revilla and Atanda ("Wells et al.") performed a second analysis[39] consisting of in-depth case studies of six high schools across the country that had undergone desegregation by the late 1970s.[40] Most recently, Wells led a third qualitative study using in-depth interviews of adults who graduated from integrated public schools in Seattle and Louisville in the mid-1980s.[41]

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[38] EATON, *supra* note 14.

[39] WELLS ET AL., *supra* note 14; *see also* Jennifer Jellison Holme et al., *Learning Through Experience: What Graduates Gained by Attending Desegregated High Schools*, 38 EQUITY & EXCELLENCE EDUC. 14 (2005); Amy Stuart Wells et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society*, http://www.tc.columbia.edu/desegregation (Mar. 30, 2004).

[40] The study involved, among other things, interviews of 242 graduates of six high schools that were integrated by the 1970s: John Muir (California), Topeka (Kansas), Dwight Morrow (New Jersey), West Charlotte (North Carolina), Shaker Heights (Ohio) and Austin (Texas). The interviewees – 135 whites, 79 African Americans, and 21 Latinos – were sampled carefully to reflect a wide range of experiences and characteristics (e.g., racial/ethnic identity, family background, neighborhoods of residence, school achievement and extracurricular involvement). The only constant across all graduates was their attendance at racially diverse high schools in the late 1970s. As a result, the correlation between their school experiences, their level of intergroup understanding and their future opportunities is highly significant and profound.

[41] Through a grant from the Ford Foundation, Amy Stuart Wells, Jacquelyn Duran, Terrenda White, Jolena James-Szanton and Jennifer

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These graduates almost universally reported that the value of their experiences in integrated schools became all the more apparent *after* they had graduated: Most respondents said that it was only when they got to college or the workplace that they realized what they had learned *vis-à-vis* those who had not attended integrated schools. Compared to these peers, the graduates said, they were more open-minded, less prejudiced, and less fearful of other races. Many graduates said that, because of their altered worldviews, they were far better prepared for life in a global economy and more adept at reaching across cultures and nationalities on the job, and they attributed these skills to their experiences in integrated schools. These studies, therefore, demonstrate that graduates of integrated schools carry benefits from their experiences throughout their lives, particularly in their ability to function in a diverse society and in a highly competitive global economy, when compared to graduates of more segregated schools.

Jellison Holme interviewed forty-two graduates of the 1985 and 1986 classes of Central, Fern Creek and Louisville Male High Schools in Louisville, and Franklin, Garfield and Ingraham High Schools in Seattle. The schools were selected based on their varied locations in the two districts and the consequent breadth of student backgrounds and experiences at each school in the mid-1980s. Graduates were sampled randomly, either from lists of all graduates provided by reunion organizers (Louisville) or from lists of graduates who responded to e-mail messages sent out by alumni association members seeking participants for the study (Seattle). Nineteen of the interviewees were from Louisville, and twenty-three were from Seattle. Twenty-two respondents were white, fourteen were African American, four were Asian/Pacific Islanders and two were of mixed race. The findings reported here were the most robust and salient experiences of graduates according to data coded from the six schools. While the brief necessarily quotes selected statements, each quote is representative of many statements from other graduates. The authors have submitted the study for publication with the *Teachers College Record*, a refereed scholarly journal. *See* Amy Stuart Wells et al., *Refusing To Leave Desegregation Behind: A Study of Louisville and Seattle Graduates of Racially Diverse Public Schools* (submitted Oct. 9, 2006) (manuscript on file with Wells).

1. Graduates of Integrated Schools Learned How To Interact with People of Other Racial Backgrounds at School, and as Adults Are More Comfortable Around Such Persons Than Those Without an Integrated K-12 Experience.

A transcendent theme that emerges from all three studies is that graduates of integrated schools are far more *accepting of* and *comfortable with* people of other racial backgrounds than those who lack an integrated K-12 experience. METCO graduates reported that they were far more comfortable in diverse or predominantly white settings than their friends or family members.[42] The Wells et al. interviewees reported similar comfort levels that, they said, resulted from firsthand experiences that ran counter to racial stereotypes.[43] White graduates emphasized how their experiences in integrated high schools had made them more accepting of people of other racial backgrounds, particularly African Americans and Latinos, than other white people they knew.[44] African American interviewees noted that they felt less intimidated by, fearful of or subservient toward white people.[45] For all but a small handful of graduates, just "being there" in integrated schools left them with a fundamentally altered worldview.[46]

The Seattle/Louisville interviews yielded similar results. Graduates recalled some intra-school division by race, but most noted that cross-racial friendships were not uncommon and that diverse cliques formed on a regular basis, particularly in connection with athletics and extracurricular activities. One graduate of Seattle's Garfield High School spoke for many of the interviewees when he identified extracurricular activities as opportunities for

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[42] EATON, *supra* note 14, at 19.

[43] WELLS ET AL., *supra* note 14 (manuscript at 245).

[44] *Id.* (manuscript at 259-64).

[45] *Id.* (manuscript at 267-70); *see also* Holme et al., *supra* note 39.

[46] Holme et al., *supra* note 39, at 18.

members of different races to participate on equal footing: "There's a camaraderie that builds rather quickly when you play sports or if you're part of a band or whatever. That seems to be the tangible thing that really breaks down the racial barrier . . . ."[47] The same graduate, echoing the sentiments of his peers from both cities, noted feeling "stronger" and "more confident" by virtue of experiencing an integrated school environment: "I think I'm a stronger person for having dealt with such a diverse background and having friends of all different backgrounds . . . . I feel definitely more confident every day that I walk around in any kind of area."[48]

In African American graduates, this "strength" and "confidence" manifested itself in a sense of efficacy in predominantly white settings. As an African American graduate of Louisville's Fern Creek High School explained, the "beauty" of attending desegregated schools is that "it makes you a much more well-rounded person, because you learn about other people . . . . And the great thing now is that . . . I have friends from so many different cultures, and I could just about talk to anyone and I have no fear."[49]

Lessons Learned Only at School. Interviewees in both Wells studies, but particularly in Louisville and Seattle, uniformly attributed their development of intergroup skills almost exclusively to their experiences in integrated schools. A white graduate of Central High in Louisville explained that, had her schools not embraced racial diversity, she would have grown up in an all-white environment and "would have been much more apprehensive about people . . . not just African Americans, but of any other race. [T]here would never [have been] any reason for me to have a lot of interaction with anyone who

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[47] Interview by Amy Stuart Wells with Subject No. 29 (Sept. 17, 2006) (transcript on file with Wells).

[48] *Id.*

[49] Interview by Jolena James-Szanton with Subject No. 10 (Sept. 12, 2006) (transcript on file with Wells).

wasn't middle-class and white."[50] One of her African American classmates described her neighborhood as almost exclusively black: "I think there was only one . . . older white lady there." Her interactions with people of other races "mostly [occurred] at school."[51]

Similarly, a white Ingraham (Seattle) graduate reflected on the degree to which he learned, in high school, to dismiss racial stereotypes and noted that "I would have had no other way of knowing. I wouldn't have had any, any interaction. . . . [T]he whole north end of the city, even now, is still probably way more white than it is anything else."[52] An Asian American classmate also observed:

> I lived in a very white community and I had Asian American friends that lived in the south end, so I really probably would not have known that many black people. And ironically, my closest friends at my own high school, I'd say, were three-quarters black and one-quarter white.[53]

A white graduate from Shaker Heights (Ohio) explained why the school setting in particular was the right environment to learn these lessons:

> When you're in school, you have a group of 2000, 3000, 1000, 500, whatever it is of people you . . . come into more intimate contact with. There are levels of intimacy and you're not friends with or enemies with everybody, and some people you probably ignored and had very little to do with but . . . you have more intimate levels of contact

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[50] Interview by Amy Stuart Wells with Subject No. 3 (Aug. 22, 2006) (transcript on file with Wells).

[51] Interview by Terrenda White with Subject No. 5 (Sept. 12, 2006) (transcript on file with Wells).

[52] Interview by Amy Stuart Wells with Subject No. 31 (Aug. 31, 2006) (transcript on file with Wells).

[53] Interview by Jacquelyn Duran with Subject No. 37 (Sept. 8, 2006) (transcript on file with Wells).

with a more diverse group than you normally would.[54]

Interviewees noted many moments when students came together across racial lines to support their schools – exactly as Allport envisioned.[55] An African American John Muir (California) graduate remembered pep rallies as the kind of all-school experience in which students bonded across racial lines. He recalled one such rally when a white athlete "cross[ed] the lines" and danced with the black athletes. "[P]eople got together and it wasn't a big deal . . . and people laughed."[56]

Lessons That Others Did Not Learn. Seattle/Louisville interviewees were quick to identify profound differences between their own racial attitudes and those of their family members and peers who did not attend integrated schools.[57] One white Ingraham graduate noted that her parents, while not "racist in any way," lacked the life experiences she had obtained through school, and they were far less comfortable than she was in settings with many people of color: "[I]f I ask my mom to drive south of the major freeway [into predominantly non-white areas], she freaks

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[54] WELLS ET AL., *supra* note 14 (manuscript at 234).

[55] *See supra* text accompanying notes 7-13.

[56] WELLS ET AL., *supra* note 14 (manuscript at 239).

[57] As discussed above, *see supra* note 37, some critics of long-term effects research argue that its findings are marred by self-selection bias: Those students whose families did not flee desegregation are predisposed to positive racial attitudes because of personal and family characteristics, not their school experiences. This *might* be the case in some instances – e.g., Shaker Heights, Ohio, where *some* white families moved because of the diversity of the community, but it would not be true in districts such as those in Charlotte, Louisville, and Pasadena, where many parents adamantly opposed integration and would have put their children in private schools if they could have done so. Moreover, there is very little empirical data to back up one premise of this criticism – that families, particularly African American families, could and did choose to live in integrated environments in the era of desegregation. *See supra* notes 10-11. These studies provide a further rebuttal: Graduates reported that their racial attitudes were more positive than other family members' attitudes, suggesting that, while family environment undoubtedly affects the racial attitudes of children, an integrated school setting is an important indicator of future attitudes regarding race.

out." And her white husband was not exposed to people of other races until he joined the Navy, where he "put his foot in his mouth several times and got in trouble" because he lacked a "roadmap" for how to deal with non-whites.[58]

A white Louisville Male graduate compared his experiences with those of his wife, who had attended all-white private schools as a child:

> When we first got married, she was scared to go downtown, and she still is .... [I]t's not that she's prejudiced against black people, but they're just different, and ... she doesn't know how to handle it .... I walk down any street downtown, and I feel fine because I know that they're just different people ....[59]

An African American graduate of Franklin High in Seattle similarly commented that attending integrated public schools allowed her to have an open mind, "[w]hereas I know some people who are African American, they just don't feel comfortable if they were going into a situation where there were all Asians."[60]

The first Wells et al. study yielded similar comparisons. For instance, a white Austin High graduate married a woman who had attended an all-white school. This graduate said he was continually surprised by his wife's anxiety in racially diverse settings. "I remember feeling I'm so glad I went to Austin High ...."[61]

2. Graduates' Intergroup Skills Carry over into the Workplace, Benefiting Both Graduates and Their Employers.

Graduates uniformly reported that integrated education better prepared them for living and working in an

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[58] Interview by Amy Stuart Wells with Subject No. 36 (Sept. 9, 2006) (transcript on file with Wells).

[59] Interview by Amy Stuart Wells with Subject No. 17 (Aug. 22, 2006) (transcript on file with Wells).

[60] Interview by Amy Stuart Wells with Subject No. 23 (Sept. 17, 2006) (transcript on file with Wells).

[61] WELLS ET AL., *supra* note 14 (manuscript at 262).

increasingly diverse American society and global economy. Indeed, subjects drew on their intergroup skills, honed during their K-12 years, more heavily for their occupations than for any other aspect of their lives.

Many interviewees expressed a belief that early interracial interactions, by changing students' worldviews, had shaped the very direction of their careers. METCO graduates, for example, could tap into powerful social networks in their suburban schools, giving them access to more opportunities through the college application process and occupational networking.[62] And one white Garfield (Seattle) graduate said that her high school experience influenced her decision to become a social worker – and made her more effective in her job:

> I think it impacted what I chose and I also think that because as a social worker, I've worked with a lot of African American families, I felt like that was an easier adjustment to me than [for] a lot of my colleagues. It felt comfortable and I sort of understood the culture in a different way than people who just maybe had read about working with African Americans . . . .[63]

Intergroup skills were especially important for those who worked for global corporations and whose day-to-day job responsibilities required interaction with people of disparate backgrounds. In the Wells et al. study, one white Shaker Heights (Ohio) graduate, who now helps run an international business, attributed his ability to connect with people all over the world to his experience in an integrated public school. "I don't think that the atmosphere of Shaker has gone away . . . ." Rather, he carries that experience with him as he works with international clients; he is open to "other places and people and to speaking other languages [because of] Shaker."[64]

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[62] EATON, *supra* note 14, at 138-43.

[63] Interview by Jacquelyn Duran with Subject No. 26 (Sept. 15, 2006) (transcript on file with Wells).

[64] WELLS ET AL., *supra* note 14 (manuscript at 254).

Similarly, an African American graduate from Dwight Morrow (New Jersey) High School explained that attending desegregated schools shaped her ability to move in different circles of people. "I'm not limited .... [W]hen I walk into a place, I can speak the same King's English, ... and I can speak to my friends on a different level." Her ease in multiracial interactions has aided her career: "I don't get nervous when I'm dealing with someone who is a CEO of a company [just] because his experiences and my experiences are so different.... I've been around certain things that have afforded me a certain confidence."[65]

Seattle/Louisville interviewees also found their intergroup skills crucial for success in the workplace. A white graduate of Seattle's Franklin High School explained that his job required him to supervise workers in sixty different countries: "[I]t's a whole different cultural difference beyond ... the ethnic differences of Americans." Franklin, with its mix of Asians, blacks and whites, provided a "step down that path of being comfortable with people of a variety of races."[66] Similarly, an African American female graduate of predominantly white Ingraham High School in Seattle noted that, as an employee:

> You have to be able to navigate different situations .... [Y]ou have to be able to be understood by different cultures. You can't ... only speak your language .... You have to be able to move in and out, if you're going to be in any type of corporate America or any hospital setting, anywhere, where there's someone other than all black.[67]

These effects on graduates' workplace effectiveness have significant policy implications, for they suggest that positive steps to promote integration at the K-12 level might help reduce the need for more drastic measures such as affirmative action later in life. The Court recently

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[65] *Id.* (manuscript at 256).

[66] Interview by Amy Stuart Wells with Subject No. 22 (Sept. 14, 2006) (transcript on file with Wells).

[67] Interview by Terrenda White with Subject No. 41 (Sept. 13, 2006) (transcript on file with Wells).

stated that "racial preferences," at least in the university admissions context, should be unnecessary in twenty-five years. *Grutter*, 539 U.S. at 343. To the extent that the same goal applies to affirmative action in the workplace, local efforts to promote K-12 integration, and thereby improve the life chances and job effectiveness of students, are consistent with this objective.

3. Exposure to Integration at the K-12 Level Is Critical.

The studies highlight the importance of *early* experiences with integrated education. Seattle and Louisville interviewees stated – some quite forcefully – that it was critical that they experienced interracial interactions as school-age children. As one African American Ingraham (Seattle) graduate explained, "to have a racially balanced make-up and life in your formative years is key to success in society as a whole."[68] A white Louisville Male graduate noted that "it's easier for kids to experience the diversity and accept it than it is to throw them in after they're twenty, twenty-five years old and say, 'Here you are! Now everybody's different, now deal with it.'"[69] An African American Franklin graduate went further: "[E]xposing kids when they're young before they have the preconceived notions that we all develop as we get older . . . would be a great thing and definitely something that I would advocate."[70]

The Franklin interviewee who supervised employees in sixty countries expressed his belief that integrated education is "very valuable . . . because the country's not getting any less diverse . . . . If you want your child to be a leader in the world some day, they have to have those experiences."[71] And as another African American graduate

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[68] Interview by Jacquelyn Duran with Subject No. 34 (Sept. 7, 2006) (transcript on file with Wells).

[69] Interview with Subject No. 17, *supra* note 59.

[70] Interview with Subject No. 23, *supra* note 60.

[71] Interview with Subject No. 22, *supra* note 66.

of Fern Creek said regarding her son's schooling, "There's a mixture, and that's what they need. If you don't have that in a school, then that person is setting [herself] up for the fall .... [T]hey're not learning to cope or deal with people in the long run."[72]

Consistent with this finding, the vast majority of Louisville and Seattle interviewees had enrolled their children in integrated schools or hoped to do so, a telling result given that they knew firsthand the challenges and benefits of the experience. This result is consistent with survey research showing that the vast majority of parents – regardless of race – say that it is either very or somewhat important for their children to attend racially diverse public schools.[73] Graduates of integrated public schools tend to favor integrated schooling for their own children with even greater conviction, even when it is not an option in their school districts, due to their own life experiences.[74] One white Dwight Morrow (New Jersey) graduate observed:

> I would love that same sort of environment [for my children] because I think that I learned something there that you can't teach anybody .... I just learned a lot by being around so many different kinds of people.... You learn something different from them without them teaching it to you in a book or writing it down, you just absorb so many different things.[75]

Echoing Allport's writings half a century earlier, a Shaker Heights (Ohio) graduate stated that interaction with people of other races on a day-to-day basis was critical: "You couldn't have taught [intergroup skills] in a

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[72] Interview by Amy Stuart Wells with Subject No. 8 (Sept. 10, 2006) (transcript on file with Wells).

[73] *See* STEVE FARKAS & JEAN JOHNSON, TIME TO MOVE ON: AFRICAN-AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC SCHOOLS 25 (1998).

[74] *See* WELLS ET AL., *supra* note 14 (manuscript at 325).

[75] *Id.* (manuscript at 251).

debriefing sessions from adults . . . trying to get into the mind of [] sixteen-year-old[s].[76] And a graduate of John Muir (California) High School who is of both white and Indian descent said that, while he faced some interracial conflict during his high school days, learning about race at a young age was vital:

> I found [John Muir] maybe a little bit harder than somewhere else, but I also knew that it was teaching me life lessons that no college can teach you. And those are invaluable. I know a lot of people who do a lot of college work and they test really well, but you put them out in the real world and . . . they can't make it.[77]

Graduates of integrated schools also questioned the wisdom of placing children in racially homogeneous school settings. In the Seattle/Louisville study, the comments of one Louisville Male graduate were emblematic of the interviews as a whole. He would be "uncomfortable" if his children were in an all-white school. "I want them to realize that there . . . are different people . . . . I want them to realize that everybody doesn't think alike, and everybody doesn't do things the exact same way . . . ." He continued: "I don't want them to grow up to think that . . . if you don't think like me, then you're not worth talking to . . . ."[78] Another interviewee, the Garfield graduate who is now a social worker, moved from a predominantly white neighborhood to a more racially diverse neighborhood specifically "so that [her daughter] could grow up in that environment."[79]

As an African American Ingraham graduate explained:

> I would like my child to have a real view of what the world is – the world is not really made of one race. . . . I have friends whose kids do go to predominantly black schools and . . . they're not

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[76] *Id.*; *see also* text accompanying notes 7-13.

[77] WELLS ET AL., *supra* note 14 (manuscript at 251).

[78] Interview with Subject No. 17, *supra* note 59.

[79] Interview with Subject No. 26, *supra* note 63.

> really used to being around other people of other races or other cultures, and they're not being exposed to a whole lot. I think it makes for a more well-rounded child when they are exposed to different cultures.[80]

4. Despite the Difficulties of Attending an Integrated School, Graduates Overwhelmingly Agreed That the Experience Was "Worth It."

Finally, it should be noted that these graduates' experiences in integrated schools were not always easy or ideal. Many interviewees experienced logistical challenges in attending a school far from home, occasional racial tensions at school or some degree of resegregation across classrooms due to tracking practices. But despite these personal hardships and sacrifices, the overwhelming majority of interviewees in all three studies indicated that the benefits of integration were worth the costs. Only four out of the sixty-five METCO students – six percent – said that they would not repeat their experiences if given the chance.[81]

The Wells et al. interviewees uniformly noted that as adults they were better able to appreciate the value of their experiences despite (and sometimes because of) the challenges they experienced. One white graduate of West Charlotte (North Carolina) High School explained:

> The things that I learned at West Charlotte I have carried with me. . . . [H]onestly it taught me not to judge people until I get to know [them]. That has been one of the best lessons I think I ever learned and I've carried that through and I definitely learned that at West Charlotte.[82]

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[80] Interview by Terrenda White with Subject No. 33 (Sept. 7, 2006) (transcript on file with Wells).

[81] EATON, *supra* note 14, at 21.

[82] WELLS ET AL., *supra* note 14 (manuscript at 245).

Recalling Braddock's perpetuation theory,[83] an African American male graduate from Dwight Morrow High School said that his experience in high school gave him a confidence in racially diverse settings that he may not have otherwise gained:

> Today I would say that it makes me feel comfortable, that I can go anywhere and not feel intimidated, I just always feel like I belong and it didn't matter who was in the majority or minority, that I knew how to deal with all of them. . . . It definitely gave me the confidence to know that it didn't matter, people were people, and I could just interact.[84]

From the other side of the color line, a white Austin High School graduate argued that attending an integrated high school was one of the best things that ever happened to him. He echoed the vast majority of his classmates – at Austin High and across the country: "[G]rowing up in a racially integrated school I think was invaluable for me. [I]t helped my people skills. It gave me the ability to relate to just about any person . . . and to be sincere, not putting on an act . . . I can't put enough value on it."[85]

CONCLUSION

Decades of social science research demonstrate the profound, lifelong impact integrated education has on the "hearts and minds" of students, *Brown*, 347 U.S. at 494, and underscore its compelling importance to America's multiethnic society and continuing economic vitality. In view of these benefits, it is hard to dispute one Seattle interviewee's conclusion that diversity in K-12 education "needs to be promoted across the board in every city in every state as much as possible." As the Court has recognized, *see*

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[83] *See supra* text accompanying notes 19-21 (discussing hypothesis that segregated groups will avoid integrated settings because of concerns about coping with hostility or tension).

[84] WELLS ET AL., *supra* note 14 (manuscript at 267).

[85] *Id.* (manuscript at 253).

Swann, 402 U.S. at 16, local school districts can take positive steps to ensure an integrated environment for students. The data, drawn from the life experiences of those who have lived and learned in integrated schools, confirm that these efforts are supported by a compelling interest. In the words of one Garfield (Seattle) graduate:

> [I]f the government can do anything, that's the one thing they have to do, is create always a diverse society, and have people of different backgrounds learn together, because obviously we don't get along with certain religions and obviously we don't get along with certain colors because we're not diverse, we don't really understand things about other people, and it's just kind of tragic . . . . I think growing up in Seattle, going through the educational system, that idea of being exposed to all these different groups, it's just been the best lesson I've ever learned in my life.[86]

The Seattle and Louisville school districts have a compelling interest in maintaining integration in their K-12 schools. The Court should affirm the judgments below.

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[86] Interview with Subject No. 29, *supra* note 47.

APPENDIX

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policies, including charter schools. Her many authored and co-authored publications in these areas include: BOTH SIDES NOW: THE STORY OF DESEGREGATION'S GRADUATES (Harvard Univ. Press, forthcoming spring 2007); STEPPING OVER THE COLOR LINE (1997); *Where School Desegregation and School Choice Policies Collide: Voluntary Transfer Plans and Controlled Choice*, *in* SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS 59 (Janelle T. Scott ed., 2005); *Against the Tide: Desegregated High Schools and Their 1980 Graduates*, 85 PHI DELTA KAPPAN 670 (2004); and *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994).

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Sociologists, the Southern Sociological Society and the Eastern Sociological Society. Dr. Braddock also has served on the editorial boards of, among other journals, the *Review of Educational Research*, the *Journal of Social and Behavioral Sciences* and *Phi Delta Kappan*. Dr. Braddock has conducted extensive research and written widely on the effects of school desegregation. These authored and co-authored publications include, among many others: *The Effects of School Desegregation, in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION (J. Banks & C.M. Banks eds., 2d ed. 2004); *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994); *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT'L J. CONTEMP. SOC. 273 (1994); *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259 (1984); *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact Hypothesis*, 53 SOC. EDUC. 178 (1980); and *Assessing School Desegregation Effects: New Directions in Research, in* RESEARCH IN SOCIOLOGY OF EDUCATION AND SOCIALIZATION 209 (R. Corwin ed., 1980).

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al. eds., 2005); *The More We Get Together: Improving Collaboration Between Educators and Their Lawyers*, 67 HARV. EDUC. REV. 531 (1997); and *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. LAW REV. 301 (1997).

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